

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2015

No. 11-1302 and consolidated cases (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,

v.

Environmental Protection Agency, *et al.*,
Respondents.

On Petitions for Review of a Final Order of the
United States Environmental Protection Agency

STATE AND LOCAL PETITIONERS' OPENING BRIEF ON REMAND

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

11-1302 (lead), 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, and 11-1395

(A) Parties, Intervenors, and Amici**Petitioners***

AEP Texas North Co.

Alabama Power Co.

American Coal Co.

American Energy Corp.

Appalachian Power Co.

ARIPPA

Big Brown Lignite Company, LLC

Big Brown Power Company, LLC

City of Ames, Iowa

City of Springfield, Illinois, Office of Public Utilities, d/b/a City
Water, Light and Power

Columbus Southern Power Co.

Consolidated Edison Company of New York

CPI USA North Carolina LLC

Dairyland Power Cooperative

DTE Stoneman, LLC

East Kentucky Power Cooperative, Inc.

EME Homer City Generation, LP

Entergy Corp.

* The petitioners that join this brief appear in bold.

Environmental Committee of the Florida Electric Power Coordinating
Group

Environmental Energy Alliance of New York, LLC

GenOn Energy, Inc.

Georgia Power Co.

Gulf Power Co.

Indiana Michigan Power Co.

International Brotherhood of Electrical Workers, AFL-CIO

Kansas City Board of Public Utilities

Kansas Gas and Electric Co.

Kenamerica Resources, Inc.

Kentucky Power Co.

Lafayette Utilities System

Louisiana Chemical Association

Louisiana Department of Environmental Quality

Louisiana Public Service Commission

Luminant Big Brown Mining Company, LLC

Luminant Energy Company, LLC

Luminant Generation Company, LLC

Luminant Holding Company, LLC

Luminant Mining Company, LLC

Midwest Food Processors Association

Midwest Ozone Group

Mississippi Power Co.

Mississippi Public Service Commission

Municipal Electric Authority of Georgia

Murray Energy Corp.

National Mining Association

National Rural Electric Cooperative Association

Northern States Power Co.

Oak Grove Management Company, LLC

Ohio Power Co.

Ohio Valley Coal Co.

OhioAmerica Energy, Inc.

Peabody Energy Corp.

Public Service Company of Oklahoma

Public Utility Commission of Texas

Railroad Commission of Texas

Sandow Power Company, LLC
South Mississippi Electric Power Association
Southern Company Services, Inc.
Southern Power Co.
Southwestern Electric Power Co.
Southwestern Public Service Co.
State of Alabama
State of Florida
State of Georgia
State of Indiana
State of Kansas
State of Louisiana
State of Michigan
State of Nebraska
State of Ohio
State of Oklahoma
State of South Carolina
State of Texas
State of Wisconsin
Sunbury Generation LP
Sunflower Electric Power Corp.
Texas Commission on Environmental Quality
Texas General Land Office
United Mine Workers of America
UtahAmerica Energy, Inc.
Utility Air Regulatory Group
Westar Energy, Inc.
Western Farmers Electric Cooperative
Wisconsin Cast Metals Association
Wisconsin Manufacturers and Commerce
Wisconsin Paper Council, Inc.
Wisconsin Public Service Corp.

Intervenors for Petitioners

San Miguel Electric Cooperative
City of New York (Nos. 11-1388 and 11-1395 only)
State of New York (Nos. 11-1388 and 11-1395 only)

Amici for Petitioners

Putnam County, Georgia

Industrial Energy Consumers of America

Southeastern Legal Foundation, Inc.

Respondents

United States Environmental Protection Agency (“EPA”)

EPA Administrator Gina McCarthy (substituted for former EPA
Administrator Lisa Perez Jackson)

Intervenors for Respondents

American Lung Association

Calpine Corp.

City of Bridgeport, Connecticut

City of Chicago

City of New York (all but Nos. 11-1388 and 11-1395)

City of Philadelphia

Clean Air Council

District of Columbia

Environmental Defense Fund

Exelon Corp.

Mayor and City Council of Baltimore

Natural Resources Defense Council

Public Service Enterprise Group, Inc.

Sierra Club

State of Connecticut

State of Delaware

State of Illinois

State of Maryland

State of Massachusetts

State of New York (all but Nos. 11-1388 and 11-1395)

State of North Carolina

State of Rhode Island

State of Vermont

(B) Rulings Under Review

All petitions for review challenge EPA's final rule entitled "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 FR 48,208 (Aug. 8, 2011) ("the Transport Rule"), which appears at pages 277 to 552 of the joint appendix ("JA").

(C) Related Cases

All of the petitions for review consolidated under Case No. 11-1302 are related. They have previously been reviewed by both this Court and the Supreme Court. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The Rule 28(a)(1) statement in the Industry and Labor Petitioners' opening brief on remand identifies and describes all other related cases.

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GLOSSARY

EPA	United States Environmental Protection Agency
CAA	Clean Air Act
CAIR	Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO _x SIP Call, 70 FR 25,162 (May 12, 2005)
FIP	Federal Implementation Plan
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standard(s)
SIP	State Implementation Plan
Transport Rule	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals 76 FR 48,208 (Aug. 8, 2011)

JURISDICTION

EPA promulgated the Transport Rule on August 8, 2011 under 42 U.S.C. 7601(a). Petitions for review were timely filed on or before October 7, 2011, invoking the Court's jurisdiction under 42 U.S.C. 7607(b)(1).

ISSUES

1. Whether EPA lacked statutory authority to impose federal implementation plans ("FIPs") with respect to the 1997 national ambient air quality standards ("NAAQS") on States whose state implementation plans ("SIPs") addressing those standards had been fully approved by EPA.
2. Whether EPA's implementation of the good-neighbor provision's "interfere with maintenance" prong, 42 U.S.C. 7410(a)(2)(D)(i)(I), was unlawful.
3. Whether the Transport Rule is invalid as applied to several States.

STATUTES AND REGULATIONS

The petitioners' joint addendum pursuant to D.C. Circuit Rule 28(a)(5) reproduces the statutes and regulatory material cited in this brief.

STATEMENT

The facts and procedural history of these consolidated challenges to EPA's Transport Rule are set forth in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11–19 (D.C. Cir. 2012). Although the Supreme Court reversed this Court's judgment vacating the rule, it agreed with significant portions of this Court's

analysis and identified challenges to be resolved on remand. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1599 n.12, 1608–09 (2014).

The first of these challenges concerns EPA’s imposition of FIPs with respect to the two 1997 standards on several upwind States even though EPA had fully approved those States’ good-neighbor SIP revisions for the 1997 standards. *See id.* at 1599 n.12; 76 FR 48,208, 48,219–22 (Aug. 8, 2011); *see also EME Homer*, 696 F.3d at 31 n.29 (noting this challenge). The second concerns EPA’s implementation of the good-neighbor provision’s “interfere with maintenance” prong. *See EME Homer*, 134 S. Ct. at 1604 n.18; 76 FR at 48,233–36, 48,246–64; *see also EME Homer*, 696 F.3d at 27 n.25 (noting the limits of EPA’s authority under this prong). The third concerns whether the Transport Rule is invalid as applied to several States. *See EME Homer*, 134 S. Ct. at 1608–09; *infra* Part III (citing the portions of the record that support the as-applied challenges presented in this brief).

SUMMARY

1. EPA’s approval of 22 States’ Clean Air Interstate Rule (“CAIR”) SIP revisions extinguished the agency’s authority under 42 U.S.C. 7410(c)(1) to impose Transport Rule FIPs on those States. EPA should have issued a SIP call under section 7410(k)(5), and its invocation of section 7410(k)(6) was unlawful for two

reasons. First, section 7410(k)(6) authorizes EPA to correct errors that were errors at the time they were made, not to retroactively rescind, based on later developments, earlier statements that had unavoidable legal consequences. Second, EPA made its “corrections” without using notice-and-comment rulemaking, but section 7410(k)(6) requires EPA to make any corrections “in the same manner as the approval.” EPA’s assertion that the SIPs it approved did not correct the deficiency that should have required disapproval is untenable, and because EPA’s errors infect a large number of the Transport Rule’s nonseverable FIPs, the proper relief is vacatur of the entire rule.

2. In concluding that CAIR was invalid, this Court explained that EPA was required to give independent effect to the good-neighbor provision’s “contribute significantly to nonattainment” and “interfere with maintenance” prongs. EPA, however, failed to do so in the Transport Rule. It instead adopted a single methodology for regulating emissions under both prongs, failing to consider whether the Transport Rule’s “maintenance” requirements were necessary to prevent upwind emissions from reaching specific downwind maintenance areas and threatening continued NAAQS attainment in those areas. That approach led EPA to require Transport Rule “maintenance” reductions that exceed what the Clean Air Act (“CAA”) and circuit precedent permit.

3. The Supreme Court agreed with this Court that EPA may not regulate upwind States under the good-neighbor provision in a manner that is unnecessary to achieve NAAQS attainment in every downwind State to which an upwind State is linked. EPA violated this prohibition with respect to Texas and several other States that were linked to areas already attaining the standards addressed in the Transport Rule.

EPA's promulgation of the Transport Rule also violated notice-and-comment requirements. This challenge, which was raised but not resolved in the initial phase of proceedings before this Court, likewise requires vacatur.

Finally, Kansas and Indiana argue that certain Transport Rule FIPs addressing the 2006 fine-particulate standard are unlawful because EPA's Administrator signed the Transport Rule before the relevant SIP disapprovals were published in the *Federal Register*.

STANDING

The Courts' opinions in these cases demonstrate the petitioners' standing. Petitioners are the objects of the action at issue, *see Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002), and the Transport Rule injures States by overriding their statutory right to control emissions through SIPs. *See, e.g.*, 76 FR at 48,219–

22. Vacating the rule would provide redress and prompt EPA to reconsider its action. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

STANDARD OF REVIEW

The Court should vacate the Transport Rule upon concluding that it is arbitrary or capricious, is in excess of EPA's statutory authority, or was promulgated without observance of required procedures. 42 U.S.C. 7607(d)(9).

ARGUMENT

I. EPA LACKED STATUTORY AUTHORITY TO IMPOSE FIPS FOR THE 1997 NAAQS ON A MAJORITY OF THE TRANSPORT RULE STATES.

A. EPA's Approval Of CAIR SIPs Deprived The Agency Of FIP Authority For 22 Of The 27 Transport Rule States.

1. 42 U.S.C. 7410(c)(1) is the exclusive source of EPA's FIP authority. EPA must promulgate a FIP whenever "a State has failed to make a required [SIP] submission" or EPA "disapproves a [SIP] submission in whole or in part." 42 U.S.C. 7410(c)(1)(A), (B). Section 7410(c)(1)'s final sentence, however, deprives EPA of FIP authority if "the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision, before [EPA] promulgates such [FIP]." "[T]he deficiency" is what allows EPA to make a finding of failure to submit a SIP under section 7410(c)(1)(A) or to disapprove a SIP submission under section 7410(c)(1)(B). *See EME Homer*, 134 S. Ct. at 1594 (explaining that EPA's FIP authority derives from a

determination “that a State has failed to submit an adequate SIP”). A State “corrects th[at] deficiency” by submitting an adequate SIP. 42 U.S.C. 7410(c)(1).

Under 42 U.S.C. 7410(k)(3), EPA has a nondiscretionary duty to approve a State’s “[SIP] submittal as a whole if it meets all of the applicable requirements of [the CAA].” And as EPA has explained, “[o]nce a SIP is fully approved, EPA no longer has authority for the FIP[]” that previously governed the State’s obligations, and the FIP must therefore be withdrawn. 72 FR 55,659, 55,660 (Oct. 1, 2007) (describing a scenario in which EPA approves SIPs to replace FIPs).

2. In April 2005, EPA issued a blanket finding that “States ha[d] failed” to submit SIPs to satisfy their good-neighbor obligations with respect to the 1997 ozone and fine-particulate NAAQS. 70 FR 21,147, 21,148 (Apr. 25, 2005); *see* JA3167–78. The next month, EPA promulgated CAIR, which defined the 1997-NAAQS good-neighbor SIP requirements for 28 States, giving those States a year and a half to submit SIPs addressing their obligations under CAIR and thus prevent application of CAIR FIPs. 70 FR 25,162, 25,162, 25,167 (May 12, 2005); 71 FR 25,328, 25,328, 25,330, 25,340 (Apr. 28, 2006). Consistent with 42 U.S.C. 7410(c)(1) and (k)(3), EPA explained that approval of CAIR SIPs would extinguish its FIP authority for the 1997 NAAQS and lead to withdrawal of any CAIR FIPs that had already issued. 71 FR at 25,333.

3. In *North Carolina v. EPA*, this Court sustained a number of challenges to CAIR but remanded the rule without vacatur. 531 F.3d 896, 930 (D.C. Cir. 2008), *modified on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). Accordingly, both before and after *North Carolina*, CAIR was effective and binding on EPA and the States. *See* 74 FR 62,496, 62,496 (Nov. 30, 2009).

When presented with CAIR-compliant SIP revisions, EPA thus had a nondiscretionary duty to approve them “as a whole.” 42 U.S.C. 7410(k)(3); *see* 74 FR 38,536, 38,537 (Aug. 4, 2009) (confirming that “EPA’s role is to approve State choices, provided that they meet the criteria of the [CAA]”). If EPA had concluded that any of those submissions failed to satisfy any portion of a State’s 1997 NAAQS good-neighbor obligations as defined in CAIR, EPA’s duty would have been to approve the submissions “in part and disapprove [them] in part,” 42 U.S.C. 7410(k)(3), preserving EPA’s FIP authority (and obligation) to cure the remaining deficiencies.

All told, EPA approved fifteen CAIR SIP revisions before *North Carolina* and seven thereafter. *See* 76 FR at 48,220–21 (citing approvals for Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia). None

of those submissions was disapproved, and none was approved in part and disapproved in part; rather, each of the 22 CAIR SIPs was approved in full. *See id.* In approving these 22 CAIR SIPs, EPA terminated, for each State, its FIP authority arising from the 2005 finding of failure. *See supra* Parts I.A.1–2.

B. EPA’s Efforts To Revive Its 1997 NAAQS FIP Authority With Respect To These 22 States Were Unlawful.

When EPA promulgated the Transport Rule, it recognized the threat to its 1997-NAAQS FIP authority that approval of the 22 States’ CAIR SIPs presented. 76 FR at 48,219 (acknowledging comments on this point). But because EPA wanted to maintain a single, accelerated timeline for all of the Transport Rule States, it attempted to “unring the bell” with respect to its CAIR SIP approvals and reclaim FIP authority arising from the 2005 finding of failure to submit SIPs—authority that EPA’s CAIR SIP approvals had extinguished. *See id.*; *see also* 76 FR at 48,213 (Table III–1), 48,219 n.12 (reflecting imposition of 1997-NAAQS FIPs on 19 of the 22 States whose CAIR SIPs had been fully approved).

EPA deployed two maneuvers in its effort to accomplish that feat. First, it attempted to invoke 42 U.S.C. 7410(k)(6), *see id.* at 48,217, to alter the past to service its present need by “rescind[ing] any statements [in its CAIR SIP approvals] suggesting that the [CAIR] SIP submissions satisfied or relieved states of the obligation to submit SIPs to satisfy the requirements of [the good-neighbor

provision] or that EPA was relieved of its obligation and authority to promulgate FIPs under [that provision].” *Id.* at 48,219. Second, EPA contended that the CAIR SIPs it had initially approved failed to “correct[] the deficiency,” 42 U.S.C. 7410(c)(1)(A), that had prompted it to issue the 2005 finding of failure. 76 FR at 48,219.

As explained below, neither maneuver was lawful. And because the Transport Rule’s FIPs are nonseverable, the Court should vacate the entire rule.

1. Section 7410(k)(6) cannot authorize retroactive—and immediate—nullification of EPA’s CAIR SIP approvals.

a. This is not the first time in recent years that EPA has attempted to stretch the boundaries of its section-7410(k)(6) “[c]orrections” power. In connection with its regulation of greenhouse gases, EPA attempted to wield that power to retroactively change an earlier SIP “full approval” into a “partial approval, partial disapproval.” *Texas v. EPA*, 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). Although the *Texas* majority did not address the merits of that effort, *see id.* at 199 (concluding that the petitioners lacked standing), the dissent observed that EPA’s invocation of section 7410(k)(6) was improper because, at the time of the full approval, the applicable authorities did not require partial disapproval. *See id.* at 204 (Kavanaugh, J., dissenting).

In *Texas*, EPA thus attempted to use section 7410(k)(6) to retroactively create SIP requirements where none existed before. *See id.* Here, EPA attempted to use section 7410(k)(6) to retroactively alter SIP requirements that *did* exist, had been satisfied, and led to EPA's full approval of 22 SIPs. *See supra* Part I.A. Both invocations of section 7410(k)(6) were unlawful. Because the petitioners here have standing, the Court should hold that EPA lacked statutory authority to impose FIPs on the States subjected to EPA's section-7410(k)(6) treatment in the Transport Rule and, in so doing, prevent further abuse of this provision.

b. Entitled "Corrections," section 7410(k)(6) was intended merely to "enable EPA to deal promptly with clerical errors or technical errors. It [wa]s not intended to offer a route for EPA to reevaluate its policy judgements," Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 ENVTL. L. 1843, 1924–25 (1991), or to give EPA the extraordinary power to undo the legal consequences of its past actions. As the Court has already suggested, the Transport Rule's invocation of section 7410(k)(6) was unlawful for two independent reasons. *See EME Homer City*, 696 F.3d at 31 n.29.

i. Section 7410(k)(6) authorizes corrections only when a past EPA action "was in error," meaning that the action was erroneous under the law in existence

at the time. *See Texas*, 726 F.3d at 204 (Kavanaugh, J., dissenting). The provision cannot be used to rescind key statements in a SIP approval based on subsequent developments in judicial doctrine or agency rulemaking. That is the office of the preceding section, which requires EPA to issue a “SIP call” whenever it finds that a SIP is “substantially inadequate to attain or maintain the relevant [NAAQS] ... or to otherwise comply with any requirement of [the CAA].” 42 U.S.C. 7410(k)(5).

Yet EPA relied on section 7410(k)(6), not section 7410(k)(5), reasoning that *North Carolina*’s invalidation of CAIR “meant that the CAIR SIPs were not adequate to satisfy [the good neighbor provision’s] mandate.” 76 FR at 48,217, 48,219. It bears emphasis, however, that EPA did not stop approving CAIR SIPs when *North Carolina* was decided. As already noted, seven of the subsequently “corrected” approvals post-date *North Carolina*. *See id.* at 48,221. In any event, EPA’s reasoning is flawed.

To begin, condoning EPA’s use of section 7410(k)(6) would impermissibly allow the Transport Rule to apply retroactively, “altering the past legal consequences of past actions.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis omitted). The Transport Rule altered the past consequences of EPA’s CAIR SIP approvals, purporting to make them prolong, rather than terminate, EPA’s authority to issue FIPs. *See* 42 U.S.C.

7410(c)(1) (requiring a FIP to issue “within 2 years after” a finding of failure to submit a SIP or a SIP disapproval); 76 FR at 48,219 (referencing the 2005 finding of failure on which EPA premised its 2011 Transport Rule FIP authority for the States subjected to EPA’s section-7410(k)(6) treatment, *see* JA3167–78). That contradicts *Bowen*, which forbids retroactive rulemaking absent clear and unambiguous statutory authorization, 488 U.S. at 208, and the Administrative Procedure Act, which defines “rule” as “an agency statement of . . . future effect.” 5 U.S.C. 551(4). Furthermore, it exceeds the admitted limits of EPA’s authority under section 7410(c)(1). *See* 76 FR at 48,219 & n.15, 48,220 (conceding that EPA lacks statutory authority to restart the “within 2 years” “FIP clock”).

EPA’s construction of “error” in section 7410(k)(6) also cannot be reconciled with section 7410(k)(5)’s SIP-call provision. Under section 7410(k)(5), EPA “shall” issue a SIP call whenever it finds a SIP “substantially inadequate” to maintain a NAAQS or comply with any CAA requirement. The provision requires EPA to “notify the State of the inadequacies” and provide an opportunity for the State to submit a revised SIP. 42 U.S.C. 7410(k)(5). A FIP cannot issue until *after* EPA finds that the State failed to submit the necessary SIP revisions. 42 U.S.C. 7410(c)(1).

EPA's understanding of the word "error" extends section 7410(k)(6)'s correction power to every circumstance described in section 7410(k)(5). Whenever an EPA-approved SIP is found inadequate to comply with EPA's current understanding of the CAA, EPA can simply declare its earlier approval an "error" and immediately impose a FIP without complying with section 7410(k)(5). That interpretation renders section 7410(k)(5)'s language meaningless and is therefore invalid. *See Davis Cnty. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1404 (D.C. Cir. 1996).

In short, EPA's SIP approvals were not in error when made. They were mandated under section 7410(k)(3), which directs EPA to "approve [a SIP] ... if it meets all of the applicable requirements of [the CAA]." Accordingly, EPA could not use section 7410(k)(6) to "correct" its CAIR SIP approvals.

ii. EPA's use of section 7410(k)(6) is unlawful for another, independent reason. Any revisions of past agency action must be made "in the same manner as" the putative erroneous action. 42 U.S.C. 7410(k)(6). Although EPA issued its SIP approvals through notice-and-comment rulemaking, *see, e.g.*, 72 FR at 55,659, its "corrections" did not go through that process. 76 FR at 48,221.

EPA's attempt to invoke the "good cause" exception of 5 U.S.C. 553(b)(B), 76 FR at 48,221-22, fails. Two independent sources of law obligated EPA to use

notice and comment: 5 U.S.C. 553(b), which is subject to a “good cause” exception, and 42 U.S.C. 7410(k)(6), which is not. Agencies do not have a good-cause license to violate their organic statutes.

2. EPA’s “correct[] the deficiency” argument fails.

As already noted, section 7410(c)(1)’s final sentence revokes EPA’s FIP authority when “the State corrects the deficiency” and EPA “approves the [SIP] or [SIP] revision.” In the Transport Rule, EPA admitted it had approved the 22 States’ CAIR SIPs but nevertheless claimed that, in light of *North Carolina*, those SIPs failed to “correct[] the deficiency,” 42 U.S.C. 7410(c)(1), and therefore did not terminate EPA’s FIP authority. 76 FR at 48,219. That position is untenable.

Again, “the deficiency” in section 7410(c)(1) is the deficiency that caused EPA to (A) find that a State failed to submit a SIP or (B) disapprove a SIP that was submitted. *See supra* Part I.A.1. It cannot mean a deficiency that arises only upon later developments. A State “corrects the deficiency” by submitting a new SIP that responds to the concerns that prompted EPA to act under section 7410(c)(1)(A) or (B) and that complies with every reasonably knowable legal obligation at the time of EPA’s disapproval or finding of failure. Each of the 22 States’ SIPs that EPA approved did so. *See supra* Part I.A.2–3.

EPA's construction of section 7410(c)(1) rewrites the statute to require a State to correct all deficiencies that are currently known and that *may become* known. That interpretation departs from the natural reading of the text and would render the final sentence of section 7410(c)(1) useless in constraining EPA's power, allowing the agency to circumvent section 7410(k)(5)'s procedural protections merely by declaring a previously approved SIP deficient. No principle of deference allows an agency to interpret its organic statute in such an atextual and self-aggrandizing manner.

3. This error requires vacatur of the entire rule.

As EPA explained in the Supreme Court, each State's good-neighbor obligations are intertwined with other States' good-neighbor obligations under the 1997 and 2006 NAAQS. *See* Br. for Fed. Pet'rs 45–53, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182); *see also EME Homer*, 134 S. Ct. at 1604 (noting that “the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States”); 76 FR at 48,252–53 (Table VI.B–3 & n.a) (reflecting EPA's conclusion that Transport Rule FIPs requiring more stringent emissions reductions in some States than others will cause emissions shifting, resulting in greater emissions in States whose Transport Rule FIPs are more lenient); *cf. North Carolina*, 531 F.3d at 929 (noting that CAIR's components

“must stand or fall together”). The Transport Rule FIPs, in other words, are nonseverable.

And as already noted, EPA’s violation of section 7410(c)(1) affects a substantial portion of the rule. Thirty-one of its fifty-nine FIPs implement good-neighbor obligations under the 1997 NAAQS for States whose CAIR SIPs EPA had previously approved, 76 FR at 48,213 (Table III–1), 48,219 n.12, 48,220–21, and the Transport Rule’s regional trading programs for the 1997 standards could not function with a majority of the covered States excluded. Accordingly, the entire rule should be vacated.

II. EPA’S IMPLEMENTATION OF THE GOOD-NEIGHBOR PROVISION’S “INTERFERE WITH MAINTENANCE” PRONG IS UNLAWFUL.

A. EPA Was Required To Give The Statute’s “Maintenance” Prong Independent Effect.

1. Once EPA promulgates a NAAQS, States must develop “attainment” SIPs that provide for “implementation, maintenance, and enforcement” of the NAAQS. 42 U.S.C. 7410(a)(1). In formulating an attainment plan, a State must impose on its sources “emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable requirements of [the CAA].” 42 U.S.C. 7410(a)(2)(A). Because the NAAQS-pollutant concentrations in each location in a State will reflect contributions from

both in-state emissions and upwind-state emissions, and because States must demonstrate attainment and maintenance of the NAAQS based on existing NAAQS-pollutant concentrations, any State's demonstration will necessarily account for present emissions from existing sources—both within and outside of the State.

When a State is unable to achieve attainment, its SIP must satisfy additional requirements for areas designated “nonattainment.” 42 U.S.C. 7410(a)(2)(I), 7502(c). If air quality sufficiently improves, the area may be redesignated from nonattainment to attainment, *see* 42 U.S.C. 7407(d)(3)(E), provided the State submits a “[m]aintenance plan[]” that assures “maintenance of the [NAAQS] ... for at least 10 years after the redesignation.” 42 U.S.C. 7505a(a); *see* 42 U.S.C. 7407(d)(3)(E)(iv). Maintenance plans must contain “contingency provisions” to ensure that the State will “promptly correct any violation of the [NAAQS].” 42 U.S.C. 7505a(d). Because both attainment plans and maintenance plans contain emissions limitations necessary to maintain NAAQS compliance, and because those NAAQS-compliant levels include emissions contributions from upwind States, only emissions that were *not* considered in the SIP attainment/maintenance demonstration (or in developing any contingency provisions), such as increased

upwind-state emissions, could trigger a requirement for SIP revision. 42 U.S.C. 7410(a)(2)(H)(ii), 7505a(d).

2. The distinction between regulating emissions causing nonattainment and regulating increased emissions that could threaten continued attainment is reflected in the text of the good-neighbor provision, which contains two distinct prongs for addressing emissions from one State that affect air quality in another. The first prong focuses on downwind nonattainment areas, prohibiting all upwind-state emissions that “contribute significantly to nonattainment in ... any other State.” 42 U.S.C. 7410(a)(2)(D)(i)(I). The second prong focuses on downwind attainment areas and addresses only those upwind-state emissions that will “interfere with maintenance [of NAAQS attainment] by ... any other State.” *Id.* Because SIPs must assure maintenance of NAAQS-compliant concentrations that include contributions from upwind States, the potential candidates for regulation under the good-neighbor provision’s “maintenance” prong are upwind-state emissions greater than those assumed in the upwind-state SIP’s attainment/maintenance demonstration.

3. These fundamental differences led the Court to hold in *North Carolina* that the two prongs of the good-neighbor provision must be given separate,

independent meanings. 531 F.3d at 909–10. And as the Court explained earlier in this litigation,

[t]o require a State to reduce “amounts” of emissions pursuant to the “interfere with maintenance” prong, EPA must show ... that those “amounts” from an upwind State ... will reach a specific maintenance area in a downwind State and push that maintenance area back over the NAAQS in the near future. Put simply, the “interfere with maintenance” prong of the statute is not an open-ended invitation for EPA to impose reductions on upwind States. Rather, it is a carefully calibrated and commonsense supplement to the “contribute significantly” requirement.

EME Homer, 696 F.3d at 27 n.25. To give the “maintenance” prong independent effect, EPA must therefore focus not on upwind-state emissions that were already accounted for in developing attainment SIPs, but instead on any additional upwind-state emissions that would increase downwind concentrations not considered in the attainment/maintenance demonstration. Reductions are required only where increased upwind-state emissions “will ... interfere” with continued NAAQS attainment “by ... any [downwind] State.” 42 U.S.C. 7410(a)(2)(D)(i)(I); *see, e.g.*, JA3210–22 (EPA memo describing maintenance-plan requirements for areas redesignated attainment).

B. EPA's Implementation Of The "Maintenance" Prong Is Contrary To The Text Of The Statute And This Court's Precedent.

Rather than recognizing the distinct focus of the "maintenance" prong, EPA simply adopted the same methodology used to implement the statute's "contribute significantly" prong, with the exception that EPA used more stringent ambient thresholds to establish "maintenance" linkages. 76 FR at 48,233–36. Like EPA's significant-contribution methodology, EPA's maintenance methodology evaluates total emissions from an upwind State (*i.e.*, all mobile, residential, industrial, and utility-sectors emissions). *Id.* at 48,224–25. When those upwind-state emissions are projected to contribute concentrations that exceed "one percent" of the rule's ambient threshold, EPA's "maintenance" methodology mandates "cost-effective" reductions in total utility-sector upwind-state emissions but no reductions in upwind emissions from any other sector. *Id.* at 48,246–64. This "contribute significantly" approach to "interfere with maintenance" violates *North Carolina* and runs afoul of the CAA in several respects.

1. To begin, EPA's approach violates the text of the good-neighbor provision by failing to identify and analyze only those upwind emissions that might actually threaten continued attainment. Upwind-state emissions that contribute to concentrations that are below the NAAQS in a downwind State, and that have already been accounted for in that State's attainment demonstration, cannot, by

definition, “interfere with maintenance.” Moreover, EPA’s methodology ignores the fundamental difference between areas that are meeting NAAQS and areas that are not. In nonattainment areas, because the air-quality status quo is unacceptable, all emissions contributing to nonattainment are targeted for reduction. 42 U.S.C. 7502(c)(1), (c)(6). In areas that have attained standards, by contrast, the air-quality status quo is the regulatory end sought by Congress, and only increased emissions that threaten that status quo “interfere with maintenance” of the NAAQS and thus are targets for additional regulation. *See* 42 U.S.C. 7407(d)(3)(E)(iv), 7505a.

Yet EPA’s “maintenance” methodology requires substantial reductions in upwind-state utility emissions without regard to whether concentrations resulting from those emissions were accounted for in the attainment-plan or maintenance-plan demonstration for the downwind attainment area. Nothing in EPA’s methodology is directed at identifying increased upwind-state emissions that threaten to “push ... [a downwind-state attainment] area back over the NAAQS in the near future.” *EME Homer*, 696 F.3d at 27 n.25. And a methodology that focuses exclusively on the utility sector for emissions reductions, when emissions from other sectors (e.g., mobile sources) may dominate contributions to downwind-state attainment areas, is not capable of targeting those emissions reductions that the

“maintenance” analysis required by the language of the Act would select for regulation.

2. The example of Allegan County, Michigan, illustrates how far EPA departed from the statute. In 2010, EPA redesignated Allegan County from nonattainment to attainment of the 1997 ozone standard. 75 FR 58,312, 58,312–13 (Sept. 24, 2010). In so doing, EPA approved Michigan’s maintenance plan for the area, based on a demonstration that ozone concentrations caused by local and upwind-state emissions would register attainment through 2021 by a wide margin. *Id.*; see 75 FR 42,018, 42,026–28 (July 20, 2010) (proposed rule). To assure attainment beyond 2021, a contingency plan targeted local volatile-organic-compound emissions for possible future reductions. See 75 FR at 42,028–29. According to the maintenance plan, further nitrogen-oxides reductions would have no impact on attainment of the ozone NAAQS in Allegan County. See *id.* at 42,027.

Without regard to this EPA-approved Allegan County maintenance plan, the Transport Rule’s “interfere with maintenance” methodology imposes substantial upwind reductions in utility-sector nitrogen-oxides emissions, ignoring the volatile-organic-compound reductions called for in the Allegan County contingency plan and making no attempt to evaluate the importance of upwind utility-sector nitrogen-oxides emissions relative to other upwind emissions that were linked to

Allegan County. *See* 76 FR at 48,233–36. As a result, the Transport Rule’s methodology mandates significant reductions in upwind utility-sector nitrogen-oxides emissions that are not necessary to prevent a violation of the ozone NAAQS in Allegan County. 75 FR at 42,027.

More specifically, the Transport Rule targeted nine upwind States (Arkansas, Illinois, Indiana, Iowa, Kansas, Missouri, Oklahoma, Texas, and Wisconsin) for the same nitrogen-oxides emissions reductions that would be required if Allegan County were subject to a nonattainment plan. *See* 76 FR at 48,246 (Table V.D–9). Yet EPA made no showing that these utility-sector emissions threaten to create downwind-state nonattainment “in the near future” (or, for that matter, at any more distant time). *EME Homer*, 696 F.3d at 27 n.25. This is not how the CAA works. Indeed, as EPA has recognized, “applying controls on upwind sources in these circumstances not only could be environmentally unnecessary, but could even create a perverse incentive for downwind states to increase local emissions.” 71 FR at 25,337.

In short, EPA unlawfully failed to adopt a methodology for the good-neighbor provision’s “maintenance” prong that gives that prong independent meaning and comports with the statute as a whole. That deficiency requires vacatur of the Transport Rule.

III. AT THE VERY LEAST, THE TRANSPORT RULE IS INVALID AS APPLIED TO SEVERAL PETITIONERS.

A. The Transport Rule Violates This Court's And The Supreme Court's Express Prohibitions.

After agreeing with this Court that “EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set,” *EME Homer*, 134 S. Ct. at 1608; *accord EME Homer*, 696 F.3d at 20–26, 27–28, the Supreme Court recognized the potential for valid as-applied challenges based on these core principles. 134 S. Ct. at 1609. As explained below, several such challenges are valid.

1. The Transport Rule is invalid as applied to Texas.

Texas is an exception to the Supreme Court's general observation that “individual upwind States often ‘contribute significantly’ to nonattainment in multiple downwind locations.” *Id.* at 1608. In the Transport Rule, EPA determined that Texas contributed significantly to nonattainment of the 1997 fine-particulate standard at the Madison, Illinois monitor alone. 76 FR at 48,241 (Table V.D–2). Similarly, EPA identified East Baton Rouge, Louisiana, as Texas's single ozone nonattainment linkage. *Id.* at 48,246 (Table V.D–8); *see also id.* at 48,246 (Table V.D–9) (linking Texas to Allegan, Michigan for ozone maintenance, rather than

nonattainment); *supra* Part II.B.2 (explaining why Allegan was not a proper maintenance linkage).

As explained in Part I.A of the Industry and Labor Petitioners' opening brief on remand, EPA over-controlled Texas for both fine particulate matter and ozone. And in light of Texas's single nonattainment linkages for the two 1997 NAAQS, the Supreme Court's discussion of permissible over-control is inapplicable to Texas. *See EME Homer*, 134 S. Ct. at 1608–09 & n.22 (reflecting that over-control with respect to one downwind location is permissible only as a byproduct of EPA's efforts to ameliorate air pollution at one or more downwind linkages with more substantial problems).

In short, the Transport Rule FIPs for Texas are based on unlawful linkages and impermissibly over-control Texas emissions. In Texas's view (unlike that of the Industry and Labor Petitioners), this error requires vacatur, at a minimum, of the Transport Rule FIPs for Texas, without remand for mere expansion of Texas's Transport Rule emissions budgets.¹

1. Louisiana also asserts that it should never have been included in the Transport Rule. EPA's Integrated Planning Model ("IPM") data is flawed. "Real world" data shows that Louisiana's emissions fall below the 1% significance threshold established by EPA with respect to every downwind State to which Louisiana was linked. *See* Louisiana's Motion For Stay, or, In the Alternative, For Expedited Review (Doc. No. 1334498) at 6–9. In support of its position, Louisiana

2. The Transport Rule is invalid as applied to States linked to areas not designated “nonattainment.”

As already noted, EPA must designate areas within a State’s borders that are not meeting a NAAQS as “nonattainment” areas. 42 U.S.C. 7407(d). The remainder of the State must be designated “attainment” or “unclassifiable.” *Id.* After designations are made, “[t]he Act ... shifts the burden to States to propose [SIPs] adequate for compliance with the NAAQS.” *EME Homer*, 134 S. Ct. at 1594. SIP requirements to protect areas designated “attainment” or “unclassifiable” are distinct from SIP requirements for nonattainment areas, both in terms of in-state emissions and transported emissions. *See* 42 U.S.C. 7410(a)(2)(A), 7410(a)(2)(I). A contribution to a downwind area designated “attainment” cannot, as matter of law, be a significant contribution to *nonattainment*.

In the Transport Rule, however, EPA imposed significant-contribution reduction obligations for the 2006 fine-particulate NAAQS based on linkages to three areas (the Madison and Cook areas in Illinois and the Marion area in Indiana, *see* 76 FR at 48,242–43 (Table V.D–5)) that EPA has never designated “nonattainment” for that standard. *See* EPA, Green Book, PM-2.5 (2006 Standard) Area Information, <http://www.epa.gov/airquality/greenbook/rindex>.

incorporates the arguments advanced in Part II.A of the Industry and Labor Petitioners’ opening brief on remand.

html (last visited December 10, 2014). Each of these areas has been designated either “attainment” or “unclassifiable” since August 2011, when EPA published the Transport Rule. *See id.* EPA thus had no authority to mandate “significant contribution” reductions based on linkages to any of these areas. This error infects the 2006-NAAQS FIPs for Alabama, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin. *See* 76 FR at 48,242–43 (Table V.D–5).

Similarly, EPA took final action approving several area redesignations from nonattainment to attainment of Transport Rule NAAQS while the rule was on judicial review. 79 FR 22,415 (Apr. 22, 2014) (Milwaukee, WI); 79 FR 15,019 (Mar. 18, 2014) (Brooke, WV); 78 FR 57,270 (Sept. 18, 2013) (Cuyahoga, OH); 78 FR 53,272 (Aug. 29, 2013) (St. Clair, MI; Wayne, MI); 78 FR 5,306 (Jan. 25, 2013) (Jefferson, AL (2006 fine-particulate NAAQS)); 78 FR 4,341 (Jan. 22, 2013) (Jefferson, AL (1997 fine-particulate NAAQS)); 76 FR 74,000 (Nov. 30, 2011) (East Baton Rouge, LA). The reductions now scheduled to begin January 1, 2015 based on “nonattainment” linkages to these areas, *see* 76 FR at 48,241–46 (Tables

V.D-2, V.D-5, V.D-8); Order 3, *EME Homer*, No. 11-1302 (Oct. 23, 2014) (Doc. No. 1518738) (granting EPA's motion to lift the stay), are likewise unlawful.²

B. EPA Violated Notice-And-Comment Requirements.

42 U.S.C. 7607(d)(3)'s notice requirements are “more stringent” than the Administrative Procedure Act's. *Union Oil Co. v. EPA*, 821 F.2d 678, 681–82 (D.C. Cir. 1987). A final rule must be a “logical outgrowth” of the proposed rule. *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); see *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518–19, 548 (D.C. Cir. 1983).

EPA made substantial, undisclosed revisions to the Transport Rule's substance and methodology. Between proposal and finalization, EPA changed “both steps of its significant contribution analysis,” altering its “modeling platforms and modeling inputs” and “its analysis for identifying” significant contribution and maintenance-interference. 76 FR at 48,213. The final rule was thus “significantly different ... than originally proposed,” JA3493, and many of its requirements were dramatically more stringent. Numerous States suffered material emissions-budget cuts between the proposed and final rules because of these

2. EPA disregarded emissions inventories, including upwind-state emissions inventories, established through the redesignation process. See, e.g., 79 FR at 22,415 (approving Wisconsin's emissions inventories). By definition, these inventories are sufficient to demonstrate attainment; any more-restrictive Transport Rule budgets constitute over-control.

changes. Ohio's sulfur-dioxide budgets, for example, were slashed by 33% for 2012 and 23% for 2014 and beyond. *Compare* 75 FR 45,210, 45,291 (Table IV.E-1) (Aug. 2, 2010), *with* 76 FR at 48,269 (Table VI.F-1).

EPA's notice violation was pronounced with respect to Texas. EPA proposed to exclude Texas from the Transport Rule's sulfur-dioxide and annual nitrogen-oxides programs based on modeling reflecting that Texas emissions do not significantly contribute to nonattainment of the fine-particulate standard. 75 FR at 45,255-67, 45,282-84. Yet in the final rule, EPA included Texas as a "significant contributor" of fine particulate matter based on data from a single downwind monitor. 76 FR at 48,241 (Table V.D-2). It also established sulfur-dioxide and annual nitrogen-oxides emissions budgets for Texas, imposing reductions that were not subject to notice and comment. *Id.* at 48,305-06 (Tables VIII.A-3, VIII.A-4); *see* 75 FR at 45,291 (Table IV.E-1), 45,309 (reflecting proposed annual emissions budgets for every Transport Rule State except Texas).

With proper notice, Texas stakeholders would undoubtedly have pointed out that the single monitor to which the State was "significantly" linked was already in attainment status for the fine-particulate standard and was heavily influenced by a local steel mill. *See* 76 FR 29,652, 29,652-53 (May 23, 2011). And although EPA initially "requested comment on whether Texas should be included in the

Transport Rule for annual [fine particulate matter],” 76 FR at 48,214, it conceded that the sole basis for that request was irrelevant to EPA’s actual basis for including Texas in the final rule. *See* 75 FR at 45,284; JA1872. Interested parties could be expected to comment only on the monitors that the proposed rule linked to their home States—not on those that, under entirely different models, *might* be linked. *Small Refiner*, 705 F.2d at 549 (requiring reasonable specificity for the range of alternatives under consideration). States cannot be required to provide comments on the entire universe of air-quality monitors. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (explaining that notice-and-comment rulemaking is not a “guessing game” forcing conjecture on a subject that *might* be addressed).

EPA also introduced a new “emissions leakage” methodology as a basis for determining significant contributions. 76 FR at 48,263. When modeled, emissions from Arkansas, Indiana, Louisiana, Maryland, and Mississippi were not found to significantly contribute to downwind nonattainment because those States had no cost-effective reductions available. *Id.* But EPA ultimately regulated the States based on ill-defined “interstate shifts in electricity generation that cause ‘emissions leakages.’” *Id.* This concept did not appear in the proposed rule. *See id.*

Finally, whereas the proposed rule contemplated only one phase of reductions for “Group 2” sulfur-dioxide States, 75 FR at 45,216, the final rule

imposed two phases. 76 FR at 48,214. That change likewise fails the “logical outgrowth” test. EPA announced for the first time at finalization that Georgia’s 2014 sulfur-dioxide budget must drop significantly from 2012 to 2014 (even though the State had been moved out of “Group 1”) to prevent other sources from offsetting planned emissions reductions under non-Transport Rule requirements. *Id.* at 48,261. But the Court has been clear that switching to a new methodology in a final rule “does not advise interested parties how to direct their comments,” thus denying them adequate notice. *Env’tl. Integrity Project*, 425 F.3d at 998. Individually and in combination, the States’ lack of notice requires vacatur. *See id.*

C. EPA Lacked Authority To Promulgate Certain FIPs With Respect To The 2006 NAAQS.³

Transport Rule FIPs addressing the 2006 fine-particulate standard were signed by the EPA Administrator on July 6, 2011. *See* 76 FR at 48,353. Two weeks later, EPA published in the *Federal Register* disapprovals of good-neighbor SIPs submitted by Kansas, Indiana, and eight other States covered by the 2006 fine-particulate FIPs. *See, e.g.*, 76 FR 43,143 (July 20, 2011). As the Supreme Court observed in *Train v. NRDC*, EPA “may devise and promulgate” a FIP “*only if* a State fails to submit [a SIP] which satisfies [the section-7410] standards.” 421 U.S.

3. This argument is presented on behalf of Kansas and Indiana only.

60, 79 (1975) (emphasis added). Because EPA's FIP authority was never "triggered" under 42 U.S.C. 7410(c), the 2006 NAAQS FIPs promulgated for these ten states must be vacated.

As the Supreme Court observed in *EME Homer*: "EPA's FIP authority is triggered at the moment the Agency disapproves a SIP." 134 S. Ct. at 1598. But the "moment" before EPA disapproves a SIP, its FIP rulemaking authority does not exist. From its inception in 1970, section 7410 has authorized EPA to initiate a FIP rulemaking *only after* EPA has taken final rulemaking action disapproving a submitted SIP. *See, e.g., Train*, 421 U.S. at 79; 42 U.S.C. 1857c-5(c)(1) (1970). In 1990, Congress extended the FIP-promulgation schedule from 120 days to 2 years, allowing States more time to resubmit SIPs that would cure the deficiencies identified by EPA in the SIP disapproval that triggered the FIP rulemaking. 42 U.S.C. 7410(c)(1). While this 1990 change did not address the proposal date for FIPs, nothing in the history of the amendment suggests that it was intended to change the state-federal SIP/FIP relationship to allow EPA to "devise" a FIP prior to disapproval of a SIP. As this Court has recognized, the 1990 "changes to section [74]10, at least as they concern EPA's approval of [SIPs], ... did not alter the division of responsibilities between EPA and the states in the section [74]10

process.” *Virginia v. EPA*, 108 F.3d 1397, 1409, 1410 (D.C. Cir. 1997). Accordingly, EPA’s action in promulgating these FIPs is contrary to section 7410(c).

CONCLUSION

The Court should vacate the Transport Rule in whole or part.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that this brief has been prepared in Microsoft Word using 14-point Equity typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 6,808 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). The combined word count of the Industry and Labor Petitioners' opening brief on remand and this brief does not exceed 14,000, as mandated by this Court's October 23, 2014 order (Doc. No. 1518738). Microsoft Word was used to compute the word count.

/s/ Bill Davis
Bill Davis

CERTIFICATE OF SERVICE

On December 10, 2014, this brief was served via CM/ECF on all registered counsel.

/s/ Bill Davis
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No. 12-1100 (and consolidated cases)

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

WHITE STALLION ENERGY CENTER, LLC, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

**On Petition for Review of Final Agency Action
77 FR 9304 (Feb. 16, 2012)**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), State, Industry, and Labor Petitioners state as follows:

A. Parties, Intervenor, and *Amici***Petitioners:**

Case No. 12-1100: White Stallion Energy Center, LLC

Case No. 12-1101: National Mining Association

Case No. 12-1102: National Black Chamber of Commerce and Institute for Liberty

Case No. 12-1147: Utility Air Regulatory Group

Case No. 12-1170: Eco Power Solutions (USA) Corporation (“Eco Power”).

On October 10, 2012, Eco Power filed a motion for voluntary dismissal.

Case No. 12-1172: Midwest Ozone Group

Case No. 12-1173: American Public Power Association

Case No. 12-1174: Julander Energy Company

Case No. 12-1175: Peabody Energy Corporation

Case No. 12-1176: Deseret Power Electric Cooperative

Case No. 12-1177: Sunflower Electric Power Corporation

Case No. 12-1178: Tri-State Generation and Transmission Association, Inc.

Case No. 12-1180: Tenaska Trailblazer Partners, LLC

Case No. 12-1181: ARIPPA

Case No. 12-1182: West Virginia Chamber of Commerce Incorporated; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; and Wisconsin Industrial Energy Group, Inc.

Case No. 12-1183: United Mine Workers of America

Case No. 12-1184: Power4Georgians, LLC

Case No. 12-1185: State of Texas, Texas Commission on Environmental Quality, Texas Public Utility Commission, and Railroad Commission of Texas

Case No. 12-1186: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas

Case No. 12-1187: Oak Grove Management Company LLC

Case No. 12-1188: Gulf Coast Lignite Coalition

Case No. 12-1189: Puerto Rico Electric Power Authority

Case No. 12-1190: State of Arkansas, *ex rel.* Dustin McDaniel, Attorney General

Case No. 12-1191: Chase Power Development, LLC

Case No. 12-1192: FirstEnergy Generation Corp.

Case No. 12-1193: Edgcombe Genco, LLC; Spruance Genco, LLC

Case No. 12-1194: Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club

Case No. 12-1195: Wolverine Power Supply Cooperative, Inc.

Case No. 12-1196: States of Michigan, Alabama, Alaska, Arizona, Florida, Idaho, Indiana, Kansas, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Utah, West Virginia, Wyoming; Commonwealths of Pennsylvania and Virginia; Terry E. Branstad, Governor of the State of Iowa, on behalf of the People of Iowa; and Jack Conway, Attorney General of Kentucky

Respondent:

The U.S. Environmental Protection Agency is the Respondent in all of these cases.

Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, is also named as a Respondent in Nos. 12-1174, 12-1189, and 12-1191.

Intervenors:

The Commonwealth of Massachusetts and the States of Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island, Vermont and the District of Columbia and the City of New York are intervenor-respondents in No. 12-1100.

The American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, and Waterkeeper Alliance are intervenor-respondents in No. 12-1100.

Calpine Corporation, Exelon Corporation, and Public Service Enterprise Group, Inc. are intervenor-respondents in No. 12-1100.

The State of North Carolina is an intervenor-respondent in No. 12-1147.

National Grid Generation LLC is an intervenor-respondent in No. 12-1147.

Utility Air Regulatory Group and Oak Grove Management Company LLC are movant intervenor-respondents in Nos. 12-1170, 12-1174, and 12-1194.

White Stallion Energy Center, LLC; Deseret Power Electric Cooperative; Sunflower Electric Power Corporation; Tri-State Generation and Transmission Association, Inc.; Tenaska Trailblazer Partners, LLC; and Power4Georgians, LLC are intervenor-respondents in No. 12-1174.

Eco Power Solutions (USA) Corporation is an intervenor-respondent in No. 12-1194.

National Black Chamber of Commerce and Institute for Liberty are intervenor-respondents in No. 12-1194.

Peabody Energy Corporation is an intervenor-respondent in Nos. 12-1174 and 12-1194.

National Mining Association is an intervenor-respondent in Nos. 12-1174 and 12-1194.

Sunflower Electric Power Corporation is an intervenor-respondent in No. 12-1194.

Gulf Coast Lignite Coalition and Lignite Energy Council are intervenor-respondents in No. 12-1194.

The States of California, Minnesota and Oregon, the County of Erie in the State of New York, the City of Baltimore in the State of Maryland, and the City of Chicago in the State of Illinois are intervenor-respondents in No. 12-1100.

The National Association for the Advancement of Colored People are intervenor-respondents in No. 12-1100.

White Stallion Energy Center, LLC is an intervenor-respondent in No. 12-1194.

Chase Power Development, LLC is an intervenor-respondent in No. 12-1194.

Amici:

The Institute for Policy Integrity at New York University School of Law is an *amicus curiae* in support of respondent in No. 12-1100.

The Chamber of Commerce of the United States of America is a movant *amicus curiae* in No. 12-1100.

B. Rulings Under Review

These petitions challenge EPA's final rule, "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 77 FR 9304 (Feb. 16, 2012).

C. Related Cases

Each of the petitions for review consolidated under No. 12-1100 is related. These cases consist of Case Nos. 12-1101, 12-1102, 12-1147, 12-1172, 12-1173, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1195, and 12-1196. The consolidated cases on review have not previously been reviewed by this or any other Court.

Case No. 12-1272—which focuses on two issues of the rule involving new units—was severed from the cases consolidated under Case No. 12-1100 on June 28, 2012. *See* Order Severing New Source Issues (Doc. No. 1381112). Briefing in

that case is currently being held in abeyance pending administrative reconsideration proceedings. *See* Order Holding Case in Abeyance (Doc. No. 1394140).

Case No. 12-1166, which challenges the New Source Performance Standards (“NSPS”) issued in the same *Federal Register* notice as the rule under review in this case, was deconsolidated from Case No. 12-1100 on August 24, 2012. *See* Order Deconsolidating NSPS Issues (Doc. No. 1391295). Additionally, the NSPS issues in Case Nos. 12-1170 and 12-1185 were severed and assigned to a new docket, Case No. 12-1366, and consolidated with Case No. 12-1166. *Id.*

CORPORATE DISCLOSURE STATEMENTS

Industry and Labor Petitioners submit the following statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

American Public Power Association (“APPA”) is a nonprofit trade association, as defined under Circuit Rule 26.1(b), whose members are units of state and local governments that own and operate electric generating, distribution and transmission assets. APPA addresses issues of interest to its members, including those issues related to the development and implementation of requirements under federal and state Clean Air Act programs. APPA does not have any outstanding securities in the hands of the public, nor does APPA have a publicly owned parent, subsidiary, or affiliate.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally-friendly circulating fluidized bed (“CFB”) boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Chase Power Development, LLC is a Texas limited liability company engaged in the development of electrical power generation facilities in Texas. Chase Power Development, LLC has no parent companies. Furthermore, no publicly held corporation has a 10 percent or greater ownership interest in Chase Power Development, LLC.

Edgecombe Genco, LLC (“Edgecombe”) is a cogeneration facility that sells power by contract and produces steam for a steam host. No publicly held corporation owns any stock in Edgecombe. Edgecombe has issued no stock. Edgecombe is wholly-owned by Calypso Energy Holdings, LLC, which has issued no stock.

FirstEnergy Generation Corporation is a wholly-owned subsidiary of FirstEnergy Solutions Corp. FirstEnergy Solutions Corp. is a wholly-owned

subsidiary of FirstEnergy Corp., a diversified energy company whose ten electric utility operating companies comprise one of the nation's largest investor-owned electric systems, serving customers in Maryland, New Jersey, Ohio, Pennsylvania, Virginia, and West Virginia. FirstEnergy Corp. is a publicly-held corporation incorporated under the laws of Ohio. No company owns more than 10 percent of the stock of FirstEnergy Corp.

Georgia Association of Manufacturers, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Indiana Chamber of Commerce, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Indiana Coal Council, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Institute for Liberty ("IFL") is a non-profit and nonpartisan organization dedicated to defending the rights of individuals and businesses against undue encroachments by government that impair economic and civil liberties. It produces academic research on health, economic, and regulatory policy and, through its Center for American Regulatory Engagement, helps ordinary Americans participate in the regulatory process to ensure that their views are represented. IFL has no parent company, subsidiary, or affiliate that has issued shares or debt securities to the public.

The Kansas City Board of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Corporate Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1 because it is a governmental entity organized under the laws of the State of Kansas. Accordingly, no Corporate Disclosure Statement has been provided.

Kentucky Chamber of Commerce, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Kentucky Coal Association, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Midwest Ozone Group is an unincorporated association of businesses and organizations formed to assist in the development of scientifically sound and effective ozone strategies. Because it is a continuing association of numerous businesses and organizations operated for the purpose of promoting the general commercial and legislative interests of its membership, no listing of its members that have issued shares or debt securities to the public is required under Circuit Rule 26.1(b).

National Black Chamber of Commerce (“NBCC”) is a non-profit, nonpartisan, nonsectarian organization dedicated to the economic empowerment of African American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African American-owned businesses, and advocates on behalf of the one million Black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation. Members of the NBCC include companies that are substantial consumers of electricity and whose economic viability depends on affordable electric service. NBCC has no parent company, subsidiary, or affiliate that has issued shares or debt securities to the public.

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

North Carolina Chamber is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Ohio Chamber of Commerce is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Peabody Energy Corporation is a publicly-traded company on the New York Stock Exchange (“NYSE”) under the symbol “BTU.” No public corporation owns more than 10% of Peabody's stock, with the exception of BlackRock, Inc. (NYSE: BLK), a publicly-held corporation which reported that as of December 31, 2011, it owned approximately 11.1% of Peabody's outstanding common stock. Peabody owns and operates several coal mines across the United States, and its coal production fuels approximately 10% of the nation's power generation.

Pennsylvania Coal Association is an unincorporated trade association organized and existing under the laws of the Commonwealth of Pennsylvania. Because it is a continuing association of numerous businesses and organizations operated for the purpose of promoting the general commercial, professional, legislative, and other interests of its membership, no listing of its members that have issued shares or debt securities to the public is required under Circuit Rule 26.1(b).

South Carolina Chamber of Commerce is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Spruance Genco, LLC (“Spruance”) is a cogeneration facility that sells power by contract and produces steam for a steam host. No publicly held corporation owns any stock in Spruance. Spruance has issued no stock. Spruance is wholly-owned by Calypso Energy Holdings, LLC, which has issued no stock.

Tri-State Generation & Transmission Association, Inc. (“Tri-State”) is a wholesale electric power supply cooperative which operates on a not-for-profit basis and is owned by 1.5 million member-owners and 44 distribution cooperatives. Tri-State issues no stock and has no parent corporation. Accordingly, no publicly held corporation owns 10% or more of its stock.

United Mine Workers of America (“UMWA”) is a non-profit national labor organization with headquarters in Triangle, Virginia. Its members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. It provides collective bargaining representation and other membership services on behalf of its members. UMWA is affiliated with the American Federation of Labor-Congress of Industrial Organizations, and has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Utility Air Regulatory Group (“UARG”) is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

The Virginia Chamber of Commerce is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

The Virginia Coal Association, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

West Virginia Chamber of Commerce is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

West Virginia Coal Association, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

White Stallion Energy Center, LLC (“White Stallion”) is a limited liability company organized under the laws of the State of Texas engaged in the business of energy development and production. White Stallion has no parent companies, and no publicly-held corporation has a 10% or greater ownership interest in it.

Wisconsin Industrial Energy Group, Inc. is a not for profit corporation. It has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Wolverine Power Supply Cooperative, Inc. (“Wolverine”) is a not-for-profit, member-owned, electric generation and transmission cooperative headquartered in Cadillac, Michigan. Wolverine has no parent company, and no publicly-held company has a 10% or greater ownership interest in Wolverine.

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GLOSSARY OF TERMS

ACI	Activated Carbon Injection
Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
BTU	British Thermal Unit
CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CAMR	Clean Air Mercury Rule
DSI	Dry Sorbent Injection
EGUs	Electric Utility Steam Generating Units
EPA	U.S. Environmental Protection Agency
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutant
HCl	Hydrogen Chloride
HF	Hydrogen Fluoride
Hg	Mercury
ICR	Information Collection Request
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
MATS	Mercury Air Toxics Standards

NAS	National Academy of Sciences
Ni	Nickel
OMB	Office of Management and Budget
RfC	Reference Concentration
RfD	Reference Dose
RIA	Regulatory Impact Analysis
RTC	Response to Comments
SAB	Science Advisory Board
tpy	tons per year
TSD	Technical Support Document
UARG	Utility Air Regulatory Group

PERTINENT STATUTES AND REGULATIONS

Clean Air Act (“CAA” or “Act”) §§112 and 307, 42 U.S.C. §§7412, 7607,¹ as well as relevant regulations, are reproduced in the attached Statutory and Regulatory Addendum.

STATEMENT OF JURISDICTION

The U.S. Environmental Protection Agency (“EPA” or “Agency”) published the “National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units,” on February 16, 2012 (“MATS rule”). 77 FR 9304 (Joint Appendix (“JA”)__). The consolidated petitions for review were filed on or before April 16, 2012. This Court has jurisdiction under CAA §307(b)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether the MATS rule must be vacated because the 2000 “appropriate and necessary” finding and source category listing based on that finding of coal- and oil-fired electric utility steam generating units (“EGUs”) are unlawful.
2. Whether EPA’s §112(n)(1)(A) “appropriate and necessary” finding relies on statutory interpretations that are contrary to law and unreasonable.

¹ Hereinafter only the CAA citation will be provided. The Table of Authorities provides parallel citations to the U.S. Code.

3. Whether EPA unlawfully failed to consider relevant statutory criteria, including regulatory costs, in making its “appropriate and necessary” finding.
4. Whether the record fails to support EPA’s §112(n)(1)(A) findings for emissions of mercury (“Hg”), other hazardous air pollutant (“HAP”) metals, and acid gas HAPs.
5. Assuming *arguendo* EPA’s §112(n)(1)(A) findings were lawful and had record support, whether EPA violated the CAA in promulgating §112(d) standards by:
 - a. Not separately listing and regulating “major sources” and “area sources”;
 - b. Using a flawed methodology to set the existing source mercury standard for EGUs burning high-British thermal unit (“BTU”) coal; and
 - c. Refusing to promulgate alternative health-based limits under §112(d)(4).
6. Whether the work practice standards and associated definitions for startup and shutdown are arbitrary and capricious, and were promulgated in violation of §307(d)’s rulemaking requirements.

7. Whether EPA's summary denial of the Utility Air Regulatory Group's ("UARG") §112(c)(9) delisting request was arbitrary and capricious and contrary to law.

INTRODUCTION

CAA §112 treats EGUs differently from other sources of HAP emissions. Historically, EPA recognized that there is little risk associated with HAP emissions from EGUs, particularly in light of other CAA programs that effectively control these emissions. Accordingly, Congress provided in §112(n)(1)(A) that EGUs are to be regulated under §112 only if, and to the extent that, EPA determines that EGU HAP emissions cause hazards to public health and that it is "appropriate and necessary" to regulate such emissions under §112.

In 2005, EPA determined after extensive rulemaking that EGU HAP emissions do not cause hazards to public health and, therefore, that §112 regulation of EGU HAP emissions was neither appropriate nor necessary. Now, EPA would reverse that rulemaking determination and the statutory interpretations on which it was based, in order to regulate EGU emissions that, by EPA's own analyses, pose no public health hazard. EPA's new interpretations effectively deprive §112(n)(1)(A) of its meaning. EPA does this at an enormous cost to society by embracing the unnecessary type of EGU HAP regulation Congress sought to avoid, imposing annual compliance costs of \$9.6 *billion* while producing a mere \$4-5

million in benefits from HAP reductions. The resulting regulatory program is not “appropriate and necessary” and should be vacated.

STATEMENT OF THE CASE

In 1990, Congress directed that, when it comes to regulating HAPs, EGUs should be treated differently than all other sources. For most sources, Congress provided a rote formula: §112 regulation begins with categorizing sources, followed by rulemakings to set technology-based standards, and then follow-up rulemakings to address residual risks.

For EGUs, §112 regulation is not rote. Regulation depends on whether additional reductions in HAP emissions are warranted given the substantial HAPs reductions resulting from other CAA requirements. For example, scrubbers installed to meet Acid Rain Program requirements are highly effective in reducing HAP emissions. Congress therefore directed EPA to determine whether remaining EGU HAP emissions pose a hazard to public health, study the efficacy and costs of further emission control for EGUs, and then decide, under CAA §112(n)(1)(A), whether and to what extent further regulation of EGU HAP emissions under §112 is “appropriate and necessary.”

I. THE CLEAN AIR ACT

Section 112, as enacted in 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1685 (1970), required EPA to determine whether sources within an industrial category

released any HAP in amounts that were reasonably anticipated to result in “an increase in mortality or an increase in serious...illness,” and was to regulate those HAPs as necessary to protect public health with an “ample margin of safety.” CAA §112(a)(1) (1970). Under this provision, EPA regulated HAPs emitted from industrial source categories other than EGUs. *See* 40 C.F.R. Part 61.

EGU HAP emissions are produced by the combustion of fossil fuels. These emissions are largely removed from the gas stream by control equipment installed to satisfy other CAA requirements. Under the 1970 and 1977 Acts, EPA investigated the need to regulate EGU HAP emissions, but never found such emissions posed unacceptable risk. For example, EPA found in 1975 and again in 1987 that “coal-fired power plants...do not emit mercury in such quantities that they are likely to cause the ambient mercury concentration to exceed” a level needed to “protect the public health with an ample margin of safety.” 40 FR 48292, 48297/2, 48298/1-2 (Oct. 14, 1975) (JA__); 52 FR 8724, 8725/3 (Mar. 19, 1987) (reaffirming mercury conclusion) (JA__); *see also* 48 FR 15076, 15085/3 (Apr. 6, 1983) (finding radionuclides from EGUs do not pose hazards to public health) (JA__).²

² EPA also set HAP standards for inorganic arsenic emissions without even mentioning EGUs, presumably because those sources did not release arsenic at levels that “result in significant risks.” *See generally* 48 FR 33112, 33116/1 (July 20, 1983).

In 1990, Congress concluded that this risk-based approach to HAP regulation was too time-consuming and cumbersome to implement. *See* S. Rep. No. 101-228, at 131-33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516-18 (JA__). To solve this problem, Congress designated 189 HAPs under §112(b) and instructed EPA in §112(c) to list categories of “major” stationary sources of HAPs based on the amount emitted (10/25 tons). Listing triggered an obligation to establish technology-based emission standards under §112(d). These maximum achievable control technology (“MACT”) standards are based on the emissions reduction achieved in practice by the best controlled similar sources. EPA is also authorized to list and regulate non-major (i.e., “area”) sources separately under §112(c) and (d).

By contrast, Congress provided in §112(n)(1)(A) that EGUs be treated differently. In S.1630, which the Senate passed on April 3, 1990, EGUs were to be listed under §112(c) and regulated under §112(d), like every other source category.³ When the House later passed a modified version of S.1630, it substantially changed the provisions governing EGUs, removing the requirement to list under §112(c) and regulate under §112(d). The House-passed provision,

³ *See* S.1630, §301 (1990), *reprinted in* 3 A Legislative History of the Clean Air Act Amendments of 1990 at 4119, 4407, 4418-28 (1998) (“1990 Legis. Hist.”) (JA__, __, __-__).

which was virtually identical to the current §112(n)(1)(A),⁴ was adopted by the Conference Committee and became law.⁵

Under §112(n)(1)(A), EPA must complete “a study *of the hazards to public health reasonably anticipated to occur as a result of [EGU HAP] emissions*” that remain after “*imposition of the requirements of this [Act]*.” *Id.* (emphases added). As part of that evaluation, EPA must “develop and describe . . . *alternative control strategies* for [any HAP] emissions which *may warrant* regulation under this section.” *Id.* (emphases added). EGU HAP emissions can be regulated only to the extent that it is “*appropriate and necessary after considering the results of the study*.” *Id.* (emphasis added). Section 307(d)(1)(C) provides that the CAA’s notice-and-comment rulemaking requirements “appl[y] to...any regulation under section [112]...(n).”

II. HAPS EMITTED BY EGUS

Most HAP emissions from EGUs result from chemical elements that are naturally present in trace amounts in the fuels they burn.

A. Mercury

Mercury enters the environment through both natural processes, such as volcanic eruptions, evaporation of oceans, and forest fires, and human activities such as gold mining, municipal waste incineration, fossil fuel combustion, and

⁴ 2 1990 Legis. Hist. at 2148-49 (JA__-__).

⁵ 1 1990 Legis. Hist. at 572-73 (JA__-__).

chlorine manufacturing. Mercury is a global pollutant, meaning that a substantial percentage of mercury emissions circulates in the atmosphere for months before depositing on soil or in water.⁶

EPA has estimated that total global emissions of mercury are about 5,000 tons per year: 1,000 tons from natural sources, 2,000 tons from manmade sources, and 2,000 tons from reemission of previously deposited mercury into the ambient air.⁷ EPA's 1998 Utility Study estimated that U.S. coal-fired EGUs emitted about 51.5 tons of mercury annually, or about 1% of the 5,000 tons of worldwide mercury emissions.⁸ By 2010, those mercury emissions were reduced to 29 tons per year ("tpy").⁹

Humans are primarily exposed to mercury through consumption of fish containing methylmercury. 69 FR at 4658/1 (JA__). EGUs do *not* produce or emit methylmercury. Methylmercury is formed by microbes in the sediments of waterbodies, where it eventually works its way up the food chain to fish. Only a small fraction of the nine tons of domestic EGU mercury emissions deposited in

⁶ EPA, Study of HAP Emissions from EGUs—Final Report to Congress, Vol. 1 at 7-7 (Feb. 1998), EPA-HQ-OAR-2009-0234-3052 ("Utility Study") (JA__).

⁷ 69 FR 4652, 4658/2-3 (Jan. 30, 2004) (JA__).

⁸ Utility Study at 7-8, Table 7-1 (JA__).

⁹ 76 FR 24976, 25002/2 (May 3, 2011) (JA__). This more recent estimate reflects implementation of other CAA requirements.

the U.S.¹⁰ actually enters waterbodies, only a very small fraction of that deposition is biologically transformed into methylmercury, and only a small fraction of that methylmercury end up in fish that people eat. As a result, human exposure to methylmercury resulting from coal-fired EGUs is exceedingly small. 70 FR 15994, 16019-20 (Mar. 29, 2005) (JA__-__).

B. Non-Mercury Metal HAPs

Trace amounts of non-mercury metal HAPs—such as arsenic, chromium, and nickel—are naturally present in coal and oil. When these fuels are burned, metals adhere to the ash, becoming part of particulate matter. Virtually all of the particulate matter produced by EGUs is captured by high-efficiency control devices.

In the Utility Study, EPA performed a conservative, “high-end” estimate of the inhalation risks posed by non-mercury metal emissions from all U.S. coal-fired EGUs. Those analyses showed that only two coal-fired facilities had cumulative risks from carcinogens of greater than one-in-one million from HAP metals. The highest facility had a risk of three-in-one million. Utility Study at 6-3, Table 6-1 (JA__). For non-carcinogen emissions, EPA found that exposure levels were far below the reference concentration (“RfC”). In December 2009, EPRI modeled

¹⁰ About 30% of U.S. EGU mercury emissions deposit within the continental United States. *See* EPRI, Comments on 2004 Proposed Rule at 2 (June 16, 2004), EPA-HQ-OAR-2002-0056-2578.

every coal-fired facility and confirmed that none posed a carcinogenic risk greater than one-in-one million.¹¹

C. Acid Gas HAPs

EGUs emit two acid gas HAPs: hydrogen chloride (“HCl”) and hydrogen fluoride (“HF”). During the combustion process, trace amounts of chlorine and fluorine found in coal and oil combine with hydrogen to form HCl and HF. HCl and HF are non-carcinogens, and EPA’s modeling has consistently shown that exposure of the maximum exposed individual to acid gas HAPs emitted by EGUs is an order of magnitude or more below the health-protective thresholds for those HAPs.¹²

D. Organic HAPs and Dioxin

Coal and oil are mostly made up of “organic” compounds—i.e., molecules comprised mostly of carbon and hydrogen. These organics release a significant amount of energy when combusted and are the reason coal and oil are used as fuels. Organic HAPs can be emitted by EGUs as a result of incomplete

¹¹ EPRI, Comments on Proposed HAPs MACT Rule at 3-22 to 3-24 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17621 (“EPRI MATS Rule Comments”) (JA__-__). EPA recently conducted inhalation modeling that found five coal-fired facilities posed risks slightly greater than one-in-one million. As described in detail below, EPA’s recent modeling used contaminated emissions data. *See infra* Argument I.C.2.

¹² *See* Utility Study at 6-7 (JA__); 76 FR at 25051/2 (“Our case study analyses of the chronic impacts of EGUs did not indicate any significant potential for them to cause any exceedances of the chronic RfC for HCl....”) (JA__).

combustion. Testing for organic HAPs and dioxins required by EPA in 2010 reported a large majority of non-detect values, meaning that these compounds are present in amounts too small to detect, if at all.¹³

III. EPA'S §112 RULEMAKING

A. The Utility Study

After enactment of the 1990 CAA, EPA began updating information on the types and amounts of HAPs emitted by EGUs. EPA also collected information on the health effects of those HAPs, and conducted modeling to determine how those emissions may affect public health. The products of these efforts were reported in the Mercury Study (December 1997)¹⁴ and the Utility Study (February 1998). The Utility Study did not contain a §112(n)(1)(A) “appropriate and necessary” determination. Utility Study, at ES-1 (JA__). Instead, EPA stated that it “believes that mercury from coal-fired utilities is the HAP of greatest potential concern” and that “[f]urther research and evaluation are needed to gain a better understanding of the risks and impacts of utility mercury emissions.” *Id.* at ES-27 (JA__). For three other HAPs, EPA noted “potential concerns and uncertainties that may need further study.”¹⁵

¹³ See 76 FR at 25040/1-2 (JA__).

¹⁴ EPA, Mercury Study Report to Congress, Vol. 1 (Dec. 1997), EPA-HQ-OAR-2009-0234-3054 (“Mercury Study”) (JA__).

¹⁵ *Id.* For dioxin and arsenic emissions from coal-fired EGUs, EPA noted that screening studies “suggest...potential concern” but further evaluations were

After issuing the Utility Study, EPA undertook several efforts to advance its understanding of mercury health effects and of the quantity and form of mercury emissions from coal-fired EGUs.¹⁶ EPA asked the National Academy of Sciences (“NAS”) to review the toxicological effects of methylmercury and to recommend an appropriate reference dose (“RfD”).¹⁷ The NAS panel found that EPA’s RfD for methylmercury was “scientifically justifiable.”¹⁸ EPA also issued two information collection requests (“ICRs”). The first required all coal-fired EGUs to collect coal samples throughout 1999 and to analyze those samples for mercury content. 65 FR 79825, 79826/3 (Dec. 20, 2000) (JA__). The second required approximately 80 EGUs to conduct stack sampling of mercury emissions. *Id.* (JA__). EPA did not collect any further information about the three other HAPs it suggested may need further study.

necessary to characterize their impacts. EPA also noted a “potential concern” about nickel emissions from oil-fired EGUs, but identified “significant uncertainties” about the form and health effects of those emissions. *Id.*

¹⁶ The Utility Study identified eleven areas where additional mercury research was needed. Utility Study at 14-8 to -9 (JA__-__).

¹⁷ EPA defines RfD as “[a]n estimate ... of a daily oral exposure to the human population (including sensitive subgroups) that is likely to be without appreciable risk of deleterious effects during a lifetime.” EPA, Risk Assessment Glossary, *available at* <http://www.epa.gov/risk/glossary.htm> (JA__).

¹⁸ National Research Council, *Toxicological Effects of Methylmercury*, at 11 (2000) (JA__).

B. The December 2000 “Notice of Finding”

On December 14, 2000, shortly before the Clinton Administration left office and well before EPA could complete the data collection and research on mercury it said was necessary to make a §112(n)(1)(A) determination, then-departing Administrator Browner published, without any prior notice of proposed rulemaking or opportunity to comment, a “notice of regulatory finding.” This notice announced her conclusions that regulation of mercury emissions from coal-fired EGUs and nickel emissions from oil-fired EGUs was “appropriate and necessary” under §112. 65 FR at 79829/2 (JA__). The notice failed to identify the increment of mercury emissions that was “appropriate and necessary” to control under §112, and did not describe the “alternative control strategies for emissions which may warrant regulation under this section.” Indeed, Administrator Browner admitted that EPA could not at that time quantify the amount of methylmercury in U.S. fish attributable to mercury emissions from domestic coal-fired EGUs. *Id.* at 79827/2-3 (JA__).

Administrator Browner claimed “it is unnecessary to solicit...public comment on today’s finding [because]...[t]he regulation developed subsequent to the finding will be subject to public review and comment.” *Id.* at 79831/1-2 (JA__). In that future rulemaking, she explained, EPA would consider alternative control strategies. *Id.* at 79830/3 (JA__).

UARG, one of the parties on this brief, sought review of the December 2000 notice in this Court.¹⁹ In response, EPA moved to dismiss, arguing that EPA's actions were not final²⁰ and would be "subject to further comment in subsequent rulemaking."²¹ This Court granted EPA's motion to dismiss, finding that "[t]his court...lacks jurisdiction at this time to review the determination of the Environmental Protection Agency...that regulation of coal- and oil-fired electric utility steam generating units is appropriate and necessary...."²² On February 12, 2002, EPA published in the *Federal Register* a notice under §112(c) listing coal-fired boilers for regulation under §112 based on the 2000 notice of finding. 67 FR 6521 (Feb. 12, 2002) (JA__).

C. The §112(n) Rulemaking

In 2004, EPA initiated a rulemaking, following the requirements of §307(d), to address HAP emissions from coal- and oil-fired EGUs. EPA considered a number of regulatory options, including: (1) no further regulation of EGU mercury emissions; (2) adoption of a §112(d) rule regulating only EGU mercury emissions; (3) adoption of rules under §112(n)(1)(A) addressing any EGU emissions that

¹⁹ *Utility Air Regulatory Grp. v. EPA*, No. 01-1074 (D.C. Cir. filed Feb. 16, 2001) ("UARG v. EPA").

²⁰ EPA's Motion to Dismiss at 1, *UARG v. EPA* (Apr. 9, 2001) (JA__).

²¹ *Id.* at 9 (JA__); *see also* EPA's Reply in Support of Motion to Dismiss at 4, *UARG v. EPA* (May 17, 2001) ("the entire predicate for EPA's finding determination and listing decision (both legal and factual) is susceptible to further comment and administrative review") (JA__); 70 FR at 15996/2-3 (JA__).

²² Order at 1, *UARG v. EPA*, (July 26, 2001) (JA__).

warrant regulation as “appropriate and necessary”; and (4) adoption of rules under other CAA sections that make further control inappropriate and unnecessary under §112.²³ EPA completed detailed scientific and technical studies to address data gaps identified by the Utility Study. Commenters also submitted detailed technical information on EGU mercury emissions and their health consequences.

EPA conducted extensive modeling to analyze how changes in mercury emissions from coal-fired EGUs, including total elimination of those emissions, would affect U.S. mercury deposition and methylmercury levels in fish.²⁴ The modeling showed that only a small fraction of the mercury deposited in the U.S. comes from domestic EGUs, and that EGUs contribute a “relatively small percentage” to fish tissue methylmercury levels in the U.S.²⁵ as a result of implementation of other CAA requirements, including the Clean Air Interstate Rule (“CAIR”). *See* 70 FR at 16004/2 (JA__).²⁶

On March 29, 2005, EPA concluded its rulemaking. Regarding mercury, EPA found that “[b]ecause this new information demonstrates that the level of Hg emissions projected to remain ‘after imposition of’ section 110(a)(2)(D) does not cause hazards to public health, we conclude that it is not appropriate to regulate

²³ *See* 69 FR at 4652 (JA__).

²⁴ 70 FR at 16011-25 (summarizing EPA’s modeling) (JA__ - __).

²⁵ *Id.* at 16019-20 (JA__ - __) (on average about 4%).

²⁶ CAIR was remanded to EPA by this Court and remains in place pending replacement rulemaking. *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302 *et al.*, 2012 WL 3570721, at *24 (D.C. Cir. Aug. 21, 2012).

coal-fired Utility Units under §112 on the basis of mercury emissions.” *Id.* EPA similarly concluded that regulation of nickel emissions from oil-fired EGUs was neither “appropriate” nor “necessary.” *Id.* at 16007/2-08/2 (JA__-__). EPA further found, as it had under the 1970 and 1977 Acts, that EGU emissions of non-mercury HAPs were too small to warrant regulation. *Id.* at 16006/2-3 (JA__-__). Because EPA found that the December 2000 notice “lacked foundation” and because §112 regulation was neither appropriate nor necessary, there was no longer a predicate for listing EGUs. Therefore, EPA removed EGUs from the §112(c) list. *Id.* at 15994/1-2 (JA__). EPA proceeded to regulate mercury emissions from EGUs under §111 through the Clean Air Mercury Rule (“CAMR”) as a backstop to ensure that expected mercury emissions reductions under CAIR would occur. 70 FR 28606 (May 18, 2005) (JA__).²⁷

In this rulemaking, EPA announced its key interpretations of §112(n). EPA cited the Merriam-Webster dictionary definition of “appropriate” as meaning “especially suitable or compatible.” 70 FR 16000/3 (JA__). In deciding whether regulation of EGUs was “appropriate,” EPA asked whether the remaining HAP emissions from EGUs, after imposition of other CAA requirements, resulted in hazards to public health. If they do not, EPA said that it would not be “‘especially suitable’ -- *i.e.*, ‘appropriate’ -- to regulate such units under section 112.” *Id.*

²⁷ EPA asserted that imposition of CAMR provided independent justification for not regulating coal-fired EGUs under §112. 70 FR at 16004/2 (JA__).

(JA__). EPA interpreted the term “necessary” to mean “that it is necessary to regulate Utility Units under section 112 only if there are no other authorities available under the CAA that would, if implemented, effectively address the remaining HAP emissions from Utility Units.” *Id.* at 16001/2 (JA__). EPA also interpreted these terms to include consideration of regulatory and compliance costs. *Id.* at 16001/1 n.19 (JA__).

D. *New Jersey v. EPA*

Numerous parties challenged EPA’s revision rule and CAMR. After all of the issues regarding these two rules were briefed, this Court limited oral argument to a single issue—whether EPA erred in removing EGUs from the §112(c) list of major source categories of HAP emissions. On February 8, 2008, the Court vacated EPA’s decision to remove EGUs from the list and also vacated CAMR. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). The Court held that, once listed, the only way that a source category may be removed from the §112(c) list is by making the showings required by §112(c)(9). *Id.* at 581-82. Because EPA did not follow §112(c)(9), the court vacated the rule. *Id.* at 583.

The Court did not rule on whether EPA’s December 2000 appropriate and necessary determination and subsequent listing decision were legally correct, whether they were supported by the factual record, whether EPA followed the proper procedural steps in taking its December 2000 actions, whether EPA’s 2005

legal interpretation of §112(n)(1)(A) was correct, or whether EPA's 2005 factual findings were correct. The Court's only discussion of §112(n)(1)(A) was limited to responding to EPA's argument that an agency has inherent authority to reverse an earlier administrative determination where it has a principled basis for doing so.

The Court stated: "An agency can normally change its position and reverse a decision, and *prior to EPA's listing of EGUs under section 112(c)(1)*, nothing in the CAA would have prevented it from reversing its [§112(n)(1)(A)] determination about whether it was 'appropriate and necessary' to do so." *Id.* at 582-83 (emphasis added). But, once the nonfinal, unreviewable "appropriate and necessary" finding was followed by a nonfinal, unreviewable §112(c) listing decision, the Court said EPA was required by statute to propose and promulgate §112(d) standards for EGUs *unless*, prior to that promulgation, EPA delisted EGUs in accordance with §112(c)(9). *Id.* at 582. In sum, the Court in *New Jersey* saw no difference between delisting a properly listed source category pursuant to §112(c)(9) and administratively correcting an improper listing decision through removal of the category from the list (as EPA had done in the past when it found that a listed "major source" category did not include "major sources").²⁸ While, listing decisions therefore could not be corrected administratively, EPA's listing decision would be reviewable following promulgation of §112(d) standards. *See*

²⁸ *New Jersey*, 517 F.3d at 583 (citing respondent's brief).

Nat'l Asphalt Pavement Ass'n v. Train, 539 F.2d 775, 779 n.1 (D.C. Cir. 1976) (threshold finding under §111 is reviewable in judicial challenge of final standards).

E. Remand Rulemaking

On remand, EPA issued an ICR in two phases to update mercury emissions information and obtain extensive new emissions information on all other HAPs emitted by the “best performing” EGUs.²⁹ This December 2009 ICR required every EGU to provide detailed information on plant equipment and operations, obtain 12 months of data about the source and chemical constituents of each coal and oil shipment, and provide all emissions tests conducted since January 1, 2005. In the second phase of the ICR, 492 well-controlled EGUs were required to conduct stack testing for one or more HAP groupings within eight months³⁰—a schedule that foreclosed retesting of suspect results. EGUs spent over \$100 million to comply with the ICR.

After completion of ICR responses in September 2010, there was little time under EPA’s consented-to rulemaking schedule³¹ to review and analyze this

²⁹ EPA, Response to Comments on Proposed ICR at 26 (Nov. 5, 2009), EPA-HQ-OAR-2009-0234-0063 (JA__) (“ICR RTC”).

³⁰ EPA, ICR Supporting Statement Part B (Dec. 24, 2009), EPA-HQ-OAR-2009-0234-0103 (JA__). EPA identified five HAP “groups” for testing: mercury, non-mercury metals, acid gases, organics and dioxins.

³¹ Following the *New Jersey* decision, and before EPA could complete the §112(d) MACT rulemaking (i.e., the subject of this litigation), the U.S. District

mountain of data before drafting a proposed rule. This rushed process produced significant anomalies. For example, within days of publishing the proposed rule, UARG alerted EPA that it had divided mercury emissions data expressed in *lb/GWh* by a factor of 1,000,000, instead of the correct divisor of 1,000, to derive a proposed mercury emission standard expressed in *lb/MWh*. This resulted in a proposed rule based on mercury emissions that were calculated to be *1,000 times lower* than the actual data, which in turn led to miscalculation of the average level of mercury control achieved by the best units and misidentification of the “best performing” units. See UARG Comments on Proposed MATS Rule at 89-90 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17775 (“UARG Comments”) (JA__-____). In a letter to UARG, EPA admitted its error,³² but did not issue a new proposal. The public was left to evaluate and to comment on a seriously flawed rule.

EPA published the MATS rule on February 16, 2012. In that rule, EPA concluded that its 2000 “appropriate and necessary” finding was valid when made, and constituted a sufficient basis for its 2002 action listing EGUs under §112(c). 77 FR at 9320/1 (JA__).

Court for the District of Columbia entered a consent decree imposing a compressed rulemaking schedule. *Am. Nurses Ass’n v. Johnson*, No. 08-2198 (D.D.C. Apr. 15, 2010) (JA__).

³² Letter from Gina McCarthy, EPA Assistant Adm’r, to Lee Zeugin, Counsel for UARG, at 1 (May 18, 2011), EPA-HQ-OAR-2009-0234-9859 (JA__).

(i) EGU mercury emissions pose a public health hazard, (ii) utility emissions of non-mercury HAP metals pose a health and environmental threat, and (iii) acid gas EGU HAP emissions pose an environmental threat. 77 FR at 9362-64 (JA__-__). For non-mercury HAP metals, this newer information consisted of a 16-unit case study that EPA conducted immediately before issuing the proposal. 76 FR at 25011/3-12/2 (JA__-__). There was no new EPA study of EGU acid gas impacts, but rather a single literature citation to a 2011 journal article about acid gas deposition in the United Kingdom. 77 FR at 9361/3-62/1 (JA__-__).

Based on these findings, EPA rejected comments calling for it to affirm the 2005 rulemaking determination that the 2000 “appropriate and necessary” finding should not have been made, and that EPA should not have listed EGUs under §112(c). In doing so, EPA abandoned virtually all the 2005 rulemaking interpretations of §112(n)(1)(A). EPA then proceeded to issue §112(d) emission limits for EGU mercury, non-mercury HAP metals, and acid gas emissions, and §112(h) work practice standards for organic substance emissions.

According to EPA analyses, it will be extraordinarily expensive to comply with the rule (about \$9.6 *billion* per year), even though its health benefits were extraordinarily low (just \$4-6 million, all from reducing mercury). See 77 FR at 9428/3 (JA__). Significant costs stem from compliance requirements for acid gases, even though EPA concluded EGU acid gas emissions pose no health risk,

and even though it could not quantify any environmental risk associated with such emissions.³³ While EPA asserted that the rule was nonetheless cost-effective based on “co-benefits” of reducing PM_{2.5} emissions—a non-HAP substance addressed under *other* CAA programs—EPA emphatically maintained that these PM_{2.5} co-benefits played no role in its “appropriate and necessary” finding. 77 FR at 9320/1 (JA__).

SUMMARY OF ARGUMENT

Before undertaking any regulation of EGUs under §112, EPA must study the “public health [hazards] reasonably anticipated to occur as a result of emissions” of HAPs from EGUs. §112(n)(1)(A). If health hazards are identified, the Administrator may regulate a specific EGU HAP only “if the Administrator finds that such regulation is appropriate and necessary.” *Id.* The MATS rule must be set aside because the 2002 listing of EGUs was based on a substantively and procedurally flawed December 2000 “appropriate and necessary” finding.

Even if the Court finds that EPA could augment its 2000 finding in the later 2012 rulemaking, that rulemaking does not establish that it is “appropriate and necessary” to regulate EGUs under §112. The 2012 rulemaking fails to justify EPA’s departure from its 2005 rulemaking interpretations of §112(n)(1)(A).

³³ See EPA, Regulatory Impact Analysis for Final MATS at 3-15, Figure 3.6 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131 (“RIA”) (JA__). Flue gas desulfurization and dry sorbent injection (“DSI”) costs are driven by acid gas standards.

Further, EPA's new interpretations are both inconsistent with the CAA and unreasonable. Finally, the record does not support EPA's findings that mercury, non-mercury HAP metals, and acid gas HAPs pose public health hazards.

While those fatal defects should end the matter, even if the Court were to accept EPA's "appropriate and necessary" analysis, the promulgated §112(d) EGU MACT standards must still be set aside for several independent reasons. First, contrary to explicit statutory directives, EPA did not distinguish between "major sources" and "area sources." Second, EPA used a flawed methodology to set the mercury standard for existing sources that combust high-BTU coal. Third, EPA arbitrarily refused to set §112(d)(4) standards for acid gases. Fourth, the work practice standards and associated definitions promulgated in the final rule are procedurally deficient because EPA failed to provide an opportunity for public comment. Finally, EPA's summary denial of UARG's §112(c)(9) delisting request was arbitrary and capricious and based on flawed statutory interpretation.

STANDING

Industry and Labor Petitioners will suffer concrete, particularized injury as a result of the direct regulation of EGUs. *See, e.g.* Southern Company, Comments on Proposed Rule at 1-2, 9-12 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-18023 ("Southern Comments") (JA__-__, __-__); National Mining Association, Comments on Proposed Rule at 1-2 (Dec. 6, 2011), EPA-HQ-OAR-2009-0234-

19825 (JA__-__). The relief requested by Industry and Labor Petitioners will redress these harms. These Petitioners have Article III standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992); *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 656-58 (D.C. Cir. 2005).

Likewise, State Petitioners satisfy the Article III standing requirements of injury, causation, and redressability. *See Lujan*, 504 U.S. at 560-61. Among other things, States have standing to challenge rules that make their regulatory tasks more difficult. *See Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). For example, State public utility commissions, which are responsible for maintaining the reliability and continuity of each State's electricity grid, face increased regulatory challenges as the costs of complying with the MATS rule force some EGUs out of the energy market, contributing to the widespread retirement of the Nation's coal-fired generating capacity. *See* 77 FR at 9407/3 (JA__). This loss in generating capacity will complicate State Petitioners' vital task of keeping the lights on, requiring public utility commissions to manage a dwindling supply of electricity and to increase prices. Beyond the regulatory burden on States, the annual compliance cost of the rule will be \$9.6 billion in 2015, which will be borne by affected sources or passed on to consumers (including the States) through higher electricity costs. *See* 77 FR at 9425/1 (JA__).

By setting aside the MATS rule, this Court would prevent these costs and redress the harm suffered by State Petitioners.

STANDARD OF REVIEW

CAA §307(d)(9) requires this Court to strike down EPA action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Agency action is arbitrary and capricious where EPA “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *North Carolina v. EPA*, 531 F.3d 896, 906 (citation and quotation marks omitted), *modified on reh’g*, 550 F.3d 1176 (D.C. Cir. 2008); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985).

ARGUMENT

I. EPA’S EGU MACT STANDARDS ARE UNLAWFUL UNDER §112(n)(1)(A).

Congress directed EPA to regulate EGUs only to the extent “appropriate and necessary” after considering other CAA requirements. While EPA recognized that

“Congress treated Utility Units differently from other major and area sources...,”³⁴ EPA’s interpretation and implementation of §112(n)(1)(A) here effectively eliminate this distinction, contrary to the language and structure of §112.

A. Because the Browner Finding Was Unlawful, the §112(d) EGU MACT Standards Must Be Vacated.

A valid listing decision under §112(c) is the legal predicate for promulgating any §112(d) standards. In the case of EGUs, assuming for purposes of argument that EPA may elect to regulate under §112, EPA’s §112(c) listing would require a lawful “appropriate and necessary” finding under §112(n)(1)(A). *New Jersey*, 517 F.3d at 582.

While an agency generally may correct an erroneous threshold finding, this Court in *New Jersey* found that, absent a §112(c)(9) delisting determination, §112(c) does not allow EPA to correct an erroneous §112(n)(1)(A) (or even an erroneous “major” source) threshold finding administratively. Instead, according to the Court, EPA must proceed to final promulgation of §112(d) standards and only this Court may “correct” an erroneous §112(n)(1)(A) decision after promulgation of §112(d) standards. As the *New Jersey* Court held, on review of those standards, the Court must determine whether the listing predicates for those

³⁴ 70 FR at 15997/2 (JA__); *see also* 77 FR at 9333/3 (acknowledging that “disparate treatment” of EGUs under §112) (JA__).

standards were lawful and, if not, “correct” that flaw through vacatur of the standards. *Id.* at 583.

EPA added EGUs to the §112(c) list of source categories in 2002, based on Administrator’s December 2000 §112(n)(1)(A) notice. As this Court explained in *New Jersey*, once the Administrator issued a notice in 2000 that EGUs should be regulated under §112 and then listed EGUs, the statute “prevented it [EPA] from reversing its determination about whether it was ‘appropriate and necessary’ to do so.” *Id.* at 582-83. EPA did not purport in the instant rulemaking to renew the earlier listing of EGUs. Therefore, as a consequence of *New Jersey*, the validity of the 2002 listing decision must be judged in reference to the validity of the 2000 §112(n)(1)(A) notice of finding on which it was based; if that finding was unlawful, the listing was unlawful.

The record plainly shows that when EPA issued its December 2000 notice, it had *not* undertaken a §112(n)(1)(A) rulemaking, as required under §307(d). Nor had EPA undertaken the work needed to characterize mercury health risks. *See supra* p.13. Therefore, the December 2000 notice was a fundamentally flawed threshold finding that could have no legal consequences and could not lawfully impose future obligations on EPA to regulate under §112(d).

In *Thomas v. New York*, 802 F.2d 1443 (D.C. Cir. 1986), this Court held that only a “threshold” finding embodied in a legislative rule can compel future agency

action. In *Thomas*, this Court addressed whether a letter, in which an outgoing Administrator concluded that acid deposition was endangering public health in the U.S. and Canada, obligated future EPA Administrators to take the regulatory action under CAA §115 that would be triggered by such a finding. Because any EPA statement of future effect must be embodied in a legislative “rule” in order to bind a future Administrator, *id.* at 1446-47, and because the Administrator had not made the §115 findings in a notice-and-comment rulemaking, this Court found in *Thomas* that it was not a “rule” and thus had no legal consequences. *Id.* at 1447.

Petitioner UARG sought judicial review of the December 2000 finding. That petition was dismissed by this Court on finality grounds. *See supra* p.14. In *New Jersey*, petitioner UARG relied on *Thomas* in defending EPA’s 2005 §112(n)(1)(A) finding, which was made after a notice-and-comment §307(d) rulemaking and which rejected the earlier December 2000 finding. This Court, however, held that, because EPA did not cite or rely on *Thomas* in its brief, the Court would not consider the *Thomas* argument in UARG’s brief in *New Jersey*. *New Jersey*, 517 F.3d at 581 n.3. Accordingly, because this *Thomas*-based argument could not be resolved in *New Jersey*, that argument is now suitable for review for the first time under §307(b).

Because the December 2000 §112(n)(1)(A) finding could not, under *Thomas*, be given legal consequences for future EGU regulation, it could not

provide the basis for a §112(c) EGU listing decision. Without a lawful listing, EPA had no obligation, or authority, to adopt any standards for EGUs under §112(d). On this basis alone, EPA's EGU MACT standards must be vacated.

B. EPA's Current Interpretations of §112(n)(1)(A) Are Unlawful.

1. Section 112(n)(1)(A) Authorizes Regulation Only of Those EGU HAPs for Which EPA Makes an "Appropriate and Necessary" Finding.

In its December 2000 §112(n)(1)(A) notice, EPA announced that mercury emissions from coal-fired EGUs merited regulatory consideration under §112. 65 FR at 79827/3 (JA__). Then, in its 2005 rulemaking, EPA determined that mercury was the *only* HAP from coal-fired EGUs warranting consideration. 70 FR at 16002/1-2 (JA__). In 2012, EPA changed course and now interprets §112(n)(1)(A) to require regulation of *all* HAPs emitted by EGUs whether or not those emissions pose hazards to public health, provided that EPA makes a health finding for at least one EGU HAP. This change in interpretation is inconsistent with the statute and is unreasonable.

Section 112(n)(1)(A) directs EPA (i) to study "hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs]" of listed HAPs and then to report to Congress the results of that study, and (ii) based on those results, to devise "alternative control strategies for emissions *which may warrant regulation* under this section." *Id.* (emphasis added). This language requires EPA

to identify specific EGU HAPs “which may warrant regulation” based on specific public health hazards they engender, and not to regulate “all HAPs” regardless of hazards to public health and regardless of whether they may warrant regulation.

Furthermore, §112 directs EPA to regulate EGU HAPs under §112 *only* if it finds “*such regulation*” is “appropriate and necessary.” §112(n)(1)(A) (emphasis added). “Such regulation” cannot be “appropriate and necessary” for any EGU HAPs that do not pose “hazards to public health.” Rather, regulation is reserved by the plain terms of §112(n)(1)(A) to EGU HAPs that pose hazards to public health, and the regulation of which is “appropriate and necessary.” Indeed, regulating emissions that do not pose hazards is incompatible with the fundamental purpose of the CAA “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 the population.” §101(b)(1). Yet under EPA’s interpretation of the CAA, EPA’s 2000 “appropriate and necessary” finding for mercury compels severe regulatory compliance requirements for non-mercury HAPs—requirements that remain wholly inappropriate and unnecessary given the more recent information EPA now advances for those substances. *See infra* Argument I.C.

The legislative history supports this commonsense reading of §112(n)(1)(A). As explained by the sponsor of this provision, EPA’s authority to regulate EGUs is premised on EPA’s ability to “clearly establish that emissions of any pollutant, or

aggregate of pollutants, from such units cause a significant risk of serious adverse effects.” 136 Cong. Rec. H12934 (daily ed. Oct. 26, 1990) (statement of Rep. Oxley), *reprinted in* 1 1990 Legis. Hist. at 1416-17 (“Oxley Statement”) (JA__-__). Though now discounting Representative Oxley’s statement, EPA previously relied on the very same statement to support its interpretation of §112(n)(1)(A). *Compare* 77 FR at 9322/1-2 (JA__) *with* 70 FR at 16000/2 (JA__).

In the 2000 “appropriate and necessary” notice of finding, EPA concluded that mercury emissions were a “threat to public health.” 65 FR at 79827/2 (JA__); *see also New Jersey*, 517 F.3d at 578 (citing mercury as the basis for 2000 “appropriate and necessary” finding). In 2004, EPA confirmed that based on the 2000 record “it could not reasonably have reached...a conclusion” that other HAPs should be considered for regulation under §112, stating that the “record supports only a finding that emissions of Hg and Ni warrant regulation.” 69 FR at 4683/2 (JA__).

At the time, some commenters claimed that this Court’s decision in *National Lime Ass’n v. EPA*, 233 F.3d 625, 633 (D.C. Cir. 2000), required EPA “to promulgate emission standards for all power plant HAP emitted in significant quantities.”³⁵ EPA disagreed, stating that EGUs are regulated differently from

³⁵ EPA, RTC Concerning Proposed Revision of 2000 Finding and Removal of EGUs from §112(c) List, at 14 (Mar. 15, 2005), EPA-HQ-OAR-2002-0056-6193 (JA__).

other source categories under §112, and that §112(n)(1)(A) limits regulation to those HAPs that are “appropriate” to regulate.³⁶ After rulemaking, EPA thus interpreted §112(n)(1)(A) in a manner consistent with its plain language: to authorize regulation under the “appropriate and necessary” standard only of those HAPs that pose hazards to public health.

Reversing its prior position, EPA now construes §112(n)(1)(A) to require EPA “to regulate all HAP from major sources of HAP emissions once a source category is added to the list of categories under CAA section 112(c),” citing *National Lime*, 233 F.3d at 633 (JA__). 77 FR at 9326/1. Under this view, EPA has no discretion to limit its regulations of EGUs to only those HAPs “which may warrant regulation” under §112(n)(1)(A).

In changing its 2005 rulemaking interpretation, other than citing *National Lime*, EPA does nothing to explain. EPA does not engage the statutory language or purposes. Nor does EPA explain why it is rejecting its previous view of the CAA and of *National Lime*.

As EPA explained in 2005, *National Lime* does not address §112(n)(1)(A). Rather, it involved the regulation of *major sources* generally under §112(c) and (d). For non-EGU sources, §112(c)(1) requires EPA to publish and maintain a list of “major sources” of HAP emissions. “Major sources” are defined in §112(a)(1)

³⁶ *Id.* at 16 (JA__).

by the objective amount of their HAP emissions, not by EPA's discretionary view of whether regulation of an EGU HAP emission that poses a health hazard is "appropriate and necessary." Reliance on *National Lime's* interpretation of different statutory provisions is therefore misplaced. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("Where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.") (emphasis added); *Norwest Bank Minn. Nat'l Ass'n. v. FDIC*, 312 F.3d 447, 451 (D.C. Cir. 2002) ("When both specific and general provisions cover the same subject, the specific provision will control.").

EPA's reliance on *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), is also misplaced. See 77 FR at 9323/1 (JA__). It is insufficient for EPA to assert, without explanation, that its new interpretation is "reasonable" when that interpretation differs from its interpretation in 2000 and 2005. See *id.* "[A]n agency changing its course...is obligated to supply a *reasoned analysis* for the change...." See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 (emphasis added). Here, EPA's bald assertion that its changed interpretation is "reasonable" and therefore accorded "deference," without analyzing the different statutory provisions Congress adopted for EGUs and other sources as EPA did in its 2005 rulemaking interpretation, must fail and the rule must be vacated. See, e.g., *Mass. Trs. v. United States*, 377 U.S. 235, 248 (1964)

(regulation based on an incorrect view of applicable law cannot stand as promulgated); *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 797-98 (D.C. Cir. 2004); *see also Prill*, 755 F.2d at 947-48 (agency action premised on a mistaken conclusion that the agency has no discretion is inherently arbitrary and must be reconsidered based on a proper understanding of the agency's discretion); *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000) (same).

2. EPA's Application of the §112(c)(9) Delisting Criteria in Making the §112(n)(1)(A) "Appropriate and Necessary" Finding Is Unlawful.

In 2005, EPA declined to interpret §112(n)(1)(A) to incorporate the "ample margin of safety" standard found in §112(f). 70 FR at 16001/3 (JA__). Rather, EPA interpreted the statute more broadly, finding that §112(n)(1)(A) "called on EPA to consider the 'hazards to public health reasonably anticipated to occur' from utility HAP emissions'...in determining whether it is both appropriate and necessary to regulate [EGUs] under section 112." *Id.*

Now, on the grounds that §112(n)(1)(A) "neither defines the phrase 'hazards to public health'" nor "sets forth parameters for EPA to use in determining whether HAP emissions from EGUs pose a hazard to public health," 76 FR at 24992/3 (JA__), EPA concludes for the first time that the §112(c)(9) criteria for delisting source categories is a sufficient basis for determining that it is "appropriate" to regulate EGUs under §112(n)(1)(A). 76 FR at 24992/2 ("[W]e conclude today that

it is appropriate to regulate non-Hg HAP because emissions of these HAP from some EGUs pose a cancer risk greater than one in one million to the most exposed individual.”) (JA__).

At the outset, the §112(c)(9) evidentiary standard for delisting—“may result”—is different from the evidentiary test governing a §112(n)(1)(A) finding—“reasonably anticipated to occur.” Furthermore, the delisting provision applies that different evidentiary standard to both “health” and “environmental” effects whereas §112(n)(1)(A) requires EPA to focus exclusively on health hazards in selecting EGU HAP candidates for regulation. *See infra* p.44. These differences in language alone preclude an interpretation of §112(n)(1)(A) as incorporating the regulatory tests in §112(c)(9).

More fundamentally, EPA’s interpretation of the phrase “hazards to public health” is inconsistent with the language and structure of §112. As discussed, Congress wrote §112(n)(1)(A) to treat EGUs *differently* from all other “major sources,” requiring an evaluation of whether it is “appropriate and necessary after considering the results of the study” on EGU HAP emissions to list those sources for §112 regulation. By applying the *delisting* provisions of §112(c)(9) in making the initial, *pre-listing* determination whether it is “appropriate and necessary” to regulate EGUs, EPA has unlawfully imposed requirements on itself that Congress chose not to impose at the listing stage. Essentially, EPA would treat EGUs the

same as all other major source categories—as a category that *must* be listed *unless* the delisting criteria are met. Because this approach is inconsistent with the statute, the rule must be set aside.

3. A §112(n)(1)(A) Finding Does Not Compel Regulation Under §112(d).

Even if EPA had properly determined that it is “appropriate and necessary” to regulate EGU HAP emissions, EPA misinterpreted the statute by concluding that those emissions must be regulated through MACT standards under §112(d), and cannot be regulated under §112(n)(1)(A) to the degree “appropriate and necessary.” Had Congress intended that EPA regulate EGU HAP emissions only through §112(d), Congress would have directed EPA to regulate EGU emissions “under §112(*d*)” once an “appropriate and necessary” finding was made. Congress did not do so, stating instead that “[t]he Administrator shall regulate [EGUs]...*under this section*” upon such a finding. §112(n)(1)(A) (emphasis added). Indeed, Congress specifically rejected the Senate bill that expressly prescribed a “list-under-(c)-and-regulate-under-(d)” approach for EGUs similar to the approach for other source categories. *See infra* p.6.

Under §112(n)(1)(A), Congress directed EPA to establish “*such regulation*” for EGUs that is “appropriate and necessary after considering the results of the study required by this subparagraph.” §112(n)(1)(A) (emphasis added). Regulation of EGU HAPs that do not pose hazards to public health, or regulation at

a level that is greater than needed to eliminate the hazard, is *not* “regulation [that] is appropriate and necessary.” *Id.* Thus, §112(n)(1)(A) *itself* provides EPA authority to regulate EGU HAP emissions, as EPA concluded in 2004 when it proposed §112(n)(1)(A) as a regulatory alternative. 69 FR at 4661/2 (JA__).

In this regard, MACT standards control emissions without regard to what is “appropriate” or “viable” regulation. *See, e.g., Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) (§112(d)(3) requires EPA to set standards based on the best performing sources even if EPA believes such standards are “not ‘appropriate’ or ‘viable’”). In any specific case, a MACT standard might provide more or less control than is needed to address the hazards identified under §112(n)(1)(A), *cf. EME Homer City*, 2012 WL 3570721, at *11-12 (“[EPA] must avoid using [§110(a)(2)(D)]...in a manner that would result in unnecessary over-control...and may not exceed a statute’s authorization or violate a statute’s limits.”), or may result in control strategies different from those identified by EPA for emissions that may warrant regulation. In either case, applying the MACT standard-setting criteria would not result in “such regulation [as] is appropriate and necessary.” *Cf. Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (“requisite” means “sufficient, but not more than necessary...to protect public health”).

Further, EPA’s current interpretation makes identification of “alternative control strategies for emissions which may warrant regulation” a meaningless

exercise. If Congress had intended that EPA regulate EGU HAP emissions only by establishing standards based on the MACT floor and beyond-the-floor provisions in §112(d), then there is no need to identify such alternative control strategies. By rendering meaningless the §112(n)(1)(A) requirement that EPA identify alternative control strategies for emissions that may warrant regulation, EPA's interpretation is unlawful and must be rejected. *See Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 130 S. Ct. 1251, 1261 (2010) (statutes should not be interpreted to render a provision meaningless).

Finally, by making the rulemaking requirements of §307(d) applicable to the “promulgation...of *any...regulation under section 7412...(n)*,” §307(d)(1)(C) (emphasis added), Congress confirmed that §112(n)(1)(A) confers authority to establish “such regulation [as] is appropriate and necessary” to address those “emissions which may warrant regulation.”

In sum, EPA misconstrued the statute as compelling regulation under §112(d) and precluding any regulation of EGUs under §112(n)(1)(A). *See* 77 FR at 9330/2 (JA___). EPA's §112(d) MACT standards therefore must be vacated. *See, e.g., Transitional Hosps. Corp.*, 222 F.3d at 1029; *Prill*, 755 F.2d at 948; *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 646 (D.C. Cir. 1998).

4. EPA Failed To Consider the Costs of Regulation in Its Appropriate and Necessary Finding.

In 2005, EPA construed §112(n)(1)(A) to allow consideration of costs in determining whether and to what extent regulation of EGU HAP emissions is “appropriate” following a finding that public health hazards warrant regulation. 70 FR at 16000/3-01/1 (JA__-__). (“Even if the remaining utility HAP emissions cause hazards to public health, it still may not be appropriate to regulate [EGUs] under section 112 because there may be other relevant factors [such as cost]...that would lead the Agency to conclude that it is not...‘appropriate’ to regulate [EGUs] under section 112.”). In this rulemaking, EPA has abruptly changed course and “reject[ed]” its “2005 interpretation that authorizes the Agency to consider other factors (*e.g.*, cost)” in determining whether regulation is “appropriate.” 76 FR at 24989/3 (JA__).

EPA’s new interpretation unreasonably constrains the language of §112(n)(1)(A). “Appropriate” is not defined in the CAA. It is defined by Webster’s Dictionary to mean “especially suitable or compatible.” Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/appropriate> (last accessed Oct. 23, 2012). *See also* New Oxford American Dictionary (2d ed. 2005) (“Appropriate” means “suitable or proper in the circumstances.”); *Schindler Elevator Corp. v. United States ex rel.*

Kirk, 131 S.Ct. 1885, 1891 (2011) (relying on dictionary definition of term not defined in statute).

Based on the plain meaning of “appropriate,” it is “suitable” and “proper” to take into account costs to the nation’s electricity generators when deciding whether to regulate EGUs. The impact of those costs will ripple throughout the Nation’s economy, affecting consumers, small businesses, industry, and all levels of government. Excluding consideration of costs would be *improper* and *unsuitable*, given the fundamental role that electricity generation plays in all economic activity. *TVA v. EPA*, 278 F.3d 1184, 1208 (11th Cir. 2002).

EPA’s new interpretation also ignores critical differences between regulating EGUs under §112(n)(1)(A) and regulating other sources under §112(c). Regulation of major sources other than EGUs is mandatory pursuant to the two-step listing and then standard-setting process Congress established in §112(c) and (d). Under §112(c), only the quantity of emissions plays a role in determining whether a source category is listed.³⁷ In contrast, Congress required in §112(n)(1)(A) that EGUs be regulated only if EPA determines it is both “appropriate” and “necessary” after considering the results of the Utility Study. In short, the fact that §112(c) establishes an automatic listing requirement that does not allow for consideration of costs for sources other than EGUs, 77 FR at 9327/1

³⁷ See §112(a)(1) (defining “major source”).

(JA__), does not inform whether cost considerations must factor into EPA's "appropriate" finding under §112(n)(1)(A) for EGUs.

It is "the settled law of this circuit" that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). Here, there is no "clear congressional intent" that precludes EPA from taking costs into account in determining appropriateness. To the contrary, EPA is required to consider the extraordinary costs that would be imposed by the MATS rule given the plain meaning of "appropriate," Congress's use of that term in §112(n)(1)(A), and §112's structure.

EPA's interpretation of "appropriate" is also unlawful because it eliminates the discretion that Congress intended EPA to exercise after completing the Utility Study. EPA claims it "*must find* that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses *a hazard* to public health or the environment." 76 FR at 24988/1 (emphasis added) (JA__). But §112(n)(1)(A) provides that EPA—through the Utility Study—would first identify "a health hazard" from HAPs emitted from EGUs, and then determine whether regulation of that health hazard is "appropriate and necessary."

If Congress wanted to *require* EPA to regulate without any further consideration if the Study identified “a hazard,” it would have said so. Instead, Congress gave EPA discretion to decide whether to regulate if the Utility Study identified hazards to public health. And the discretion Congress wanted EPA to exercise includes an evaluation of the costs and benefits of addressing whatever hazards are identified in the Utility Study.³⁸ EPA unlawfully eliminated the exercise of that discretion by incorrectly interpreting “appropriate” to preclude consideration of costs.

When the costs and potential benefits of the MATS rule *are* considered, it is unmistakable that regulation of EGUs is not appropriate. According to EPA, the annual cost to comply with the rule is \$9.6 billion. 77 FR at 9306, Table 2 (JA___). The adverse impact of EPA’s rule on the reliability of the electrical grid because of early plant retirements will impose additional costs.³⁹ By contrast, the rule’s

³⁸ For example, §112(n)(1)(A) directs EPA to “develop and describe...alternative control strategies” for those “emissions which may warrant regulation under this section.” §112(n)(1)(A). An evaluation of “alternative” controls includes an assessment of both the amount of HAPs controlled by different control techniques *and their costs*.

³⁹ Texas has its own power grid. Texas electricity producers rely heavily on the state’s own natural resources, including coal. EPA’s promulgated emission limits will effectively end the construction of new coal-fired facilities (and may cause the closure of existing facilities). Texas cannot offset these losses by using power from other sources because it is not sufficiently connected to any other power grid. EPA failed to adequately consider and account for reliability issues unique to Texas. Texas Commission on Environmental Quality, Comments on

benefits of reducing HAPs are *de minimis*: only \$4 to \$6 million in 2016 based on EPA's analysis of health effects due to recreational freshwater fish consumption. *Id.* Put another way, it would cost at least \$1,500 for \$1 of benefit in HAP emission reductions.

Although EPA estimated the rule's "Total Monetized Benefits" to be \$37 to \$90 billion, nearly all (\$36 to \$89 billion) are attributed to a non-HAP substance regulated under other CAA provisions—"PM_{2.5}-related Co-benefits."⁴⁰ EPA insists, however, it did not base the "appropriate and necessary finding on hazards to public health attributable to PM emissions." *Id.* at 9320/1 (JA__). Consequently, the only health benefit from HAP reductions attributable to the rule are the \$4 to \$6 million in benefits associated with eating fish.

Perhaps EPA could demonstrate it is appropriate to spend \$9.6 *billion* every year to achieve an annual health benefit of \$4 to \$6 *million* from reducing HAP emissions, or that spending a significant part of that \$9.6 billion annually is justified to reduce acid gas emissions that pose no health or quantifiable environmental impact.⁴¹ EPA, however, never performed any such analysis and did not base its "appropriate" finding on those grounds, given its incorrect

Proposed Rule at 1-2, 26-28 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-18034 (JA__-__, __-__).

⁴⁰ Additional "co-benefits" are "Climate-related Co-Benefits" of \$36 million in 2016. *Id.*

⁴¹ As noted above, EPA cites a single study for its acid gas finding that does not even examine the EGU acid gas emissions EPA has determined to regulate.

interpretation that §112(n)(1)(A) precludes such considerations. EPA's failure to take costs into account, as Congress intended, requires vacatur of the MATS rule.

5. EPA Violated §112(n)(1)(A) by Making Environmental Effects the Trigger for an “Appropriate and Necessary” Finding.

CAA §112(n)(1)(A) calls for a study that focuses exclusively on identifying EGU HAP emissions that pose “hazards to public health” and directs EPA to regulate those emissions only if “appropriate and necessary...considering the results of the study.” In 2005, EPA read §112(n)(1)(A) in accordance with its plain text, as excluding emissions that only had environmental effects from the emissions that the Utility Study could target for “appropriate and necessary” evaluation. 70 FR at 15998/1-2 (JA__).⁴² EPA explained that:

[W]e believe that environmental factors unrelated to public health, although they can be considered in the appropriate inquiry, may not independently or, in conjunction with one another, justify regulation of Utility Units under section 112 when EPA has concluded that hazards to public health are not reasonably anticipated to result from utility HAP emissions.

Id. at 16002/3 (JA__).

⁴² As EPA itself recounted in its petition for certiorari in *New Jersey*, consideration of environmental impacts is “inconsistent with the text of Section 7412(n)(1)(A), under which ‘the condition precedent for regulation...is public health hazards, not environmental effects.’” EPA Pet. for Cert. at 7, *EPA v. New Jersey*, No. 08-512 (U.S. Oct. 17, 2008) (ellipsis in original, citation omitted) (JA__).

In 2012, EPA abandoned the CAA's plain meaning and its 2005 interpretation, saying that §112(n)(1)(A) "require[s] the Agency to find regulation of EGUs...appropriate if we determine that HAP emissions from EGUs pose a hazard to public health *or the environment* at the time the finding is made." *See* 76 FR at 24988/1 (emphasis added) (JA__); 77 FR at 9325/1 (JA__)). EPA argues that if Congress meant to "prohibit EPA from considering adverse environmental effects" as a primary criterion for selecting emissions that would be evaluated in an "appropriate" finding under §112(n)(1)(A), it was incumbent on Congress to have "stated so expressly." 76 FR at 24988/2 (JA__) (referenced at 77 FR at 9325/1 (JA__)).

Congress, however, knew how to direct EPA to consider environmental impacts in making regulatory choices and did not do so in §112(n)(1)(A). Numerous *other* provisions of §112, including elsewhere in §112(n), expressly require consideration of both health and environmental effects.⁴³ Thus, the fact that "environmental effects" are not mentioned in §112(n)(1)(A) does not give EPA license to consider such effects as a key factor that triggers an "appropriate and necessary" evaluation under §112(n)(1)(A). Instead, omission of "environmental effects" from §112(n)(1)(A) is a clear signal that those effects are *not* what brings an EGU HAP into this program.

⁴³ *See* §112(n)(5) & (6); §112(b)(2); §112(e)(2)(A).

The Supreme Court has recognized that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally...in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983). Similarly, in *Ethyl Corporation v. EPA*, 51 F.3d 1053, 1058 (D.C. Cir. 1995), this Court rejected EPA’s assertion that it could make public health impacts the focus of its regulatory determination even though the statute lacked any mention of such impacts: “Section 211(f)(4) instructs the Administrator to consider a new fuel additive’s effects only on emission standards. The language of the provision...is specific and definite; it does not permit the Administrator to consider other factors ‘in the public interest.’” *Id.* at 1058. The legislative history confirms that under §112(n)(1)(A), EPA “may regulate [EGUs] *only if* the studies described in section 112(n) clearly establish that emissions of any pollutant...from such units cause a significant risk...on the *public health*.”⁴⁴

Because EPA made environmental effects of HAPs a key factor, and in the case of acid gas HAPs the only factor, in its appropriate and necessary determination, the MATS rule is contrary to law and must be set aside.

⁴⁴ Oxley Statement at 1416 (emphases added) (JA___).

6. EPA Improperly Considered the Impacts of Non-EGU HAP Emissions as the Trigger for an “Appropriate and Necessary” Finding.

EPA acknowledges that the “appropriate and necessary” finding is based on the EGU emissions addressed in the “Utility Study,” and that the “scope of the Utility Study was limited to HAP emissions from EGUs.” 77 FR at 9322/2 (JA__); 76 FR at 24987/3 (JA__). Contrary to its 2005 interpretation, EPA now interprets §112(n)(1)(A) as authorizing regulation without a showing that EGU emissions “alone would cause the harm.”⁴⁵ EPA’s interpretation again conflicts with the language of §112(n)(1)(A), which makes EGU emissions that have been identified in the Utility Study the trigger for an “appropriate and necessary” determination.

Furthermore, under §112(n)(1)(A) only hazards “reasonably anticipated to occur as a result of” EGU HAPs emissions may be evaluated by EPA, not EGU emissions that may contribute to a hazard that “occur[s] as a result of” HAPs emitted by other sources. Here again, EPA has departed from numerous CAA provisions that distinguish between emissions that cause harm and emissions that

⁴⁵ 77 FR at 9325/3 (JA__). EPA’s consideration of emissions from other sources plays a key role in its “appropriate and necessary” finding for mercury and the acid gas HAPs. *See* EPA, Hg Risk Technical Support Document (“TSD”), §2.3 Table 2-5 (Dec. 2011), EPA-HQ-OAR-2009-0234-19913 (EPA’s mercury study based on methylmercury levels in fish where EGUs’ contribution to fish tissue levels was on average 3.4%) (JA__); 77 FR at 9362/1 (“Given the extent and importance of the sensitive ecosystems evaluated in the review of nitrogen and sulfur deposition any substance [acid gas HAP] that contributes to further acidification must be considered to be affecting the public welfare.”) (JA__).

contribute to harm. *Compare* §111(b)(1)(A) (addressing emissions that “cause[], or contribute[] significantly to, air pollution”) *with* §112(n)(1)(A) (addressing hazards that “occur as a result” of EGU HAPs).

The legislative history confirms that EPA’s authority is limited initially to consideration of hazards associated with HAP emissions *from EGUs*. As the sponsor of §112(n) explained, EPA “may regulate fossil fuel fired electric utility steam generating units” only if emissions of any pollutant “*from such units*” cause a significant risk of serious adverse effects to the public health.⁴⁶ Thus, the regulation of EGUs is authorized only if EPA were to determine that HAP emissions *from EGUs* (not EGU HAP emissions plus HAP emissions from other sources) cause a significant risk of serious adverse effects to the public health. Because EPA’s “appropriate and necessary” finding is based on public health hazards associated with non-EGU emissions, this rule must be set aside.

C. EPA’s “Appropriate and Necessary” Determinations Are Unlawful.

In addition to defending its 2000 “appropriate and necessary” finding on its own terms, EPA advances new technical information in support of this finding. But neither the 2000 information nor the new information provide a rational basis for that finding.

⁴⁶ Oxley Statement at 1416 (emphasis added) (JA__).

1. Mercury

EPA's 2000 finding addressed nationwide exposures to mercury from all sources and concluded that "mercury is both a public health concern and a concern in the environment."⁴⁷ EPA then made the qualitative observation that "there is a plausible link between methylmercury concentrations in fish and mercury emissions from coal-fired [EGUs]."⁴⁸ EPA could not, however, quantify "the degree to which that linkage occurs."⁴⁹ By failing to quantify the contribution of EGUs to methylmercury in fish, EPA had no factual basis for concluding that health hazards were "reasonably anticipated to occur as a result of [EGU] emissions." 70 FR at 16006/3 (JA__).

In 2005, EPA conducted extensive modeling to quantify the public health significance of EGU mercury emissions. The modeling showed that total EGU mercury emissions would be reduced from 48.57 tpy in 2001 to 34.42 tpy in 2020 due solely to the implementation of other CAA requirements, including CAIR.⁵⁰ The modeling also demonstrated that further reductions beyond this 34 tpy level would have little or no impact on methylmercury levels in fish⁵¹ and, hence, would not significantly reduce human exposure to methylmercury. As a result, EPA

⁴⁷ 65 FR at 79830/1 (JA__).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 70 FR at 16018, Table VI-2 (JA__).

⁵¹ *Id.* at 16020, Table VI-6 (JA__).

concluded that “the [national] level of Hg emissions [34.42 tpy] projected to remain ‘after imposition of’ section 110(a)(2)(D) does not cause hazards to public health,”⁵² and that regulation of EGU mercury emissions under §112 was not “appropriate.”⁵³

The 2012 MATS rulemaking did not abandon EPA’s 2005 mercury modeling. In fact, the mercury emissions data from the 2010 ICR show that EPA’s 2005 modeling had *significantly overstated* the amount of mercury EGUs emit without any §112 regulation. Based on more recent data, EPA estimated that EGU’s 2010 mercury emissions were 29 tpy compared to the 34.42 tpy it projected in 2005 as presenting no hazard to public health. EPA’s failure to address the 2005 study and explain why that study no longer supports the conclusion that EPA reached in 2005, *see, e.g. Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42, renders EPA’s 2012 determinations arbitrary and capricious.

Without addressing its 2005 analysis, EPA conducted an entirely new analysis to assess mercury risk in the context of IQ benefits. The Science Advisory Board (“SAB”) panel convened by EPA to review that analysis reported that SAB reviewers “could not evaluate the [new] risk assessment based ...[on] information

⁵² *Id.* at 16004/2 (JA___).

⁵³ *Id.*

provided in the [TSD]. Important elements of the methods and findings are missing or poorly explained.”⁵⁴

The Mercury TSD employs a series of assumptions that vastly overstate mercury exposure.⁵⁵ Even with these overestimates, EPA could only calculate an aggregate public health benefit from the MATS rule of a total of 510 IQ points to the most sensitive individuals (prenatally-exposed children).⁵⁶ This hypothetical increment of two one-thousandths of an IQ point for each individual in that population, RIA at 4-56 (JA__), is too small to have any scientifically discernible meaning or public health impact. These results confirm EPA’s 2005 rulemaking conclusion that mercury emissions do not present a public health hazard, and require that the MATS rule be set aside.

2. Other HAP Metals

EPA used its prior dispersion modeling and select emissions data from the 2010 ICR to identify 16 facilities that it believed were likely to present high off-site risks of cancer from emissions of non-mercury HAP metals. EPA, Non-Hg

⁵⁴ SAB letter to EPA Adm’r Jackson at 1 (Sept. 29, 2011), EPA-SAB-11-017 (JA__). The SAB final report was submitted almost two months *after* the public comment period closed. EPA refused to grant the SAB panel’s request that it be provided an opportunity to review the final TSD.

⁵⁵ UARG Comments at 6, 58-72 (JA__, __-__); EPRI MATS Rule Comments at 3-1, 3-10 to -11, App. G at G1-12 (JA__, __-__, __-__). The Hg exposure levels EPA calculated in the Mercury TSD are more than *2 times higher* than those in the Utility Study, despite Hg emissions having decreased almost 45%; Southern Comments, Attachments B & C (JA__, __).

⁵⁶ See RIA at 4-56 (JA__).

Case Study Memo at 1-2 (Mar. 16, 2011), EPA-HQ-OAR-2009-0234-2939 (JA__).

EPA's goal was to find a single EGU presenting risks greater than one-in-one million for the most exposed individuals, which EPA then used to support an "appropriate and necessary" finding.⁵⁷ EPA's abbreviated modeling effort was infected with errors.

Contrary to over a decade of EGU emissions data and modeling, hexavalent chromium emissions drove the risk estimate for the five coal-fired units with risks that slightly exceeded the one-in-one million level. *See* UARG Comments at 75-76 (JA__-__). A simple review of the sampling results for these facilities showed that the removal efficiencies for chromium and nickel for these units were far different than for other trace metals. These results suggested sample contamination. EPA, MATS ICR Data, Coal HAP Metals spreadsheet at "Coal Metals Data" tab (Dec. 16, 2011) (JA__).

Despite comments raising the sample contamination issue, EPA refused to change the chromium emission inputs. 77 FR at 9357/1 (JA__).⁵⁸ Had EPA used

⁵⁷ Under EPA's theory, because a single, isolated plant posing off-site risks greater than one-in-one million would violate the §112(c)(9) delisting criteria, it would also require an "appropriate and necessary" finding under EPA's new interpretation of §112(n)(1)(A). *See* 76 FR at 24999/2 ("[W]e conclude today that it is appropriate to regulate non-Hg HAP because emissions of these HAP from some EGUs pose a cancer risk greater than one in one million to the most exposed individual.").

⁵⁸ Subsequent resampling at each of those facilities shows that the high chromium levels that EPA calculated resulted from sample contamination caused

correct chromium emissions information, no selected EGU would have presented a risk greater than one-in-one million from non-mercury metal HAPs. As a result, even applying §112(c)(9) as the listing criterion, EPA's "appropriate and necessary" finding for other HAP metals lacks factual support.

3. Acid Gas HAPs

EPA's conclusion that it is appropriate and necessary to regulate acid gas HAPs is not premised on public health risk. 76 FR at 25016/3 ("[O]ur case studies did not identify significant chronic non-cancer risks from acid gas emissions.") (JA__). Indeed, EPA's modeling has consistently shown that exposures from EGU acid gas HAP emissions are an order of magnitude or more below EPA's health thresholds defining a safe level of exposure.⁵⁹ It is not "appropriate and necessary" to regulate EGU emissions under §112 that pose no health hazard.

In support of its §112(n)(1)(A) finding for acid gases, therefore, EPA cites environmental effects—unquantified acidification effects⁶⁰—and co-benefits from

by stainless steel fittings used in the sampling trains. UARG, Petition for Reconsideration of MATS Rule at 6-7 (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20179 (JA__ - __). When stainless steel fittings were removed, chromium emissions for those units were one to two orders of magnitude below the levels EPA used in its risk modeling.

⁵⁹ See UARG Comments at 116 (JA__); Utility Study at 6-1 (JA__); EPA, Supplement to Non-Hg Case Study at 12 & 13, Table 9 (Nov. 2011), EPA-HQ-OAR-2009-0234-19912 (JA__ - __).

⁶⁰ See 77 FR at 9362/1 (JA__).

reducing the criteria pollutant PM_{2.5}.⁶¹ Even if §112(n)(1)(A) authorized EPA to regulate EGUs under §112 based solely on environmental impacts, EPA has no rational basis for making an “appropriate and necessary” determination for acid gases. EPA’s “evidence” on the environmental impacts of EGU acid gas HAP emissions consists of EPA’s general claim that “[i]n areas where the deposition of acids derived from emissions of sulfur and NO_x are causing aquatic and/or terrestrial acidification, with accompanying ecological impacts, the deposition of hydrochloric acid *could exacerbate* these impacts.” 76 FR at 25050/3 (emphasis added) (JA__). EPA then references one study on HCl deposition in the United Kingdom, which EPA cites for the proposition that: (a) HCl is highly mobile in the environment, (b) HCl can transport longer distances than previously thought, and (c) HCl *can be* a larger driver of acidification than previously thought. 77 FR at 9362 (JA__). EPA does not even attempt to quantify the impact, if any, of EGU emissions of HCl in the United States and, as a result, cannot point to even a single instance in which EGU HCl emissions have affected acid deposition anywhere or otherwise created an environmental impact. This paucity of analysis is especially striking given that a significant portion of the \$9.6 billion in annual costs that EPA

⁶¹ See 77 FR at 9306, Table 2 (vast majority of benefits attributable to PM_{2.5} reductions), 9446/2 (“substantial health benefits...from reductions in PM_{2.5}”) (JA__, __).

would impose on EGUs stems from EPA's decision to regulate acid gas HAPs.

See supra note 33.

Because EPA's appropriate and necessary finding for acid gases lacks record support, even under EPA's unlawful environmental effects standard, the rule must be vacated.

II. ASSUMING ARGUENDO THAT THE REQUIREMENTS OF §112(d) GOVERN THE VALIDITY OF EPA'S EGU MACT STANDARDS, THOSE STANDARDS ARE UNLAWFUL UNDER §§112(c) AND (d).

As discussed in the foregoing section, the Court should vacate the MACT standards because EPA unlawfully construed and implemented §112(n)(1)(A). If the Court nonetheless finds that EPA's §112(n) interpretations were permissible and its §112(n) findings had record support, the standards should nonetheless be set aside for the reasons discussed below.

A. EPA's EGU MACT Standards Failed To Distinguish Between Major Sources and Area Sources.

CAA §112(d) calls for standards for two statutorily distinct and defined types of sources: "major sources" and "area sources" (i.e., sources that do not emit HAPs above the major source thresholds). Where §112(d) applies, EPA is required to establish MACT standards for all "major sources" in a listed category and (EPA believes) these standards must cover all HAPs emitted by those major sources.

To list and regulate “area sources,” “the Administrator [must] find[] [that a category or subcategory of area sources] presents a threat of adverse effects... warranting regulation....” §112(c)(3). Without an “area source” listing based on that finding, EPA has no authority to establish any standards under §112(d) for “area sources.”⁶² With such a finding and listing, EPA must determine which HAPs emitted by “area sources” to regulate and under what regulatory standard (i.e., generally available control technology” (“GACT”) or MACT).⁶³

In promulgating the EGU MATS standards, EPA ignored each of these “area source” statutory prerequisites to regulation. EPA failed to identify a category or subcategory of EGU “area sources.”⁶⁴ EPA made no finding that EGU “area source” HAP emissions create hazards “warranting regulation.” (EPA’s §112(n)(1)(A) findings were based on an evaluation of HAP emissions from *all* EGUs, instead of emissions from only those EGUs that are “area sources.”) EPA refused to explain adequately why it rejected adoption of GACT rather than MACT in establishing standards for EGU “area sources.” Finally, EPA concluded that *National Lime* required regulation of all HAPs emitted by EGUs, including all

⁶² When EPA listed coal- and oil-fired EGUs under §112(c) in 2002, it only listed major sources. It did not include a separate listing of EGU area sources. *See* 67 FR at 6521 (JA__).

⁶³ *See* Newmont Nevada Energy Investment, LLC, Comments on Proposed MATS Rule at 2-8 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17871 (JA__-__).

⁶⁴ EPRI estimated that approximately 12% of all coal-fired facilities are area sources. EPRI MATS Rule Comments at 2-31 to 2-33 (JA__-__).

HAPs emitted by EGU “area sources.” *National Lime*, however, only addressed an “all HAPs” standard-setting obligation with respect to “major sources.” *See e.g.*, 76 FR 15554, 15567/1-3 (Mar. 21, 2011) (JA__).

While each of these departures from the statute would require vacatur of the EGU MACT standards as applied to EGU “area sources,” the consequences of EPA’s failure to comply with Congress’ “area source” directives does not end with EGU “area sources.” EPA must establish MACT standards for “major sources” based on the performance, and characteristics, of a population of sources that consists *exclusively* of “major sources.” §112(d)(1). Here, EPA established MACT based on a population of EGUs that included *both* “major sources” and “area sources.” As a result, the MACT standards, as applied to major sources, are not based on the performance data required by statute and, therefore, must be vacated.

Finally, EPA’s assertion that, by specifically defining EGUs in §112(a)(8), Congress intended that EGU MACT standards be established without regard to the distinction between “major” and “area” sources is, at best, an *ipse dixit* without any foundation in logic. *See* 77 FR at 9403/2 (JA__). The definition of EGU gives meaning to language found only in §112(n)(1)(A); there is no reference to EGUs in §112(c) and (d), except to exclude EGUs from coverage of §112(c)(6). As a result, there is no textual support for concluding that the requirements for listing “area

sources” under §112(c)(3) or for MACT standard-setting under §112(d) are different for EGUs (unless, as discussed in above, §112(n)(1)(A) provides the *only* basis for EGU regulation). As this Court noted, “where Congress wished to exempt EGUs from specific requirements of section 112, it said so explicitly.” *New Jersey*, 517 F.3d at 582.

B. The Mercury Standard for Existing Sources Is Arbitrary and Capricious.

CAA §112(d)(3)(A) requires EPA to set MACT limits for existing sources at least as stringent as the “average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information).” This minimum level of stringency is commonly called the “MACT floor.”

In 2009, EPA concluded that it needed additional EGU HAP emissions data to establish MACT floors. In designing an ICR, EPA had two options in choosing units to conduct stack sampling: (1) it could choose units on a purely random basis, or (2) it could select the presumed 12% of best performing units based on plant configurations and installed pollution control equipment that would result in the lowest emissions of a given HAP. The choice of the first option would require that MACT floors be calculated using a MACT pool comprised of the best performing 12% of units for which EPA had data. The choice of the second option would require MACT floors to be calculated using a larger MACT pool of the best

performing 12% of units in the entire category because the ICR sampling was designed to select the best 12% of the units in the entire industry.

EPA chose the second option when it designed its EGU MACT ICR. As EPA explained to the Office of Management and Budget (“OMB”), EPA chose the 170-175 “best performing” units (out of 1091 units) for each HAP:

For the Hg and other non-mercury metallic HAP group, EPA believes that units with the newest PM controls installed represent those units meeting the lowest PM emission limits, and, thus, are believed to be among *the top performers with respect to Hg* and other non-mercury metallic HAP emissions. Therefore, EPA has selected 175 units with the newest PM controls installed; of these 175, the newest 170 operating units will be required to conduct Hg and other non-mercury metallic HAP testing.

ICR RTC at 27 (emphasis added) (JA__).⁶⁵

Because the ICR was designed to test only the best performing units in the source category, EPA calculated the MACT floors for non-mercury metal and acid gas HAPs using a MACT pool of 131 units.⁶⁶ By contrast, for existing coal-fired EGUs burning high-BTU coals, EPA calculated the MACT floor for mercury emissions using only data from the top 12% of the units for which it had data—40 units, or less than 4% of the industry—even though the ICR required testing by the

⁶⁵ There are 1091 coal-fired EGUs, and the top 175 units comprise about 16% of the industry. EPA selected slightly more than the 12% criterion due to uncertainties in precisely identifying the top 12% and concern that not all of the selected units would be available for testing.

⁶⁶ Twelve percent of 1091 coal-fired EGUs is 131. 76 FR at 25023/1 (JA__); 77 FR at 9386/3 (JA__).

top mercury performers. EPA explained its decision to use a smaller pool of data as follows:

For Hg from coal-fired units, we used the top 12 percent of the data obtained because, even though we required Hg testing for the units testing for the non-Hg metallic HAP, *we did not believe those units represented the top performing 12 percent of sources for Hg in the category at the time we issued the ICR and we made no assertions to that effect.*

76 FR at 25023/1 (emphasis added) (JA__).

This claim is flatly contradicted by EPA's own assertions to OMB when it sought approval of its ICR. It also is plainly contradicted by the facts. For example, the 170 units tested included 73% of all EGUs equipped with activated carbon injection ("ACI")—the most advanced mercury removal technology. Yet, a random selection of EGUs would have required testing by only about 15% of the EGUs equipped with ACI. UARG Comments at 91 (JA__). In addition, an inordinately high percentage of the EGUs chosen for mercury testing were equipped with fabric filters—a technology known to produce lower mercury emissions. EPA selected the best performing units for mercury testing just as it told OMB. *Id.*

The likely reason for EPA's confusion regarding the MACT floor for mercury is the significant, widespread conversion error EPA made in analyzing the ICR mercury emissions data. *See supra* p.20. Based on a 1,000-fold calculational error, EPA erroneously believed that units that were not selected in the ICR testing

phase controlled mercury better than those that were selected. Correcting EPA's conversion error confirms that EPA actually selected the best performing mercury units for ICR sampling. *See* UARG Comments at 90 (JA__).

Nevertheless, in the final rule, EPA stuck to its claim that the ICR testing was not designed to require testing by the top performing units for mercury.⁶⁷ As a result, the existing source mercury standard for EGUs burning high-BTU coals is patently unlawful and must be set aside. *See Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (“[This cursory] exercise highlights the need for additional explanation,” for “[w]ith these numbers, EPA’s method looks hopelessly irrational.”).

C. EPA Arbitrarily and Capriciously Refused To Set Alternative Health-Based Limits Under §112(d)(4) for Acid Gas HAPs.

Congress wrote §112(d)(4) to avoid situations where the mechanical setting of §112(d) MACT limits would result in emission standards more stringent than necessary to protect public health. CAA §112(d)(4) provides:

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.

⁶⁷ EPA, RTC on Proposed Rule, Vol. 1 at 575 (Dec. 2011), EPA-HQ-OAR-2009-0234-20126 (JA__).

The acid gas HAPs emitted by EGUs are non-carcinogens that have EPA- or state-defined health thresholds known as RfCs.⁶⁸ EPA defines an RfC as “an estimate...of a continuous [inhalation] exposure to the human population (including sensitive subgroups) that is likely to be without appreciable risk of deleterious effects during a lifetime.”⁶⁹ Thus, public health is protected with an ample margin of safety when long-term exposures are below the RfC.

EPA and industry modeling has consistently shown that worst case exposures to EGU acid gas HAPs are an order of magnitude or more *below* the RfCs. *See supra* note 59. Yet, EPA refused to set an alternative §112(d)(4) standard, asserting that §112(d)(4) provided EPA unfettered authority to consider other “factors not specifically enumerated” in that subsection when deciding whether to set a §112(d)(4) standard.” RTC on Proposed Rule, Vol. 1 at 11 (JA__). EPA then recited general, unquantified concerns about “potential cumulative public health and environmental effects” and PM_{2.5} co-benefits as grounds for refusing to promulgate §112(d)(4) limits. 77 FR at 9405/3 (JA__); *see supra* pp.53-54.

A rule must be set aside where the agency has “relied on factors which Congress has not intended it to consider,” or has “offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs.*

⁶⁸ *See* UARG Comments at 114 (JA__).

⁶⁹ 55 FR 39321, 39321/3 (Sept. 26, 1990) (JA__).

Ass’n, 463 U.S. at 43. Here, there is undisputed evidence that public exposure to acid gas HAP emissions from EGUs were 10% or less of the RfC. If, as EPA argues, EGUs must be regulated like any other source category, then EPA had ample justification for establishing alternative health-based limits under §112(d)(4). EPA abused its discretion by refusing to consider such limits based on unquantified concerns about environmental effects and effects of PM_{2.5}.

D. The Startup and Shutdown Work Practice Standards Were Promulgated with Inadequate Notice and Are Arbitrary and Capricious.

EPA proposed numerical emission limitations under §112(d) that would have applied “at all times.” 76 FR at 25028/1 (JA__). In the final rule, EPA agreed with commenters that it lacked data sufficient to set emissions standards that apply during periods of unit startup and shutdown. 77 FR at 9381/1-2 (JA__). Instead, EPA promulgated work practice standards for those periods under CAA §112(h), as commenters urged. 40 C.F.R. §63.10042 and Part 63, Subpart UUUUU, Table 3, 77 FR at 9486/3, 9493-94 (JA__, __-__); RTC on Proposed Rule, Vol. 2 at 418-419 (JA__-__). However, rather than use the definitions of “startup” and “shutdown” EPA proposed to apply to the rule (i.e., those in the general provisions at 40 C.F.R. §63.2), or to specify standards consistent with comments it received, EPA promulgated new definitions of “startup” and “shutdown” and more detailed requirements. *See* Joint Brief of Petitioners, *UARG*

v. *EPA*, No. 12-1166 (D.C. Cir. filed Oct. 23, 2012) at Statement of the Case V.C (describing the final Subpart UUUUU work practice standards and problems with them).

The definitions and standards EPA promulgated do not adequately reflect how EGUs actually start up and shut down their emissions control equipment, or take into account all types of units to which they would apply and the fuels those units can (or have available to) combust.⁷⁰ *Id.* Once source-specific characteristics are considered, EPA's startup and shutdown provisions are plainly arbitrary and lack any record support.

Moreover, commenters could not have anticipated the specific details in EPA's final rule, as they were not proposed. EPA's attempts to tie the details of its new definitions and associated requirements to its original notice, and the comments received on it, fail. *Id.* Because the notice EPA provided was not sufficient to support the details of the final work practice standards, they must be vacated and remanded for further notice and comment. *Fertilizer Inst. v. EPA*, 935

⁷⁰ For example, the final work practice standards require use of either natural gas or distillate oil for ignition and require engagement of emissions controls when any other fuel is combusted. 40 C.F.R. Part 63, Subpart UUUUU, Table 3, 77 FR at 9493-94 (JA__-__). Petitioners Edgecombe and Spruance operate coal-fired stoker boilers that were not designed with auxiliary burners and, thus, have no startup fuel. Rather, diesel-soaked coal and wood are used to ignite the coal during startup. Neither facility is equipped to burn natural gas or distillate oil, and neither has the internal or external infrastructure to do so. Edgecombe & Spruance Petition for Reconsideration at 4 (Apr. 27, 2012), EPA-HQ-OAR-2009-0234-20194 (JA__).

F.2d 1303, 1311 (D.C. Cir. 1991) (requiring a new round of notice-and-comment rulemaking if it would provide commenters with “their first occasion to offer new and different criticisms which the agency might find convincing”)(internal quotation marks omitted); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (describing the more exacting notice requirements of §307(d)).

E. EPA’s Denial of UARG’s Delisting Petition Was Unlawful.

EPA relies on the same flawed factual bases to deny UARG’s §112(c)(9) petition to delist coal-fired EGUs from the §112(c) list of major source categories as EPA does in making its “appropriate and necessary” determination. *See* 77 FR at 9364-66 (JA__-__); *supra* Argument I.C. EPA’s summary denial does not follow its own memorandum discussing the delisting process,⁷¹ and was issued without any prior notice or opportunity for public comment.

EPA also appears to deny UARG’s delisting petition on the grounds that the petition was deficient because UARG only sought to delist coal-fired EGUs and not oil-fired units. *Id.* at 9364/2 (JA__). This reason for denial must fail. CAA §112(n)(1)(A) requires EPA to evaluate all “fossil-fuel-fired” EGUs to determine if further regulation is appropriate and necessary. EPA’s Utility Study and

⁷¹ Memorandum from Sally Shaver, EPA, to Potential Petitioners Seeking Delisting of HAPs or Source Categories, Information on EPA’s Delisting Process (undated) (JA__).

subsequent December 2000 regulatory determination divided the universe of “fossil-fuel fired” EGUs into three categories: coal-fired, oil-fired, and gas-fired. In 2000, EPA decided not to regulate gas-fired EGUs but to regulate coal- and oil-fired EGUs under §112(d) for different factual reasons. 65 FR at 79831/1 (JA___). Just as EPA can decide not to regulate gas-fired EGUs it can also legally decide not to regulate coal-fired EGUs. For these reasons, the Court should reject EPA’s factual and legal claims and return UARG’s delisting petition to EPA for further consideration.

CONCLUSION

For the foregoing reasons, the Court should vacate the MATS rule.

Dated: October 23, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Joint Brief of State, Industry, and Labor Petitioners contains 14,879 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: October 23, 2012

/s/ F. William Brownell

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of October 2012, a copy of the Joint Brief of State, Industry, and Labor Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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CODIFICATION

Act July 14, 1955, ch. 360, 69 Stat. 322, as amended, known as the Clean Air Act, which was formerly classified to chapter 15B (§1857 et seq.) of this title, was completely revised by Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 685, and was reclassified to this chapter.

SUBCHAPTER I—PROGRAMS AND ACTIVITIES

PART A—AIR QUALITY AND EMISSION LIMITATIONS

AMENDMENTS

1977—Pub. L. 95-95, title I, §117(a), Aug. 7, 1977, 91 Stat. 712, designated sections 7401 to 7428 of this title as part A.

§ 7401. Congressional findings and declaration of purpose CAA § 101

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which

generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(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.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

(July 14, 1955, ch. 360, title I, §101, formerly §1, as added Pub. L. 88-206, §1, Dec. 17, 1963, 77 Stat. 392; renumbered §101 and amended Pub. L. 89-272, title I, §101(2), (3), Oct. 20, 1965, 79 Stat. 992; Pub. L. 90-148, §2, Nov. 21, 1967, 81 Stat. 485; Pub. L. 101-549, title I, §108(k), Nov. 15, 1990, 104 Stat. 2468.)

CODIFICATION

Section was formerly classified to section 1857 of this title.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in a prior section 1857 of this title, act of July 14, 1955, ch. 360, §1, 69 Stat. 322, prior to the general amendment of this chapter by Pub. L. 88-206.

AMENDMENTS

1990—Subsec. (a)(3). Pub. L. 101-549, §108(k)(1), amended par. (3) generally. Prior to amendment, par. (3) read as follows: “that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and”.

Subsec. (b)(4). Pub. L. 101-549, §108(k)(2), inserted “prevention and” after “pollution”.

Subsec. (c). Pub. L. 101-549, §108(k)(3), added subsec. (c).

1967—Subsec. (b)(1). Pub. L. 90-148 inserted “and enhance the quality of” after “to protect”.

1965—Subsec. (b). Pub. L. 89-272 substituted “this title” for “this Act”, which for purposes of codification has been changed to “this subchapter”.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 711(b) of Pub. L. 101-549 provided that:

“(1) Except as otherwise expressly provided, the amendments made by this Act [see Tables for classification] shall be effective on the date of enactment of this Act [Nov. 15, 1990].

“(2) The Administrator's authority to assess civil penalties under section 205(c) of the Clean Air Act [42 U.S.C. 7524(c)], as amended by this Act, shall apply to violations that occur or continue on or after the date of enactment of this Act. Civil penalties for violations that occur prior to such date and do not continue after such date shall be assessed in accordance with the provisions of the Clean Air Act [42 U.S.C. 7401 et seq.] in effect immediately prior to the date of enactment of this Act.

“(3) The civil penalties prescribed under sections 205(a) and 211(d)(1) of the Clean Air Act [42 U.S.C. 7524(a), 7545(d)(1)], as amended by this Act, shall apply to violations that occur on or after the date of enactment of this Act. Violations that occur prior to such date shall be subject to the civil penalty provisions prescribed in sections 205(a) and 211(d) of the Clean Air Act in effect immediately prior to the enactment of this Act. The injunctive authority prescribed under section 211(d)(2) of the Clean Air Act, as amended by this Act, shall apply to violations that occur or continue on or after the date of enactment of this Act.

“(4) For purposes of paragraphs (2) and (3), where the date of a violation cannot be determined it will be assumed to be the date on which the violation is discovered.”

EFFECTIVE DATE OF 1977 AMENDMENT; PENDING ACTIONS; CONTINUATION OF RULES, CONTRACTS, AUTHORIZATIONS, ETC.; IMPLEMENTATION PLANS

Section 406 of Pub. L. 95-95, as amended by Pub. L. 95-190, §14(b)(6), Nov. 16, 1977, 91 Stat. 1405, provided that:

“(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Clean Air Act [this chapter], as in effect immediately prior to the date of enactment of this Act [Aug. 7, 1977] shall abate by reason of the taking effect of the amendments made by this Act [see Short Title of 1977 Amendment note below]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

“(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Clean Air Act [this chapter], as in effect immediately prior to the date of enactment of this Act [Aug. 7, 1977], and pertaining to any functions, powers, requirements, and duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act, and not suspended by the Administrator or the courts, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act [see Short Title of 1977 Amendment note below].

“(c) Nothing in this Act [see Short Title of 1977 Amendment note below] nor any action taken pursuant to this Act shall in any way affect any requirement of an approved implementation plan in effect under section 110 of the Clean Air Act [section 7410 of this title]

(designated in subsection (a)) which consists of the PM_{2.5} monitors necessary to implement the national ambient air quality standards is established by December 31, 1999.

“(c)(1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] for each area following promulgation of the July 1997 PM_{2.5} national ambient air quality standard within 1 year after receipt of 3 years of air quality monitoring data performed in accordance with any applicable Federal reference methods for the relevant areas. Only data from the monitoring network designated in subsection (a) and other Federal reference method PM_{2.5} monitors shall be considered for such designations. Nothing in the previous sentence shall be construed as affecting the Governor’s authority to designate an area initially as nonattainment, and the Administrator’s authority to promulgate the designation of an area as nonattainment, under section 107(d)(1) of the Clean Air Act, based on its contribution to ambient air quality in a nearby nonattainment area.

“(2) For any area designated as nonattainment for the July 1997 PM_{2.5} national ambient air quality standard in accordance with the schedule set forth in this section, notwithstanding the time limit prescribed in paragraph (2) of section 169B(e) of the Clean Air Act [42 U.S.C. 7492(e)(2)], the Administrator shall require State implementation plan revisions referred to in such paragraph (2) to be submitted at the same time as State implementation plan revisions referred to in section 172 of the Clean Air Act [42 U.S.C. 7502] implementing the revised national ambient air quality standard for fine particulate matter are required to be submitted. For any area designated as attainment or unclassifiable for such standard, the Administrator shall require the State implementation plan revisions referred to in such paragraph (2) to be submitted 1 year after the area has been so designated. The preceding provisions of this paragraph shall not preclude the implementation of the agreements and recommendations set forth in the Grand Canyon Visibility Transport Commission Report dated June 1996.

“(d) The Administrator shall promulgate the designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] for each area following promulgation of the July 1997 PM_{2.5} national ambient air quality standard by the earlier of 1 year after the initial designations required under subsection (c)(1) are required to be submitted or December 31, 2005.

“(e) FIELD STUDY.—Not later than 2 years after the date of enactment of the SAFETEA-LU [Aug. 10, 2005], the Administrator shall—

“(1) conduct a field study of the ability of the PM_{2.5} Federal Reference Method to differentiate those particles that are larger than 2.5 micrometers in diameter;

“(2) develop a Federal reference method to measure directly particles that are larger than 2.5 micrometers in diameter without reliance on subtracting from coarse particle measurements those particles that are equal to or smaller than 2.5 micrometers in diameter;

“(3) develop a method of measuring the composition of coarse particles; and

“(4) submit a report on the study and responsibilities of the Administrator under paragraphs (1) through (3) to—

“(A) the Committee on Energy and Commerce of the House of Representatives; and

“(B) the Committee on Environment and Public Works of the Senate.

“SEC. 6103. OZONE DESIGNATION REQUIREMENTS.

“(a) The Governors shall be required to submit the designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] within 2 years following the promulgation of the July 1997 ozone national ambient air quality standards.

“(b) The Administrator shall promulgate final designations no later than 1 year after the designations re-

quired under subsection (a) are required to be submitted.

“SEC. 6104. ADDITIONAL PROVISIONS.

“Nothing in sections 6101 through 6103 shall be construed by the Administrator of Environmental Protection Agency or any court, State, or person to affect any pending litigation or to be a ratification of the ozone or PM_{2.5} standards.”

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7408. Air quality criteria and control techniques CAA § 108

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in

combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO₂ over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

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 November 15, 1990,¹ 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. Such guidelines shall include information on—

(1) methods to identify and evaluate alternative planning and control activities;

(2) methods of reviewing plans on a regular basis as conditions change or new information is presented;

(3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;

(4) methods to assure participation by the public in all phases of the planning process; and

(5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 1990, and from time to time thereafter—

(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;

(vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

(x) programs for secure bicycle storage facilities and other facilities, including bicy-

¹ See Codification note below.

amended Pub. L. 95–95, title I, §106, Aug. 7, 1977, 91 Stat. 691.)

CODIFICATION

Section was formerly classified to section 1857c–4 of this title.

PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91–604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95–95, §106(b), added subsec. (c).

Subsec. (d). Pub. L. 95–95, §106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101–549, title VIII, §817, Nov. 15, 1990, 104 Stat. 2697, provided that:

“(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

“(1) include information on the effects on welfare and the environment which are caused by ambient concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

“(2) estimate welfare and environmental costs incurred as a result of such effects;

“(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

“(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

“(5) estimate the costs and other impacts of meeting secondary standards; and

“(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et

seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

“(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

“(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

“(3) There are authorized to be appropriated such sums as are necessary to carry out this section.”

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as nec-

CAA § 110

essary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after pub-

Pub. L. 95-95, §107(b), added subsec. (g) relating to Governor's authority to issue temporary emergency suspensions.

Subsec. (h). Pub. L. 95-190, §14(a)(5), redesignated subsec. (g), added by Pub. L. 95-95, §108(g), as (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 95-190, §14(a)(5), redesignated subsec. (h), added by Pub. L. 95-95, §108(g), as (i). Former subsec. (i) redesignated (j) and amended.

Subsec. (j). Pub. L. 95-190 §14(a)(5), (6), redesignated subsec. (i), added by Pub. L. 95-95, §108(g), as (j) and in subsec. (j) as so redesignated, substituted "will enable such source" for "at such source will enable it".

1974—Subsec. (a)(3). Pub. L. 93-319, §4(a), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (c). Pub. L. 93-319, §4(b), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C), respectively, of such redesignated par. (1), and added par. (2).

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

MODIFICATION OR RESCISSION OF IMPLEMENTATION PLANS APPROVED AND IN EFFECT PRIOR TO AUG. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub. L. 95-95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SAVINGS PROVISION

Section 16 of Pub. L. 91-604 provided that:

"(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91-604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act

[this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

"(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

"(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter]."

FEDERAL ENERGY ADMINISTRATOR

"Federal Energy Administrator", for purposes of this chapter, to mean Administrator of Federal Energy Administration established by Pub. L. 93-275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until Federal Energy Administrator takes office and after Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

Federal Energy Administration terminated and functions vested by law in Administrator thereof transferred to Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

§ 7411. Standards of performance for new stationary sources CAA § 111

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of

operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term “existing source” means any stationary source other than a new source.

(7) The term “technological system of continuous emission reduction” means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supercedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)¹ of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(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 lim-

itations 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)¹ 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.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(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 sub-

¹ See References in Text note below.

mitted 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.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed

to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-

air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial

likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consider-

ation the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

(July 14, 1955, ch. 360, title I, §111, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1683; amended Pub. L. 92-157, title III, §302(f), Nov. 18, 1971, 85 Stat. 464; Pub. L. 95-95, title I, §109(a)-(d)(1), (e), (f), title IV, §401(b), Aug. 7, 1977, 91 Stat. 697-703, 791; Pub. L. 95-190, §14(a)(7)-(9), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 95-623, §13(a), Nov. 9, 1978, 92 Stat. 3457; Pub. L. 101-549, title I, §108(e)-(g), title III, §302(a), (b), title IV, §403(a), Nov. 15, 1990, 104 Stat. 2467, 2574, 2631.)

REFERENCES IN TEXT

Such Act, referred to in subsec. (a)(8), means Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsec. (a)(8), was amended generally by Pub. L. 101-549, title VII,

§701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

Subsection (a)(1) of this section, referred to in subsec. (b)(6), was amended generally by Pub. L. 101-549, title VII, §403(a), Nov. 15, 1990, 104 Stat. 2631, and, as so amended, no longer contains subpars.

CODIFICATION

Section was formerly classified to section 1857c-6 of this title.

PRIOR PROVISIONS

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91-604 and is classified to section 7418 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, §403(a), amended par. (1) generally, substituting provisions defining “standard of performance” with respect to any air pollutant for provisions defining such term with respect to subsec. (b) fossil fuel fired and other stationary sources and subsec. (d) particular sources.

Subsec. (a)(3). Pub. L. 101-549, §108(f), inserted at end “Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.”

Subsec. (b)(1)(B). Pub. L. 101-549, §108(e)(1), substituted “Within one year” for “Within 120 days”, “within one year” for “within 90 days”, and “every 8 years” for “every four years”, inserted before last sentence “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.”, and inserted at end “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.”

Subsec. (d)(1)(A)(i). Pub. L. 101-549, §302(a), which directed the substitution of “7412(b)” for “7412(b)(1)(A)”, could not be executed, because of the prior amendment by Pub. L. 101-549, §108(g), see below.

Pub. L. 101-549, §108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A)”.

Subsec. (f)(1). Pub. L. 101-549, §108(e)(2), amended par. (1) generally, substituting present provisions for provisions requiring the Administrator to promulgate regulations listing the categories of major stationary sources not on the required list by Aug. 7, 1977, and regulations establishing standards of performance for such categories.

Subsec. (g)(5) to (8). Pub. L. 101-549, §302(b), redesignated par. (7) as (5) and struck out “or section 7412 of this title” after “this section”, redesignated par. (8) as (6), and struck out former pars. (5) and (6) which read as follows:

“(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

“(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.”

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95-623, §13(a)(2), substituted “under this section” for “under subsection (b) of this section”.

Subsec. (h)(5). Pub. L. 95-623, §13(a)(1), added par. (5). Subsec. (j). Pub. L. 95-623, §13(a)(3), substituted in pars. (1)(A) and (2)(A) “standards under this section” and “under this section” for “standards under subsection (b) of this section” and “under subsection (b) of this section”, respectively.

1977—Subsec. (a)(1). Pub. L. 95-95, §109(c)(1)(A), added subpars. (A), (B), and (C), substituted “For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect” for “a standard for emissions of air pollutants which reflects”, “and the percentage reduction achievable” for “achievable”, and “technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)” for “system of emission reduction which (taking into account the cost of achieving such reduction)” in existing provisions, and inserted provision that, for the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

Subsec. (a)(7). Pub. L. 95-95, §109(c)(1)(B), added par. (7) defining “technological system of continuous emission reduction”.

Pub. L. 95-95, §109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95-190, §14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95-95, §401(b), substituted “such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger” for “such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of”.

Subsec. (b)(1)(B). Pub. L. 95-95, §109(c)(2), substituted “shall, at least every four years, review and, if appropriate,” for “may, from time to time,”.

Subsec. (b)(5), (6). Pub. L. 95-95, §109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-95, §109(d)(1), struck out “(except with respect to new sources owned or operated by the United States)” after “implement and enforce such standards”.

Subsec. (d)(1). Pub. L. 95-95, §109(b)(1), substituted “standards of performance” for “emission standards” and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95-95, §109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95-95, §109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95-190, §14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted “(B)” for “(8)” as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95-95, §109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95-95, §109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence “publish proposed” for “propose”.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d)

of Pub. L. 95-95, set out as a note under section 7401 of this title.

REGULATIONS

Section 403(b), (c) of Pub. L. 101-549 provided that:

“(b) REVISED REGULATIONS.—Not later than three years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], the Administrator shall promulgate revised regulations for standards of performance for new fossil fuel fired electric utility units commencing construction after the date on which such regulations are proposed that, at a minimum, require any source subject to such revised standards to emit sulfur dioxide at a rate not greater than would have resulted from compliance by such source with the applicable standards of performance under this section [amending sections 7411 and 7479 of this title] prior to such revision.

“(c) APPLICABILITY.—The provisions of subsections (a) [amending this section] and (b) apply only so long as the provisions of section 403(e) of the Clean Air Act [42 U.S.C. 7651b(e)] remain in effect.”

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7412. Hazardous air pollutants

(a) Definitions

For purposes of this section, except subsection (r) of this section—

CAA § 112

(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.¹ 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

¹ See References in Text note below.

CAS number	Chemical name	CAS number	Chemical name
108394	m-Cresol	92933	4-Nitrobiphenyl
106445	p-Cresol	100027	4-Nitrophenol
98828	Cumene	79469	2-Nitropropane
94757	2,4-D, salts and esters	684935	N-Nitroso-N-methylurea
3547044	DDE	62759	N-Nitrosodimethylamine
334883	Diazomethane	59892	N-Nitrosomorpholine
132649	Dibenzofurans	56382	Parathion
96128	1,2-Dibromo-3-chloropropane	82688	Pentachloronitrobenzene (Quintobenzene)
84742	Dibutylphthalate	87865	Pentachlorophenol
106467	1,4-Dichlorobenzene(p)	108952	Phenol
91941	3,3-Dichlorobenzidene	106503	p-Phenylenediamine
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)	75445	Phosgene
542756	1,3-Dichloropropene	7803512	Phosphine
62737	Dichlorvos	7723140	Phosphorus
111422	Diethanolamine	85449	Phthalic anhydride
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)	1336363	Polychlorinated biphenyls (Aroclors)
64675	Diethyl sulfate	1120714	1,3-Propane sultone
119904	3,3-Dimethoxybenzidine	57578	beta-Propiolactone
60117	Dimethyl aminoazobenzene	123386	Propionaldehyde
119937	3,3'-Dimethyl benzidine	114261	Propoxur (Baygon)
79447	Dimethyl carbamoyl chloride	78875	Propylene dichloride (1,2-Dichloropropane)
68122	Dimethyl formamide	75569	Propylene oxide
57147	1,1-Dimethyl hydrazine	75558	1,2-Propylenimine (2-Methyl aziridine)
131113	Dimethyl phthalate	91225	Quinoline
77781	Dimethyl sulfate	106514	Quinone
534521	4,6-Dinitro-o-cresol, and salts	100425	Styrene
51285	2,4-Dinitrophenol	96093	Styrene oxide
121142	2,4-Dinitrotoluene	1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
123911	1,4-Dioxane (1,4-Diethyleneoxide)	79345	1,1,2,2-Tetrachloroethane
122667	1,2-Diphenylhydrazine	127184	Tetrachloroethylene (Perchloroethylene)
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)	7550450	Titanium tetrachloride
106887	1,2-Epoxybutane	108883	Toluene
140885	Ethyl acrylate	95807	2,4-Toluene diamine
100414	Ethyl benzene	584849	2,4-Toluene diisocyanate
51796	Ethyl carbamate (Urethane)	95534	o-Toluidine
75003	Ethyl chloride (Chloroethane)	8001352	Toxaphene (chlorinated camphene)
106934	Ethylene dibromide (Dibromoethane)	120821	1,2,4-Trichlorobenzene
107062	Ethylene dichloride (1,2-Dichloroethane)	79005	1,1,2-Trichloroethane
107211	Ethylene glycol	79016	Trichloroethylene
151564	Ethylene imine (Aziridine)	95954	2,4,5-Trichlorophenol
75218	Ethylene oxide	88062	2,4,6-Trichlorophenol
96457	Ethylene thiourea	121448	Triethylamine
75343	Ethylidene dichloride (1,1-Dichloroethane)	1582098	Trifluralin
50000	Formaldehyde	540841	2,2,4-Trimethylpentane
76448	Heptachlor	108054	Vinyl acetate
118741	Hexachlorobenzene	593602	Vinyl bromide
87683	Hexachlorobutadiene	75014	Vinyl chloride
77474	Hexachlorocyclopentadiene	75354	Vinylidene chloride (1,1-Dichloroethylene)
67721	Hexachloroethane	1330207	Xylenes (isomers and mixture)
822060	Hexamethylene-1,6-diisocyanate	95476	o-Xylenes
680319	Hexamethylphosphoramide	108383	m-Xylenes
110543	Hexane	106423	p-Xylenes
302012	Hydrazine	0	Antimony Compounds
7647010	Hydrochloric acid	0	Arsenic Compounds (inorganic including arsine)
7664393	Hydrogen fluoride (Hydrofluoric acid)	0	Beryllium Compounds
123319	Hydroquinone	0	Cadmium Compounds
78591	Isophorone	0	Chromium Compounds
58899	Lindane (all isomers)	0	Cobalt Compounds
108316	Maleic anhydride	0	Coke Oven Emissions
67561	Methanol	0	Cyanide Compounds ¹
72435	Methoxychlor	0	Glycol ethers ²
74839	Methyl bromide (Bromomethane)	0	Lead Compounds
74873	Methyl chloride (Chloromethane)	0	Manganese Compounds
71556	Methyl chloroform (1,1,1-Trichloroethane)	0	Mercury Compounds
78933	Methyl ethyl ketone (2-Butanone)	0	Fine mineral fibers ³
60344	Methyl hydrazine	0	Nickel Compounds
74884	Methyl iodide (Iodomethane)	0	Polycyclic Organic Matter ⁴
108101	Methyl isobutyl ketone (Hexone)	0	Radionuclides (including radon) ⁵
624839	Methyl isocyanate	0	Selenium Compounds
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		

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.

¹X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or Ca(CN)₂.

²Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-(OCH₂CH₂)_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-(OCH₂CH₂)_n-OH. Polymers are excluded from the glycol category.

³Includes 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.

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

⁵A 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 defects² 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

²So in original. Probably should be "effects".

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. 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.

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that—

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) Priorities

In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider—

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on—

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in

any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that—

(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source establishes to the satisfaction of the Administrator that an alternative means of emission limita-

tion will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if—

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installa-

tion of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7414 of this title.

(D) For each source granted an alternative emission limitation under this paragraph

there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed—

- (A) best available control technology (as defined in section 7479(3) of this title), or
- (B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The Administrator may issue such rules and guidance as are necessary to implement this paragraph.

(7) Extension for new sources

A source for which construction or reconstruction is commenced after the date an emission standard applicable to such source is proposed pursuant to subsection (d) of this section but before the date an emission standard applicable to such source is proposed pursuant to subsection (f) of this section shall not be required to comply with the emission standard under subsection (f) of this section until the date 10 years after the date construction or reconstruction is commenced.

(8) Coke ovens

(A) Any coke oven battery that complies with the emission limitations established under subsection (d)(8)(C) of this section, subparagraph (B), and subparagraph (C), and complies with the provisions of subparagraph (E), shall not be required to achieve emission limitations promulgated under subsection (f) of this section until January 1, 2020.

(B)(i) Not later than December 31, 1992, the Administrator shall promulgate emission limitations for coke oven emissions from coke oven batteries. Notwithstanding paragraph (3) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 1998. Such emission limitations shall reflect the lowest achievable emission rate as defined in section 7501 of this title for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than—

- (I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);
- (II) 1 per centum leaking lids;
- (III) 4 per centum leaking offtakes; and
- (IV) 16 seconds visible emissions per charge,

with an exclusion for emissions during the period after the closing of self-sealing oven doors (or the total mass emissions equivalent). The rulemaking in which such emission limitations are promulgated shall also establish an appropriate measurement methodology for determining compliance with such emission limitations, and shall establish such emission limitations in terms of an equivalent level of mass emissions reduction from a coke oven battery, unless the Administrator finds that such a mass emissions standard would not be practicable or enforceable. Such measurement methodology, to the extent it measures leaking doors, shall take into consideration alternative test methods that reflect the best technology and practices actually applied in the affected industries, and shall assure that the final test methods are consistent with the performance of such best technology and practices.

(ii) If the Administrator fails to promulgate such emission limitations under this subparagraph prior to the effective date of such emission limitations, the emission limitations applicable to coke oven batteries under this subparagraph shall be—

- (I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);
- (II) 1 per centum leaking lids;
- (III) 4 per centum leaking offtakes; and
- (IV) 16 seconds visible emissions per charge,

or the total mass emissions equivalent (if the total mass emissions equivalent is determined to be practicable and enforceable), with no exclusion for emissions during the period after the closing of self-sealing oven doors.

(C) Not later than January 1, 2007, the Administrator shall review the emission limitations promulgated under subparagraph (B) and revise, as necessary, such emission limitations to reflect the lowest achievable emission rate as defined in section 7501 of this title at the time for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than the emission limitation promulgated under subparagraph (B). Notwithstanding paragraph (2) of this subsection, the compliance date for such emission

limitations for existing coke oven batteries shall be January 1, 2010.

(D) At any time prior to January 1, 1998, the owner or operator of any coke oven battery may elect to comply with emission limitations promulgated under subsection (f) of this section by the date such emission limitations would otherwise apply to such coke oven battery, in lieu of the emission limitations and the compliance dates provided under subparagraphs (B) and (C) of this paragraph. Any such owner or operator shall be legally bound to comply with such emission limitations promulgated under subsection (f) of this section with respect to such coke oven battery as of January 1, 2003. If no such emission limitations have been promulgated for such coke oven battery, the Administrator shall promulgate such emission limitations in accordance with subsection (f) of this section for such coke oven battery.

(E) Coke oven batteries qualifying for an extension under subparagraph (A) shall make available not later than January 1, 2000, to the surrounding communities the results of any risk assessment performed by the Administrator to determine the appropriate level of any emission standard established by the Administrator pursuant to subsection (f) of this section.

(F) Notwithstanding the provisions of this section, reconstruction of any source of coke oven emissions qualifying for an extension under this paragraph shall not subject such source to emission limitations under subsection (f) of this section more stringent than those established under subparagraphs (B) and (C) until January 1, 2020. For the purposes of this subparagraph, the term "reconstruction" includes the replacement of existing coke oven battery capacity with new coke oven batteries of comparable or lower capacity and lower potential emissions.

(j) Equivalent emission limitation by permit

(1) Effective date

The requirements of this subsection shall apply in each State beginning on the effective date of a permit program established pursuant to subchapter V of this chapter in such State, but not prior to the date 42 months after November 15, 1990.

(2) Failure to promulgate a standard

In the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning 18 months after such date (but not prior to the effective date of a permit program under subchapter V of this chapter), the owner or operator of any major source in such category or subcategory shall submit a permit application under paragraph (3) and such owner or operator shall also comply with paragraphs (5) and (6).

(3) Applications

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit. If the owner or operator of a source

has submitted a timely and complete application for a permit required by this subsection, any failure to have a permit shall not be a violation of paragraph (2), unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application. The Administrator shall not later than 18 months after November 15, 1990, and after notice and opportunity for comment, establish requirements for applications under this subsection including a standard application form and criteria for determining in a timely manner the completeness of applications.

(4) Review and approval

Permit applications submitted under this subsection shall be reviewed and approved or disapproved according to the provisions of section 7661d of this title. In the event that the Administrator (or the State) disapproves a permit application submitted under this subsection or determines that the application is incomplete, the applicant shall have up to 6 months to revise the application to meet the objections of the Administrator (or the State).

(5) Emission limitation

The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d) of this section. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of subsection (i)(5) of this section. For purposes of the preceding sentence, the reduction required by subsection (i)(5)(A) of this section shall be achieved by the date on which the relevant standard should have been promulgated under subsection (d) of this section. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i) of this section.

(6) Applicability of subsequent standards

If the Administrator promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to paragraph (5), provided that the source shall have the compliance period provided under subsection (i) of this section. If the Administrator promulgates a standard under subsection (d) of this section that would be applicable to the source in lieu of the emission limitation established by permit under this subsection after the date on which the permit has been issued, the Admin-

to pollutant loadings. For purposes of this subsection, "coastal waters" shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C. 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of—

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal waters cause or contribute to exceedances of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C. 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] or, with respect to the Great Lakes, exceedances of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements

promulgated pursuant to this paragraph with respect to coastal waters shall only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(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 signifi-

cant 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 sul-

fide 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. 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 sections³ 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. 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.

(o) National Academy of Sciences study

(1) Request of the Academy

Within 3 months of November 15, 1990, the Administrator shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of—

(A) risk assessment methodology used by the Environmental Protection Agency to determine the carcinogenic risk associated with exposure to hazardous air pollutants from source categories and subcategories subject to the requirements of this section; and

(B) improvements in such methodology.

(2) Elements to be studied

In conducting such review, the National Academy of Sciences should consider, but not be limited to, the following—

(A) the techniques used for estimating and describing the carcinogenic potency to humans of hazardous air pollutants; and

³ So in original. Probably should be "section".

action, indicating the purpose of such action. No State agency which receives notice under this paragraph of an action proposed to be taken may use the information contained in the notice to inform the person whose property is proposed to be affected of the proposed action. If the Administrator has reasonable basis for believing that a State agency is so using or will so use such information, notice to the agency under this paragraph is not required until such time as the Administrator determines the agency will no longer so use information contained in a notice under this paragraph. Nothing in this section shall be construed to require notification to any State agency of any action taken by the Administrator with respect to any standard, limitation, or other requirement which is not part of an applicable implementation plan or which was promulgated by the Administrator under section 7410(c) of this title.

(2) Nothing in paragraph (1) shall be construed to provide that any failure of the Administrator to comply with the requirements of such paragraph shall be a defense in any enforcement action brought by the Administrator or shall make inadmissible as evidence in any such action any information or material obtained notwithstanding such failure to comply with such requirements.

(July 14, 1955, ch. 360, title I, § 114, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1687; amended Pub. L. 93-319, § 6(a)(4), June 22, 1974, 88 Stat. 259; Pub. L. 95-95, title I, §§ 109(d)(3), 113, title III, § 305(d), Aug. 7, 1977, 91 Stat. 701, 709, 776; Pub. L. 95-190, § 14(a)(22), (23), Nov. 16, 1977, 91 Stat. 1400; Pub. L. 101-549, title III, § 302(c), title VII, § 702(a), (b), Nov. 15, 1990, 104 Stat. 2574, 2680, 2681.)

REFERENCES IN TEXT

Section 7413(d) of this title, referred to in subsec. (d)(1), was amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders.

CODIFICATION

Section was formerly classified to section 1857c-9 of this title.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, § 702(a)(1), which directed that “or” be struck out in first sentence immediately before “any emission standard under section 7412 of this title,” could not be executed because of the prior amendment by Pub. L. 101-549, § 302(c), see below.

Pub. L. 101-549, § 702(a)(2), inserted “or any regulation under section 7429 of this title (relating to solid waste combustion),” before “(ii) of determining”.

Pub. L. 101-549, § 302(c), struck out “or” after “performance under section 7411 of this title,” and inserted “, or any regulation of solid waste combustion under section 7429 of this title,” after “standard under section 7412 of this title”.

Subsec. (a)(1). Pub. L. 101-549, § 702(a)(3), amended par. (1) generally. Prior to amendment, par. (1) read as follows: “the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such

methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and”.

Subsec. (a)(3). Pub. L. 101-549, § 702(b), added par. (3). 1977—Subsec. (a). Pub. L. 95-190, § 14(a)(22), inserted reference to subchapter II of this chapter and “new” before “motor” in two places.

Pub. L. 95-95, § 305(d), substituted “carrying out any provision of this chapter (except with respect to a manufacturer of motor vehicles or motor vehicle engines)” for “carrying out sections 119 or 303” in cl. (iii) preceding par. (1), substituted “any person subject to any requirement of this chapter (other than a manufacturer subject to the provisions of sections 7525(c) or 7542 of this title)” for “the owner or operator of any emission source” in par. (1), substituted “any premises of such person” for “any premises in which an emission source is located” in subpar. (A) of par. (2), and substituted “emissions which such person is required to sample” for “emissions which the owner or operator of such source is required to sample” in subpar. (B) of subpar. (2).

Subsec. (a)(1). Pub. L. 95-190, § 14(a)(23), inserted reference to subchapter II of this chapter and “who owns or operates any emission source or who is” after “any person”.

Subsec. (b)(1). Pub. L. 95-95, § 109(d)(3), struck out “(except with respect to new sources owned or operated by the United States)” after “to carry out this section”.

Subsec. (d). Pub. L. 95-95, § 113, added subsec. (d).

1974—Subsec. (a). Pub. L. 93-319 inserted reference to section 119.

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7415. International air pollution

(a) Endangerment of public health or welfare in foreign countries from pollution emitted in United States

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emit-

CAA § 115

ted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

(b) Prevention or elimination of endangerment

The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section. Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.

(c) Reciprocity

This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

(d) Recommendations

Recommendations issued following any abatement conference conducted prior to August 7, 1977, shall remain in effect with respect to any pollutant for which no national ambient air quality standard has been established under section 7409 of this title unless the Administrator, after consultation with all agencies which were party to the conference, rescinds any such recommendation on grounds of obsolescence.

(July 14, 1955, ch. 360, title I, §115, formerly §5, as added Pub. L. 88-206, §1, Dec. 17, 1963, 77 Stat. 396; renumbered §105 and amended Pub. L. 89-272, title I, §§101(2), (3), 102, Oct. 20, 1965, 79 Stat. 992, 995, renumbered §108 and amended Pub. L. 90-148, §2, Nov. 21, 1967, 81 Stat. 491, renumbered §115 and amended Pub. L. 91-604, §§4(a), (b)(2)-(10), 15(c)(2), Dec. 31, 1970, 84 Stat. 1678, 1688, 1689, 1713; Pub. L. 95-95, title I, §114, Aug. 7, 1977, 91 Stat. 710.)

CODIFICATION

Section was formerly classified to section 1857d of this title.

AMENDMENTS

1977—Pub. L. 95-95 completely revised section by substituting provisions establishing a mechanism for the Administrator to trigger a revision of a State implementation plan under section 7410(a)(2)(H) upon a petition of an international agency or the Secretary of State if he finds that emissions originating in a State endanger the health or welfare of persons in a foreign country for provisions calling for the abatement of air pollution by means of conference procedures.

1970—Subsec. (a). Pub. L. 91-604, §4(b)(2), inserted “and which is covered by subsection (b) or (c) of this section” after “persons”.

Subsec. (b). Pub. L. 91-604, §§4(b)(3), (4), (5), 15(c)(2), redesignated former subsec. (d)(1)(A), (B), and (C) as (b)(1), (2), and (3), substituted “Administrator” for

“Secretary” wherever appearing, and added subsec. (b)(4). Former subsec. (b), which related to the encouragement of municipal, State, and interstate action to abate air pollution, was struck out.

Subsec. (c). Pub. L. 91-604, §§4(b)(3), (6), 15(c)(2), redesignated former subsec. (d)(1)(D) as (c) and substituted “Administrator” for “Secretary” and “Secretary of Health, Education, and Welfare” wherever appearing and “subsection” for “subparagraph” wherever appearing. Former subsec. (c), which related to the procedure for the promulgation of State air quality standards, was struck out.

Subsec. (d). Pub. L. 91-604, §§4(b)(4), (6), (7), (8), 15(c)(2), redesignated former subsec. (d)(2) and (3) as (d)(1) and (2), in (d)(1) substituted “Administrator” for “Secretary” wherever appearing and “any conference under this section” for “such conference”, and in (d)(2) substituted “Administrator” for “Secretary”. Former subsec. (d)(1)(A), (B), and (C) were redesignated as (b)(1), (2), and (3), respectively, and subsec. (d)(1)(D) was redesignated as (c).

Subsec. (e). Pub. L. 91-604, §15(c)(2), substituted “Administrator” for “Secretary” wherever appearing.

Subsec. (f). Pub. L. 91-604, §15(c)(2), substituted “Administrator” for “Secretary” wherever appearing and “Environmental Protection Agency” for “Department of Health, Education, and Welfare”.

Subsec. (g). Pub. L. 91-604, §§4(b)(9), 15(c)(2), substituted “Administrator” for “Secretary” and “subsection (c)” for “subparagraph (D) of subsection (d)”.

Subsecs. (i), (j). Pub. L. 91-604, §15(c)(2), substituted “Administrator” for “Secretary” wherever appearing.

Subsec. (k). Pub. L. 91-604, §4(b)(3), (10), substituted provisions relating to compliance with any requirement of an applicable implementation plan or with any standard prescribed under section 7411 of this title or section 7412 of this title, for provisions relating to the enjoining of imminent and substantial endangerment from pollution sources.

1967—Subsec. (b). Pub. L. 90-148 substituted reference to subsec. (c), (h), or (k) of this section for reference to subsec. (g) of this section.

Subsecs. (c), (d). Pub. L. 90-148 added subsec. (c), redesignated former subsec. (c) as (d), inserted in par. (2) provisions for the delivery prior to the conference of a Federal report to agencies and interested parties covering matters before the conference, raised from three weeks to thirty days the required notice of the conference, and inserted provisions for notice by newspapers, presentation of views on the Federal report, and transcript of proceedings. Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 90-148 redesignated former subsec. (d) as (e). Former subsec. (e) redesignated (f) and amended.

Subsec. (f). Pub. L. 90-148 redesignated former subsec. (e) as (f) and inserted in par. (1) requirement that all interested parties be given a reasonable opportunity to present evidence to the hearing board. Former subsec. (f) redesignated (g) and amended.

Subsec. (g). Pub. L. 90-148 redesignated former subsec. (f) as (g) and substituted reference to subsec. (d) of this section for reference to subsec. (c) of this section. Former subsec. (g) redesignated (h) and amended.

Subsec. (h). Pub. L. 90-148 redesignated former subsec. (g) as (h) and substituted reference to subsec. (g) of this section for reference to subsec. (f) of this section. Former subsec. (h) redesignated (i) and amended.

Subsec. (i). Pub. L. 90-148 redesignated former subsec. (h) as (i) and substituted reference to subsec. (f) of this section for reference to subsec. (e) of this section and raised the per diem maximum from \$50 to \$100. Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 90-148 redesignated former subsec. (i) as (j).

Subsec. (k). Pub. L. 90-148 added subsec. (k).

1965—Subsec. (b). Pub. L. 89-272, §101(2), substituted “this title” for “this Act”, which for purposes of codification has been changed to “this subchapter”.

Subsec. (c)(1)(D). Pub. L. 89-272, §102(a), added subpar. (D).

have been expended by the State before the date on which any such grant was made.

(July 14, 1955, ch. 360, title II, §210, formerly §209, as added Pub. L. 90-148, §2, Nov. 21, 1967, 81 Stat. 502; renumbered and amended Pub. L. 91-604, §§8(a), 10(b), Dec. 31, 1970, 84 Stat. 1694, 1700; Pub. L. 95-95, title II, §204, Aug. 7, 1977, 91 Stat. 754.)

CODIFICATION

Section was formerly classified to section 1857f-6b of this title.

PRIOR PROVISIONS

A prior section 210 of act July 14, 1955, was renumbered section 211 by Pub. L. 91-604 and is classified to section 7545 of this title.

AMENDMENTS

1977—Pub. L. 95-95 inserted provision allowing grants to be made by way of reimbursement in any case in which amounts have been expended by States before the date on which the grants were made.

1970—Pub. L. 91-604, §10(b), substituted provisions authorizing the Administrator to make grants to appropriate State agencies for the development and maintenance of effective vehicle emission devices and systems inspection and emission testing and control programs, for provisions authorizing the Secretary to make grants to appropriate State air pollution control agencies for the development of meaningful uniform motor vehicle emission device inspection and emission testing programs.

EFFECTIVE DATE OF 1977 AMENDMENT

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

(B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of concentration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle, vehicle engine, nonroad engine or nonroad vehicle, or the extent to which such emissions affect the public health or welfare.

Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential.

(3) Upon compliance with the provision of this subsection, including assurances that the Administrator will receive changes in the information required, the Administrator shall register such fuel or fuel additive.

(4) STUDY ON CERTAIN FUEL ADDITIVES AND BLENDSTOCKS.—

(A) IN GENERAL.—Not later than 2 years after August 8, 2005, the Administrator shall—

(i) conduct a study on the effects on public health (including the effects on children, pregnant women, minority or low-income communities, and other sensitive populations), air quality, and water resources of increased use of, and the feasibility of using as substitutes for methyl tertiary butyl ether in gasoline—

(I) ethyl tertiary butyl ether;

(II) tertiary amyl methyl ether;

(III) di-isopropyl ether;

(IV) tertiary butyl alcohol;

(V) other ethers and heavy alcohols, as determined by then¹ Administrator;

(VI) ethanol;

(VII) iso-octane; and

(VIII) alkylates; and

(ii) conduct a study on the effects on public health (including the effects on children, pregnant women, minority or low-income communities, and other sensitive populations), air quality, and water resources of the adjustment for ethanol-blended reformulated gasoline to the volatile organic compounds performance requirements that are applicable under paragraphs (1) and (3) of subsection (k) of this section; and

(iii) submit to the Committee on Environment and Public Works of the Senate and the Committee on Energy and Commerce of the House of Representatives a report describing the results of the studies under clauses (i) and (ii).

(B) CONTRACTS FOR STUDY.—In carrying out this paragraph, the Administrator may enter into one or more contracts with nongovernmental entities such as—

(i) the national energy laboratories; and

(ii) institutions of higher education (as defined in section 1001 of title 20).

¹ So in original. Probably should be “the”.

CAA § 211 § 7545. Regulation of fuels

(a) Authority of Administrator to regulate

The Administrator may by regulation designate any fuel or fuel additive (including any fuel or fuel additive used exclusively in nonroad engines or nonroad vehicles) and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive may sell, offer for sale, or introduce into commerce such fuel or additive unless the Administrator has registered such fuel or additive in accordance with subsection (b) of this section.

(b) Registration requirement

(1) For the purpose of registration of fuels and fuel additives, the Administrator shall require—

(A) the manufacturer of any fuel to notify him as to the commercial identifying name and manufacturer of any additive contained in such fuel; the range of concentration of any additive in the fuel; and the purpose-in-use of any such additive; and

(B) the manufacturer of any additive to notify him as to the chemical composition of such additive.

(2) For the purpose of registration of fuels and fuel additives, the Administrator shall, on a regular basis, require the manufacturer of any fuel or fuel additive—

(A) to conduct tests to determine potential public health and environmental effects of the fuel or additive (including carcinogenic, teratogenic, or mutagenic effects); and

(d) Penalties and injunctions**(1) Civil penalties**

Any person who violates subsection (a), (f), (g), (k), (l), (m), (n), or (o) of this section or the regulations prescribed under subsection (c), (h), (i), (k), (l), (m), (n), or (o) of this section or who fails to furnish any information or conduct any tests required by the Administrator under subsection (b) of this section shall be liable to the United States for a civil penalty of not more than the sum of \$25,000 for every day of such violation and the amount of economic benefit or savings resulting from the violation. Any violation with respect to a regulation prescribed under subsection (c), (k), (l), (m), or (o) of this section which establishes a regulatory standard based upon a multiday averaging period shall constitute a separate day of violation for each and every day in the averaging period. Civil penalties shall be assessed in accordance with subsections (b) and (c) of section 7524 of this title.

(2) Injunctive authority

The district courts of the United States shall have jurisdiction to restrain violations of subsections (a), (f), (g), (k), (l), (m), (n), and (o) of this section and of the regulations prescribed under subsections (c), (h), (i), (k), (l), (m), (n), and (o) of this section, to award other appropriate relief, and to compel the furnishing of information and the conduct of tests required by the Administrator under subsection (b) of this section. Actions to restrain such violations and compel such actions shall be brought by and in the name of the United States. In any such action, subpoenas for witnesses who are required to attend a district court in any district may run into any other district.

(e) Testing of fuels and fuel additives

(1) Not later than one year after August 7, 1977, and after notice and opportunity for a public hearing, the Administrator shall promulgate regulations which implement the authority under subsection (b)(2)(A) and (B) of this section with respect to each fuel or fuel additive which is registered on the date of promulgation of such regulations and with respect to each fuel or fuel additive for which an application for registration is filed thereafter.

(2) Regulations under subsection (b) of this section to carry out this subsection shall require that the requisite information be provided to the Administrator by each such manufacturer—

(A) prior to registration, in the case of any fuel or fuel additive which is not registered on the date of promulgation of such regulations; or

(B) not later than three years after the date of promulgation of such regulations, in the case of any fuel or fuel additive which is registered on such date.

(3) In promulgating such regulations, the Administrator may—

(A) exempt any small business (as defined in such regulations) from or defer or modify the requirements of, such regulations with respect to any such small business;

(B) provide for cost-sharing with respect to the testing of any fuel or fuel additive which

is manufactured or processed by two or more persons or otherwise provide for shared responsibility to meet the requirements of this section without duplication; or

(C) exempt any person from such regulations with respect to a particular fuel or fuel additive upon a finding that any additional testing of such fuel or fuel additive would be duplicative of adequate existing testing.

(f) New fuels and fuel additives

(1)(A) Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(B) Effective upon November 15, 1990, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(2) Effective November 30, 1977, it shall be unlawful for any manufacturer of any fuel to introduce into commerce any gasoline which contains a concentration of manganese in excess of .0625 grams per gallon of fuel, except as otherwise provided pursuant to a waiver under paragraph (4).

(3) Any manufacturer of any fuel or fuel additive which prior to March 31, 1977, and after January 1, 1974, first introduced into commerce or increased the concentration in use of a fuel or fuel additive that would otherwise have been prohibited under paragraph (1)(A) if introduced on or after March 31, 1977 shall, not later than September 15, 1978, cease to distribute such fuel or fuel additive in commerce. During the period beginning 180 days after August 7, 1977, and before September 15, 1978, the Administrator shall prohibit, or restrict the concentration of any fuel additive which he determines will cause or contribute to the failure of an emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified under section 7525 of this title.

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle,

motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to sections 7525 and 7547(a) of this title. The Administrator shall take final action to grant or deny an application submitted under this paragraph, after public notice and comment, within 270 days of the receipt of such an application.

(5) No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

(g) Misfueling

(1) No person shall introduce, or cause or allow the introduction of, leaded gasoline into any motor vehicle which is labeled "unleaded gasoline only," which is equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, which is a 1990 or later model year motor vehicle, or which such person knows or should know is a vehicle designed solely for the use of unleaded gasoline.

(2) Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight) or which fails to meet a cetane index minimum of 40 or such equivalent alternative aromatic level as prescribed by the Administrator under subsection (i)(2) of this section.

(h) Reid Vapor Pressure requirements

(1) Prohibition

Not later than 6 months after November 15, 1990, the Administrator shall promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi). Such regulations shall also establish more stringent Reid Vapor Pressure standards in a nonattainment area as the Administrator finds necessary to generally achieve comparable evaporative emissions (on a per-vehicle basis) in nonattainment areas, taking into consideration the enforceability of such standards, the need of an area for emission control, and economic factors.

(2) Attainment areas

The regulations under this subsection shall not make it unlawful for any person to sell, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure of 9.0 pounds per square inch (psi) or lower in any area designated under section 7407 of this title as an attainment area. Notwithstanding the preceding sentence, the Administrator may impose a Reid vapor pressure requirement lower than 9.0 pounds per square inch (psi) in any area, formerly an ozone nonattainment area, which has been redesignated as an attainment area.

(3) Effective date; enforcement

The regulations under this subsection shall provide that the requirements of this sub-

section shall take effect not later than the high ozone season for 1992, and shall include such provisions as the Administrator determines are necessary to implement and enforce the requirements of this subsection.

(4) Ethanol waiver

For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the Reid vapor pressure limitation under this subsection shall be one pound per square inch (psi) greater than the applicable Reid vapor pressure limitations established under paragraph (1); *Provided, however*, That a distributor, blender, marketer, reseller, carrier, retailer, or wholesale purchaser-consumer shall be deemed to be in full compliance with the provisions of this subsection and the regulations promulgated thereunder if it can demonstrate (by showing receipt of a certification or other evidence acceptable to the Administrator) that—

(A) the gasoline portion of the blend complies with the Reid vapor pressure limitations promulgated pursuant to this subsection;

(B) the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4) of this section; and

(C) no additional alcohol or other additive has been added to increase the Reid Vapor Pressure of the ethanol portion of the blend.

(5) Exclusion from ethanol waiver

(A) Promulgation of regulations

Upon notification, accompanied by supporting documentation, from the Governor of a State that the Reid vapor pressure limitation established by paragraph (4) will increase emissions that contribute to air pollution in any area in the State, the Administrator shall, by regulation, apply, in lieu of the Reid vapor pressure limitation established by paragraph (4), the Reid vapor pressure limitation established by paragraph (1) to all fuel blends containing gasoline and 10 percent denatured anhydrous ethanol that are sold, offered for sale, dispensed, supplied, offered for supply, transported, or introduced into commerce in the area during the high ozone season.

(B) Deadline for promulgation

The Administrator shall promulgate regulations under subparagraph (A) not later than 90 days after the date of receipt of a notification from a Governor under that subparagraph.

(C) Effective date

(i) In general

With respect to an area in a State for which the Governor submits a notification under subparagraph (A), the regulations under that subparagraph shall take effect on the later of—

(I) the first day of the first high ozone season for the area that begins after the date of receipt of the notification; or

(II) 1 year after the date of receipt of the notification.

95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

CAA § 304

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.¹

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have

¹ So in original. The period probably should be “, or”.

SEC. 2. *Designation of Facilities.* (a) The Administrator of the Environmental Protection Agency (hereinafter referred to as "the Administrator") shall be responsible for the attainment of the purposes and objectives of this Order.

(b) In carrying out his responsibilities under this Order, the Administrator shall, in conformity with all applicable requirements of law, designate facilities which have given rise to a conviction for an offense under section 113(c)(1) of the Air Act [42 U.S.C. 7413(c)(1)] or section 309(c) of the Water Act [33 U.S.C. 1319(c)]. The Administrator shall, from time to time, publish and circulate to all Federal agencies lists of those facilities, together with the names and addresses of the persons who have been convicted of such offenses. Whenever the Administrator determines that the condition which gave rise to a conviction has been corrected, he shall promptly remove the facility and the name and address of the person concerned from the list.

SEC. 3. *Contracts, Grants, or Loans.* (a) Except as provided in section 8 of this Order, no Federal agency shall enter into any contract for the procurement of goods, materials, or services which is to be performed in whole or in part in a facility then designated by the Administrator pursuant to section 2.

(b) Except as provided in section 8 of this Order, no Federal agency authorized to extend Federal assistance by way of grant, loan, or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

SEC. 4. *Procurement, Grant, and Loan Regulations.* The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the Executive Branch shall, following consultation with the Administrator, be amended to require, as a condition of entering into, renewing, or extending any contract for the procurement of goods, materials, or services or extending any assistance by way of grant, loan, or contract, inclusion of a provision requiring compliance with the Air Act, the Water Act, and standards issued pursuant thereto in the facilities in which the contract is to be performed, or which are involved in the activity or program to receive assistance.

SEC. 5. *Rules and Regulations.* The Administrator shall issue such rules, regulations, standards, and guidelines as he may deem necessary or appropriate to carry out the purposes of this Order.

SEC. 6. *Cooperation and Assistance.* The head of each Federal agency shall take such steps as may be necessary to insure that all officers and employees of this agency whose duties entail compliance or comparable functions with respect to contracts, grants, and loans are familiar with the provisions of this Order. In addition to any other appropriate action, such officers and employees shall report promptly any condition in a facility which may involve noncompliance with the Air Act or the Water Act or any rules, regulations, standards, or guidelines issued pursuant to this Order to the head of the agency, who shall transmit such reports to the Administrator.

SEC. 7. *Enforcement.* The Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever he becomes aware of a breach of any provision required, under the amendments issued pursuant to section 4 of this Order, to be included in a contract or other agreement.

SEC. 8. *Exemptions—Reports to Congress.* (a) Upon a determination that the paramount interest of the United States so requires—

(1) The head of a Federal agency may exempt any contract, grant, or loan, and, following consultation with the Administrator, any class of contracts, grants or loans from the provisions of this Order. In any such case, the head of the Federal agency granting such ex-

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions.* The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability.* This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity.* Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded.* Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review CAA § 307

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph,⁴ the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(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,⁵ 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)¹ 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 pub-

lishes 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).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁵ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(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,

⁴ So in original. Probably should be "subsection,".

⁵ So in original. The word "to" probably should not appear.

(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.

(f) Costs

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

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section⁶ 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92-157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93-319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95-95, title III, §§303(d), 305(a), (c), (f)-(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95-190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681-2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101-549, title II, §230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101-549, title II, §230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original “section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)”, meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, §3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101-549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original “subtitle C of title I”, and was translated as reading “part C of title I” to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), “subchapter II of chapter 5 of title 5” was substituted for “the Administrative Procedures Act” on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h-5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91-604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89-272, renumbered section 310 by Pub. L. 90-148, and renumbered section 317 by Pub. L. 91-604, and is set out as a Short Title note under section 7401 of this title.

⁶ So in original. Probably should be “sections”.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, §703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out “or section 7521(b)(5)” after “section 7410(f)”.

Subsec. (b)(1). Pub. L. 101-549, §706(2), which directed amendment of second sentence by striking “under section 7413(d) of this title” immediately before “under section 7419 of this title”, was executed by striking “under section 7413(d) of this title,” before “under section 7419 of this title”, to reflect the probable intent of Congress.

Pub. L. 101-549, §706(1), inserted at end: “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.”

Pub. L. 101-549, §702(c), inserted “or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title,” before “or any other final action of the Administrator”.

Pub. L. 101-549, §302(g), substituted “section 7412” for “section 7412(c)”.

Subsec. (b)(2). Pub. L. 101-549, §707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101-549, §110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title.”.

Subsec. (d)(1)(D), (E). Pub. L. 101-549, §302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101-549, §302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101-549, §110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: “promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders)”.

Subsec. (d)(1)(G), (H). Pub. L. 101-549, §302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101-549, §710(b), which directed that subpar. (H) be amended by substituting “subchapter VI of this chapter” for “part B of subchapter I of this chapter”, was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, §302(h), see below.

Pub. L. 101-549, §302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101-549, §302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101-549, §302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101-549, §110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101-549, §302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101-549, §110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101-549, §302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101-549, §110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101-549, §302(h), redesignated subpar. (U) as (V).

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PUBLIC LAW 91-604—DEC. 31, 1970

[84 STAT.]

Public Law 91-604

AN ACT

December 31, 1970

[H. R. 17255]

To amend the Clean Air Act to provide for a more effective program to improve the quality of the Nation's air.

Clean Air
Amendments of
1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Clean Air Amendments of 1970".

RESEARCH

81 Stat. 486.
42 USC 1857b.

SEC. 2. (a) Section 103 of the Clean Air Act (42 U.S.C. 1857, et seq.) is amended by adding at the end thereof the following new subsection:

"(f) (1) In carrying out research pursuant to this Act, the Administrator shall give special emphasis to research on the short- and long-term effects of air pollutants on public health and welfare. In the furtherance of such research, he shall conduct an accelerated research program—

"(A) to improve knowledge of the contribution of air pollutants to the occurrence of adverse effects on health, including, but not limited to, behavioral, physiological, toxicological, and biochemical effects; and

"(B) to improve knowledge of the short- and long-term effects of air pollutants on welfare.

"(2) In carrying out the provisions of this subsection the Administrator may—

"(A) conduct epidemiological studies of the effects of air pollutants on mortality and morbidity;

"(B) conduct clinical and laboratory studies on the immunologic, biochemical, physiological, and the toxicological effects including carcinogenic, teratogenic, and mutagenic effects of air pollutants;

"(C) utilize, on a reimbursable basis, the facilities of existing Federal scientific laboratories and research centers;

"(D) utilize the authority contained in paragraphs (1) through (4) of subsection (b); and

"(E) consult with other appropriate Federal agencies to assure that research or studies conducted pursuant to this subsection will be coordinated with research and studies of such other Federal agencies.

Appropriation.

"(3) In entering into contracts under this subsection, the Administrator is authorized to contract for a term not to exceed 10 years in duration. For the purposes of this paragraph, there are authorized to be appropriated \$15,000,000. Such amounts as are appropriated shall remain available until expended and shall be in addition to any other appropriations under this Act."

42 USC 1857b-1.

(b) Section 104(a)(1) of the Clean Air Act is amended to read as follows:

"(1) conduct and accelerate research programs directed toward development of improved, low-cost techniques for—

"(A) control of combustion byproducts of fuels,

"(B) removal of potential air pollutants from fuels prior to combustion,

"(C) control of emissions from the evaporation of fuels,

"(D) improving the efficiency of fuels combustion so as to decrease atmospheric emissions, and

"(E) producing synthetic or new fuels which, when used, result in decreased atmospheric emissions."

"NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

"SEC. 112. (a) For purposes of this section—

Definitions.

"(1) The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

"(2) The term 'new source' means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

"(3) The terms 'stationary source', 'modification', 'owner or operator' and 'existing source' shall have the same meaning as such terms have under section 111(a).

Ante, p. 1683.

"(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

List, publication.

"(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

Proposed regulations; hearing.

"(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

"(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

"(c) (1) After the effective date of any emission standard under this section—

"(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

"(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

"(i) such standard shall not apply until 90 days after its effective date, and

"(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

"(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended

Presidential exemption.

Extension.

§ 60.44

40 CFR Ch. I (7–1–11 Edition)

Where:

PS_{SO_2} = Prorated standard for SO_2 when burning different fuels simultaneously, in ng/J heat input derived from all fossil fuels or from all fossil fuels and wood residue fired;
 y = Percentage of total heat input derived from liquid fossil fuel; and
 z = Percentage of total heat input derived from solid fossil fuel.

(c) Compliance shall be based on the total heat input from all fossil fuels burned, including gaseous fuels.

(d) As an alternate to meeting the requirements of paragraphs (a) and (b) of this section, an owner or operator can petition the Administrator (in writing) to comply with § 60.43Da(i)(3) of subpart Da of this part or comply with § 60.42b(k)(4) of subpart Db of this part, as applicable to the affected source. If the Administrator grants the petition, the source will from then on (unless the unit is modified or reconstructed in the future) have to comply with the requirements in § 60.43Da(i)(3) of subpart Da of this part or § 60.42b(k)(4) of subpart Db of this part, as applicable to the affected source.

(e) Units 1 and 2 (as defined in appendix G of this part) at the Newton Power Station owned or operated by the Central Illinois Public Service Company will be in compliance with paragraph (a)(2) of this section if Unit 1 and Unit 2 individually comply with paragraph (a)(2) of this section or if the combined emission rate from Units 1 and 2 does not exceed 470 ng/J (1.1 lb/MMBtu) combined heat input to Units 1 and 2.

[60 FR 65415, Dec. 19, 1995, as amended at 74 FR 5077, Jan. 28, 2009]

§ 60.44 Standard for nitrogen oxides (NO_x).

(a) Except as provided under paragraph (e) of this section, on and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases that contain NO_x , expressed as NO_2 in excess of:

(1) 86 ng/J heat input (0.20 lb/MMBtu) derived from gaseous fossil fuel.

(2) 129 ng/J heat input (0.30 lb/MMBtu) derived from liquid fossil fuel, liquid fossil fuel and wood residue, or gaseous fossil fuel and wood residue.

(3) 300 ng/J heat input (0.70 lb/MMBtu) derived from solid fossil fuel or solid fossil fuel and wood residue (except lignite or a solid fossil fuel containing 25 percent, by weight, or more of coal refuse).

(4) 260 ng/J heat input (0.60 lb/MMBtu) derived from lignite or lignite and wood residue (except as provided under paragraph (a)(5) of this section).

(5) 340 ng/J heat input (0.80 lb/MMBtu) derived from lignite which is mined in North Dakota, South Dakota, or Montana and which is burned in a cyclone-fired unit.

(b) Except as provided under paragraphs (c), (d), and (e) of this section, when different fossil fuels are burned simultaneously in any combination, the applicable standard (in ng/J) is determined by proration using the following formula:

$$PS_{NO_x} = \frac{w(260) + x(86) + y(130) + z(300)}{(w + x + y + z)}$$

Where:

PS_{NO_x} = Prorated standard for NO_x when burning different fuels simultaneously, in ng/J heat input derived from all fossil fuels fired or from all fossil fuels and wood residue fired;
 w = Percentage of total heat input derived from lignite;

x = Percentage of total heat input derived from gaseous fossil fuel;

y = Percentage of total heat input derived from liquid fossil fuel; and

z = Percentage of total heat input derived from solid fossil fuel (except lignite).

(c) When a fossil fuel containing at least 25 percent, by weight, of coal refuse is burned in combination with gaseous, liquid, or other solid fossil fuel or wood residue, the standard for NO_x does not apply.

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(d) Except as provided under paragraph (e) of this section, cyclone-fired units which burn fuels containing at least 25 percent of lignite that is mined in North Dakota, South Dakota, or Montana remain subject to paragraph (a)(5) of this section regardless of the types of fuel combusted in combination with that lignite.

(e) As an alternate to meeting the requirements of paragraphs (a), (b), and (d) of this section, an owner or operator can petition the Administrator (in writing) to comply with § 60.44Da(e)(3) of subpart Da of this part. If the Administrator grants the petition, the source will from then on (unless the unit is modified or reconstructed in the future) have to comply with the requirements in § 60.44Da(e)(3) of subpart Da of this part.

§ 60.45 Emissions and fuel monitoring.

(a) Each owner or operator shall install, calibrate, maintain, and operate continuous opacity monitoring system (COMS) for measuring opacity and a CEMS for measuring SO₂ emissions, NO_x emissions, and either oxygen (O₂) or carbon dioxide (CO₂) except as provided in paragraph (b) of this section.

(b) Certain of the CEMS requirements under paragraph (a) of this section do not apply to owners or operators under the following conditions:

(1) For a fossil-fuel-fired steam generator that burns only gaseous or liquid fossil fuel (excluding residual oil) with potential SO₂ emissions rates of 26 ng/J (0.060 lb/MMBtu) or less and that does not use post-combustion technology to reduce emissions of SO₂ or PM, CEMS for measuring the opacity of emissions and SO₂ emissions are not required if the owner or operator monitors SO₂ emissions by fuel sampling and analysis or fuel receipts.

(2) For a fossil-fuel-fired steam generator that does not use a flue gas desulfurization device, a CEMS for measuring SO₂ emissions is not required if the owner or operator monitors SO₂ emissions by fuel sampling and analysis.

(3) Notwithstanding § 60.13(b), installation of a CEMS for NO_x may be delayed until after the initial performance tests under § 60.8 have been conducted. If the owner or operator dem-

onstrates during the performance test that emissions of NO_x are less than 70 percent of the applicable standards in § 60.44, a CEMS for measuring NO_x emissions is not required. If the initial performance test results show that NO_x emissions are greater than 70 percent of the applicable standard, the owner or operator shall install a CEMS for NO_x within one year after the date of the initial performance tests under § 60.8 and comply with all other applicable monitoring requirements under this part.

(4) If an owner or operator does not install any CEMS for sulfur oxides and NO_x, as provided under paragraphs (b)(1) and (b)(3) or paragraphs (b)(2) and (b)(3) of this section a CEMS for measuring either O₂ or CO₂ is not required.

(5) An owner or operator may petition the Administrator (in writing) to install a PM CEMS as an alternative to the CEMS for monitoring opacity emissions.

(6) A CEMS for measuring the opacity of emissions is not required for a fossil fuel-fired steam generator that does not use post-combustion technology (except a wet scrubber) for reducing PM, SO₂, or carbon monoxide (CO) emissions, burns only gaseous fuels or fuel oils that contain less than or equal to 0.30 weight percent sulfur, and is operated such that emissions of CO to the atmosphere from the affected source are maintained at levels less than or equal to 0.15 lb/MMBtu on a boiler operating day average basis. Owners and operators of affected sources electing to comply with this paragraph must demonstrate compliance according to the procedures specified in paragraphs (b)(6)(i) through (iv) of this section.

(i) You must monitor CO emissions using a CEMS according to the procedures specified in paragraphs (b)(6)(i)(A) through (D) of this section.

(A) The CO CEMS must be installed, certified, maintained, and operated according to the provisions in § 60.58b(i)(3) of subpart Eb of this part.

(B) Each 1-hour CO emissions average is calculated using the data points generated by the CO CEMS expressed in parts per million by volume corrected to 3 percent oxygen (dry basis).

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emission limitation are substantially as effective as the promulgated emission standard, the owner or operator may request the permitting authority to revise the source's title V permit to reflect that the emission limitation in the permit satisfies the requirements of the promulgated emission standard. The process by which the permitting authority determines whether the section 112(j) emission limitation is substantially as effective as the promulgated emission standard must include, consistent with part 70 or 71 of this chapter, the opportunity for full public, EPA, and affected State review (including the opportunity for EPA's objection) prior to the permit revision being finalized. A negative determination by the permitting authority constitutes final action for purposes of review and appeal under the applicable title V operating permit program.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16595, Apr. 5, 2002]

§ 63.2 Definitions.

The terms used in this part are defined in the Act or in this section as follows:

Act means the Clean Air Act (42 U.S.C. 7401 et seq., as amended by Pub. L. 101-549, 104 Stat. 2399).

Actual emissions is defined in subpart D of this part for the purpose of granting a compliance extension for an early reduction of hazardous air pollutants.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her authorized representative (e.g., a State that has been delegated the authority to implement the provisions of this part).

Affected source, for the purposes of this part, means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act. Each relevant standard will define the "affected source," as defined in this paragraph unless a different definition is warranted based on a published justification as to why this definition would result in significant ad-

ministrative, practical, or implementation problems and why the different definition would resolve those problems. The term "affected source," as used in this part, is separate and distinct from any other use of that term in EPA regulations such as those implementing title IV of the Act. Affected source may be defined differently for part 63 than affected facility and stationary source in parts 60 and 61, respectively. This definition of "affected source," and the procedures for adopting an alternative definition of "affected source," shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002.

Alternative emission limitation means conditions established pursuant to sections 112(i)(5) or 112(i)(6) of the Act by the Administrator or by a State with an approved permit program.

Alternative emission standard means an alternative means of emission limitation that, after notice and opportunity for public comment, has been demonstrated by an owner or operator to the Administrator's satisfaction to achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under a relevant design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act.

Alternative test method means any method of sampling and analyzing for an air pollutant that is not a test method in this chapter and that has been demonstrated to the Administrator's satisfaction, using Method 301 in appendix A of this part, to produce results adequate for the Administrator's determination that it may be used in place of a test method specified in this part.

Approved permit program means a State permit program approved by the Administrator as meeting the requirements of part 70 of this chapter or a Federal permit program established in this chapter pursuant to title V of the Act (42 U.S.C. 7661).

Area source means any stationary source of hazardous air pollutants that

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is not a major source as defined in this part.

Commenced means, with respect to construction or reconstruction of an affected source, that an owner or operator has undertaken a continuous program of construction or reconstruction or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or reconstruction.

Compliance date means the date by which an affected source is required to be in compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established by the Administrator (or a State with an approved permit program) pursuant to section 112 of the Act.

Compliance schedule means: (1) In the case of an affected source that is in compliance with all applicable requirements established under this part, a statement that the source will continue to comply with such requirements; or

(2) In the case of an affected source that is required to comply with applicable requirements by a future date, a statement that the source will meet such requirements on a timely basis and, if required by an applicable requirement, a detailed schedule of the dates by which each step toward compliance will be reached; or

(3) In the case of an affected source not in compliance with all applicable requirements established under this part, a schedule of remedial measures, including an enforceable sequence of actions or operations with milestones and a schedule for the submission of certified progress reports, where applicable, leading to compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established pursuant to section 112 of the Act for which the affected source is not in compliance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction non-compliance with, the applicable requirements on which it is based.

Construction means the on-site fabrication, erection, or installation of an affected source. Construction does not include the removal of all equipment comprising an affected source from an existing location and reinstallation of such equipment at a new location. The owner or operator of an existing affected source that is relocated may elect not to reinstall minor ancillary equipment including, but not limited to, piping, ductwork, and valves. However, removal and reinstallation of an affected source will be construed as reconstruction if it satisfies the criteria for reconstruction as defined in this section. The costs of replacing minor ancillary equipment must be considered in determining whether the existing affected source is reconstructed.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this part, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) is a comprehensive term that may include, but is not limited to, continuous emission monitoring systems, continuous opacity monitoring systems, continuous parameter monitoring systems, or other manual or automatic monitoring that is used for demonstrating compliance with an applicable regulation on a continuous basis as defined by the regulation.

Continuous opacity monitoring system (COMS) means a continuous monitoring system that measures the opacity of emissions.

Continuous parameter monitoring system means the total equipment that may be required to meet the data acquisition and availability requirements of this part, used to sample, condition (if applicable), analyze, and provide a record of process or control system parameters.

Effective date means:

(1) With regard to an emission standard established under this part, the date of promulgation in the FEDERAL REGISTER of such standard; or

(2) With regard to an alternative emission limitation or equivalent emission limitation determined by the

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Administrator (or a State with an approved permit program), the date that the alternative emission limitation or equivalent emission limitation becomes effective according to the provisions of this part.

Emission standard means a national standard, limitation, prohibition, or other regulation promulgated in a subpart of this part pursuant to sections 112(d), 112(h), or 112(f) of the Act.

Emissions averaging is a way to comply with the emission limitations specified in a relevant standard, whereby an affected source, if allowed under a subpart of this part, may create emission credits by reducing emissions from specific points to a level below that required by the relevant standard, and those credits are used to offset emissions from points that are not controlled to the level required by the relevant standard.

EPA means the United States Environmental Protection Agency.

Equivalent emission limitation means any maximum achievable control technology emission limitation or requirements which are applicable to a major source of hazardous air pollutants and are adopted by the Administrator (or a State with an approved permit program) on a case-by-case basis, pursuant to section 112(g) or (j) of the Act.

Excess emissions and continuous monitoring system performance report is a report that must be submitted periodically by an affected source in order to provide data on its compliance with relevant emission limits, operating parameters, and the performance of its continuous parameter monitoring systems.

Existing source means any affected source that is not a new source.

Federally enforceable means all limitations and conditions that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator. Examples of federally enforceable limitations and conditions include, but are not limited to:

(1) Emission standards, alternative emission standards, alternative emission limitations, and equivalent emission limitations established pursuant

to section 112 of the Act as amended in 1990;

(2) New source performance standards established pursuant to section 111 of the Act, and emission standards established pursuant to section 112 of the Act before it was amended in 1990;

(3) All terms and conditions in a title V permit, including any provisions that limit a source's potential to emit, unless expressly designated as not federally enforceable;

(4) Limitations and conditions that are part of an approved State Implementation Plan (SIP) or a Federal Implementation Plan (FIP);

(5) Limitations and conditions that are part of a Federal construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by the EPA in accordance with 40 CFR part 51;

(6) Limitations and conditions that are part of an operating permit where the permit and the permitting program pursuant to which it was issued meet all of the following criteria:

(i) The operating permit program has been submitted to and approved by EPA into a State implementation plan (SIP) under section 110 of the CAA;

(ii) The SIP imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits and provides that permits which do not conform to the operating permit program requirements and the requirements of EPA's underlying regulations may be deemed not "federally enforceable" by EPA;

(iii) The operating permit program requires that all emission limitations, controls, and other requirements imposed by such permits will be at least as stringent as any other applicable limitations and requirements contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the SIP, or that are otherwise "federally enforceable";

(iv) The limitations, controls, and requirements in the permit in question are permanent, quantifiable, and otherwise enforceable as a practical matter; and

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(v) The permit in question was issued only after adequate and timely notice and opportunity for comment for EPA and the public.

(7) Limitations and conditions in a State rule or program that has been approved by the EPA under subpart E of this part for the purposes of implementing and enforcing section 112; and

(8) Individual consent agreements that the EPA has legal authority to create.

Fixed capital cost means the capital needed to provide all the depreciable components of an existing source.

Force majeure means, for purposes of § 63.7, an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents the owner or operator from complying with the regulatory requirement to conduct performance tests within the specified timeframe despite the affected facility's best efforts to fulfill the obligation. Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility.

Fugitive emissions means those emissions from a stationary source that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Under section 112 of the Act, all fugitive emissions are to be considered in determining whether a stationary source is a major source.

Hazardous air pollutant means any air pollutant listed in or pursuant to section 112(b) of the Act.

Issuance of a part 70 permit will occur, if the State is the permitting authority, in accordance with the requirements of part 70 of this chapter and the applicable, approved State permit program. When the EPA is the permitting authority, issuance of a title V permit occurs immediately after the EPA takes final action on the final permit.

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, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence.

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Monitoring means the collection and use of measurement data or other information to control the operation of a process or pollution control device or to verify a work practice standard relative to assuring compliance with applicable requirements. Monitoring is composed of four elements:

(1) Indicator(s) of performance—the parameter or parameters you measure or observe for demonstrating proper operation of the pollution control measures or compliance with the applicable emissions limitation or standard. Indicators of performance may include direct or predicted emissions measurements (including opacity), operational parametric values that correspond to process or control device (and capture system) efficiencies or emissions rates, and recorded findings of inspection of work practice activities, materials tracking, or design characteristics. Indicators may be expressed as a single maximum or minimum value, a function of process variables (for example, within a range of pressure drops), a particular operational or work practice status (for example, a damper position, completion of a waste recovery task, materials tracking), or an interdependency between two or among more than two variables.

(2) Measurement techniques—the means by which you gather and record information of or about the indicators of performance. The components of the measurement technique include the detector type, location and installation specifications, inspection procedures,

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and quality assurance and quality control measures. Examples of measurement techniques include continuous emission monitoring systems, continuous opacity monitoring systems, continuous parametric monitoring systems, and manual inspections that include making records of process conditions or work practices.

(3) Monitoring frequency—the number of times you obtain and record monitoring data over a specified time interval. Examples of monitoring frequencies include at least four points equally spaced for each hour for continuous emissions or parametric monitoring systems, at least every 10 seconds for continuous opacity monitoring systems, and at least once per operating day (or week, month, etc.) for work practice or design inspections.

(4) Averaging time—the period over which you average and use data to verify proper operation of the pollution control approach or compliance with the emissions limitation or standard. Examples of averaging time include a 3-hour average in units of the emissions limitation, a 30-day rolling average emissions value, a daily average of a control device operational parametric range, and an instantaneous alarm.

New affected source means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory that is subject to a section 112(d) or other relevant standard for new sources. This definition of “new affected source,” and the criteria to be utilized in implementing it, shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002. Each relevant standard will define the term “new affected source,” which will be the same as the “affected source” unless a different collection is warranted based on consideration of factors including:

(1) Emission reduction impacts of controlling individual sources versus groups of sources;

(2) Cost effectiveness of controlling individual equipment;

(3) Flexibility to accommodate common control strategies;

(4) Cost/benefits of emissions averaging;

(5) Incentives for pollution prevention;

(6) Feasibility and cost of controlling processes that share common equipment (e.g., product recovery devices);

(7) Feasibility and cost of monitoring; and

(8) Other relevant factors.

New source means any affected source the construction or reconstruction of which is commenced after the Administrator first proposes a relevant emission standard under this part establishing an emission standard applicable to such source.

One-hour period, unless otherwise defined in an applicable subpart, means any 60-minute period commencing on the hour.

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. For continuous opacity monitoring systems, opacity means the fraction of incident light that is attenuated by an optical medium.

Owner or operator means any person who owns, leases, operates, controls, or supervises a stationary source.

Performance audit means a procedure to analyze blind samples, the content of which is known by the Administrator, simultaneously with the analysis of performance test samples in order to provide a measure of test data quality.

Performance evaluation means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

Performance test means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

Permit modification means a change to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661).

Permit program means a comprehensive State operating permit system established pursuant to title V of the Act (42 U.S.C. 7661) and regulations codified

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in part 70 of this chapter and applicable State regulations, or a comprehensive Federal operating permit system established pursuant to title V of the Act and regulations codified in this chapter.

Permit revision means any permit modification or administrative permit amendment to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661).

Permitting authority means: (1) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under part 70 of this chapter; or

(2) The Administrator, in the case of EPA-implemented permit programs under title V of the Act (42 U.S.C. 7661).

Pollution Prevention means *source reduction* as defined under the Pollution Prevention Act (42 U.S.C. 13101–13109). The definition is as follows:

(1) *Source reduction* is any practice that:

(i) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(ii) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

(2) The term *source reduction* includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in house-keeping, maintenance, training, or inventory control.

(3) The term *source reduction* does not include any practice that alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or oper-

ational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

Reconstruction, unless otherwise defined in a relevant standard, means the replacement of components of an affected or a previously nonaffected source to such an extent that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable new source; and

(2) It is technologically and economically feasible for the reconstructed source to meet the relevant standard(s) established by the Administrator (or a State) pursuant to section 112 of the Act. Upon reconstruction, an affected source, or a stationary source that becomes an affected source, is subject to relevant standards for new sources, including compliance dates, irrespective of any change in emissions of hazardous air pollutants from that source.

Regulation promulgation schedule means the schedule for the promulgation of emission standards under this part, established by the Administrator pursuant to section 112(e) of the Act and published in the FEDERAL REGISTER.

Relevant standard means:

(1) An emission standard;

(2) An alternative emission standard;

(3) An alternative emission limitation; or

(4) An equivalent emission limitation established pursuant to section 112 of the Act that applies to the collection of equipment, activities, or both regulated by such standard or limitation. A relevant standard may include or consist of a design, equipment, work practice, or operational requirement, or other measure, process, method, system, or technique (including prohibition of emissions) that the Administrator (or a State) establishes for new or existing sources to which such standard or limitation applies. Every relevant standard established pursuant

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to section 112 of the Act includes subpart A of this part, as provided by § 63.1(a)(4), and all applicable appendices of this part or of other parts of this chapter that are referenced in that standard.

Responsible official means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representative is approved in advance by the Administrator.

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(3) For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the EPA).

(4) For affected sources (as defined in this part) applying for or subject to a title V permit: "responsible official" shall have the same meaning as defined in part 70 or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever is applicable.

Run means one of a series of emission or other measurements needed to determine emissions for a representative operating period or cycle as specified in this part.

Shutdown means the cessation of operation of an affected source or portion of an affected source for any purpose.

Six-minute period means, with respect to opacity determinations, any one of the 10 equal parts of a 1-hour period.

Source at a Performance Track member facility means a major or area source located at a facility which has been accepted by EPA for membership in the Performance Track Program (as described at www.epa.gov/PerformanceTrack) and is still a member of the Program. The Performance Track Program is a voluntary program that encourages continuous environmental improvement through the use of environmental management systems, local community outreach, and measurable results.

Standard conditions means a temperature of 293 K (68 °F) and a pressure of 101.3 kilopascals (29.92 in. Hg).

Startup means the setting in operation of an affected source or portion of an affected source for any purpose.

State means all non-Federal authorities, including local agencies, interstate associations, and State-wide programs, that have delegated authority to implement: (1) The provisions of this part and/or (2) the permit program established under part 70 of this chapter. The term State shall have its conventional meaning where clear from the context.

Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant.

Test method means the validated procedure for sampling, preparing, and analyzing for an air pollutant specified in a relevant standard as the performance test procedure. The test method may include methods described in an appendix of this chapter, test methods incorporated by reference in this part, or methods validated for an application through procedures in Method 301 of appendix A of this part.

Title V permit means any permit issued, renewed, or revised pursuant to Federal or State regulations established to implement title V of the Act (42 U.S.C. 7661). A title V permit issued by a State permitting authority is called a part 70 permit in this part.

Visible emission means the observation of an emission of opacity or optical density above the threshold of vision.

Working day means any day on which Federal Government offices (or State government offices for a State that has

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obtained delegation under section 112(l)) are open for normal business. Saturdays, Sundays, and official Federal (or where delegated, State) holidays are not working days.

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16596, Apr. 5, 2002; 68 FR 32600, May 30, 2003; 69 FR 21752, Apr. 22, 2004; 72 FR 27443, May 16, 2007]

§ 63.3 Units and abbreviations.

Used in this part are abbreviations and symbols of units of measure. These are defined as follows:

(a) *System International (SI) units of measure:*

A = ampere
g = gram
Hz = hertz
J = joule
°K = degree Kelvin
kg = kilogram
l = liter
m = meter
m³ = cubic meter
mg = milligram = 10⁻³ gram
ml = milliliter = 10⁻³ liter
mm = millimeter = 10⁻³ meter
Mg = megagram = 10⁶ gram = metric ton
MJ = megajoule
mol = mole
N = newton
ng = nanogram = 10⁻⁹ gram
nm = nanometer = 10⁻⁹ meter
Pa = pascal
s = second
V = volt
W = watt
Ω = ohm
μg = microgram = 10⁻⁶ gram
μl = microliter = 10⁻⁶ liter

(b) *Other units of measure:*

Btu = British thermal unit
°C = degree Celsius (centigrade)
cal = calorie
cfm = cubic feet per minute
cc = cubic centimeter
cu ft = cubic feet
d = day
dcf = dry cubic feet
dcm = dry cubic meter
dscf = dry cubic feet at standard conditions
dscm = dry cubic meter at standard conditions
eq = equivalent
°F degree Fahrenheit
ft = feet
ft² = square feet
ft³ = cubic feet
gal = gallon
gr = grain
g-eq = gram equivalent
g-mole = gram mole

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hr = hour
in. = inch
in. H₂O = inches of water
K = 1,000
kcal = kilocalorie
lb = pound
lpm = liter per minute
meq = milliequivalent
min = minute
MW = molecular weight
oz = ounces
ppb = parts per billion
ppbw = parts per billion by weight
ppbv = parts per billion by volume
ppm = parts per million
ppmw = parts per million by weight
ppmv = parts per million by volume
psia = pounds per square inch absolute
psig = pounds per square inch gage
°R = degree Rankine
scf = cubic feet at standard conditions
scfh = cubic feet at standard conditions per hour
scm = cubic meter at standard conditions
scmm = cubic meter at standard conditions per minute
sec = second
sq ft = square feet
std = at standard conditions
v/v = volume per volume
yd² = square yards
yr = year

(c) *Miscellaneous:*

act = actual
avg = average
I.D. = inside diameter
M = molar
N = normal
O.D. = outside diameter
% = percent

[59 FR 12430, Mar. 16, 1994, as amended at 67 FR 16598, Apr. 5, 2002]

§ 63.4 Prohibited activities and circumvention.

(a) *Prohibited activities.* (1) No owner or operator subject to the provisions of this part must operate any affected source in violation of the requirements of this part. Affected sources subject to and in compliance with either an extension of compliance or an exemption from compliance are not in violation of the requirements of this part. An extension of compliance can be granted by the Administrator under this part; by a State with an approved permit program; or by the President under section 112(i)(4) of the Act.

(2) No owner or operator subject to the provisions of this part shall fail to keep records, notify, report, or revise reports as required under this part.

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as the performance test method (see definition of “test method” in § 63.2.

(3) Approval of major changes to monitoring under § 63.8(f) and as defined in § 63.90.

(4) Approval of major change to recordkeeping and reporting under § 63.10(e) and as defined in § 63.90.

§ 63.10042 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act (CAA), in § 63.2 (the General Provisions), and in this section as follows:

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

Anthracite coal means solid fossil fuel classified as anthracite coal by American Society of Testing and Materials (ASTM) Method D388-05, “Standard Classification of Coals by Rank” (incorporated by reference, see § 63.14).

Bituminous coal means coal that is classified as bituminous according to ASTM Method D388-05, “Standard Classification of Coals by Rank” (incorporated by reference, see § 63.14).

Boiler operating day means a 24-hour period between midnight and the following midnight during which any fuel is combusted at any time in the steam generating unit. It is not necessary for the fuel to be combusted the entire 24-hour period.

Capacity factor for a liquid oil-fired EGU means the total annual heat input from oil divided by the product of maximum hourly heat input for the EGU, regardless of fuel, multiplied by 8,760 hours.

Coal means all solid fuels classifiable as anthracite, bituminous, sub-bituminous, or lignite by ASTM Method D388-05, “Standard Classification of Coals by Rank” (incorporated by reference, see § 63.14), and coal refuse. Synthetic fuels derived from coal for the purpose of creating useful heat including but not limited to, coal derived gases (not meeting the definition of natural gas), solvent-refined coal, coal-oil mixtures, and coal-water mixtures,

are considered “coal” for the purposes of this subpart.

Coal-fired electric utility steam generating unit means an electric utility steam generating unit meeting the definition of “fossil fuel-fired” that burns coal for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year.

Coal refuse means any by-product of coal mining, physical coal cleaning, and coal preparation operations (e.g., culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material with an ash content greater than 50 percent (by weight) and a heating value less than 13,900 kilojoules per kilogram (6,000 Btu per pound) on a dry basis.

Cogeneration means a steam-generating unit that simultaneously produces both electrical and useful thermal (or mechanical) energy from the same primary energy source.

Cogeneration unit means a stationary, fossil fuel-fired EGU meeting the definition of “fossil fuel-fired” or stationary, integrated gasification combined cycle:

(1) Having equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy; and

(2) Producing during the 12-month period starting on the date the unit first produces electricity and during any calendar year after which the unit first produces electricity:

(i) For a topping-cycle cogeneration unit,

(A) Useful thermal energy not less than 5 percent of total energy output; and

(B) Useful power that, when added to one-half of useful thermal energy produced, is not less than 42.5 percent of total energy input, if useful thermal energy produced is 15 percent or more of total energy output, or not less than 45 percent of total energy input, if useful thermal energy produced is less than 15 percent of total energy output.

(ii) For a bottoming-cycle cogeneration unit, useful power not less than 45 percent of total energy input.

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(3) Provided that the total energy input under paragraphs (2)(i)(B) and (2)(ii) of this definition shall equal the unit's total energy input from all fuel except biomass if the unit is a boiler.

Combined-cycle gas stationary combustion turbine means a stationary combustion turbine system where heat from the turbine exhaust gases is recovered by a waste heat boiler.

Common stack means the exhaust of emissions from two or more affected units through a single flue.

Continental liquid oil-fired subcategory means any oil-fired electric utility steam generating unit that burns liquid oil and is located in the continental United States.

Deviation. (1) *Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(i) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limit, operating limit, work practice standard, or monitoring requirement; or

(ii) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

(2) A deviation is not always a violation. The determination of whether a deviation constitutes a violation of the standard is up to the discretion of the entity responsible for enforcement of the standards.

Distillate oil means fuel oils, including recycled oils, that comply with the specifications for fuel oil numbers 1 and 2, as defined by ASTM Method D396–10, “Standard Specification for Fuel Oils” (incorporated by reference, see § 63.14).

Dry flue gas desulfurization technology, or *dry FGD*, or *spray dryer absorber (SDA)*, or *spray dryer*, or *dry scrubber* means an add-on air pollution control system located downstream of the steam generating unit that injects a dry alkaline sorbent (dry sorbent injection) or sprays an alkaline sorbent slurry (spray dryer) to react with and neutralize acid gases such as SO₂ and HCl in the exhaust stream forming a dry powder material. Alkaline sorbent

injection systems in fluidized bed combustors (FBC) or circulating fluidized bed (CFB) boilers are included in this definition.

Dry sorbent injection (DSI) means an add-on air pollution control system in which sorbent (e.g., conventional activated carbon, brominated activated carbon, Trona, hydrated lime, sodium carbonate, etc.) is injected into the flue gas stream upstream of a PM control device to react with and neutralize acid gases (such as SO₂ and HCl) or Hg in the exhaust stream forming a dry powder material that may be removed in a primary or secondary PM control device.

Electric Steam generating unit means any furnace, boiler, or other device used for combusting fuel for the purpose of producing steam (including fossil-fuel-fired steam generators associated with integrated gasification combined cycle gas turbines; nuclear steam generators are not included) for the purpose of powering a generator to produce electricity or electricity and other thermal energy.

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

Emission limitation means any emissions limit, work practice standard, or operating limit.

Excess emissions means, with respect to this subpart, results of any required measurements outside the applicable range (e.g., emissions limitations, parametric operating limits) that is permitted by this subpart. The values of measurements will be in the same units and averaging time as the values specified in this subpart for the limitations.

Federally enforceable means all limitations and conditions that are enforceable by the Administrator, including the requirements of 40 CFR parts 60, 61, and 63; requirements within any

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applicable state implementation plan; and any permit requirements established under 40 CFR 52.21 or under 40 CFR 51.18 and 40 CFR 51.24.

Flue gas desulfurization system means any add-on air pollution control system located downstream of the steam generating unit whose purpose or effect is to remove at least 50 percent of the SO₂ in the exhaust gas stream.

Fossil fuel means natural gas, oil, coal, and any form of solid, liquid, or gaseous fuel derived from such material.

Fossil fuel-fired means an electric utility steam generating unit (EGU) that is capable of combusting more than 25 MW of fossil fuels. To be “capable of combusting” fossil fuels, an EGU would need to have these fuels allowed in its operating permit and have the appropriate fuel handling facilities on-site or otherwise available (e.g., coal handling equipment, including coal storage area, belts and conveyers, pulverizers, etc.; oil storage facilities). In addition, fossil fuel-fired means any EGU that fired fossil fuels for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year after the applicable compliance date.

Fuel type means each category of fuels that share a common name or classification. Examples include, but are not limited to, bituminous coal, subbituminous coal, lignite, anthracite, biomass, and residual oil. Individual fuel types received from different suppliers are not considered new fuel types.

Fluidized bed boiler, or *fluidized bed combustor*, or *circulating fluidized boiler*, or *CFB* means a boiler utilizing a fluidized bed combustion process.

Fluidized bed combustion means a process where a fuel is burned in a bed of granulated particles which are maintained in a mobile suspension by the upward flow of air and combustion products.

Gaseous fuel includes, but is not limited to, natural gas, process gas, landfill gas, coal derived gas, solid oil-derived gas, refinery gas, and biogas.

Generator means a device that produces electricity.

Gross output means the gross useful work performed by the steam generated and, for an IGCC electric utility steam generating unit, the work performed by the stationary combustion turbines. For a unit generating only electricity, the gross useful work performed is the gross electrical output from the unit’s turbine/generator sets. For a cogeneration unit, the gross useful work performed is the gross electrical output, including any such electricity used in the power production process (which process includes, but is not limited to, any on-site processing or treatment of fuel combusted at the unit and any on-site emission controls), or mechanical output plus 75 percent of the useful thermal output measured relative to ISO conditions that is not used to generate additional electrical or mechanical output or to enhance the performance of the unit (i.e., steam delivered to an industrial process).

Heat input means heat derived from combustion of fuel in an EGU (synthetic gas for an IGCC) and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources such as gas turbines, internal combustion engines, etc.

Integrated gasification combined cycle electric utility steam generating unit or *IGCC* means an electric utility steam generating unit meeting the definition of “fossil fuel-fired” that burns a synthetic gas derived from coal and/or solid oil-derived fuel for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year in a combined-cycle gas turbine. No solid coal or solid oil-derived fuel is directly burned in the unit during operation.

ISO conditions means a temperature of 288 Kelvin, a relative humidity of 60 percent, and a pressure of 101.3 kilopascals.

Lignite coal means coal that is classified as lignite A or B according to ASTM Method D388-05, “Standard Classification of Coals by Rank” (incorporated by reference, see § 63.14).

Limited-use liquid oil-fired subcategory means an oil-fired electric utility

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steam generating unit with an annual capacity factor of less than 8 percent of its maximum or nameplate heat input, whichever is greater, averaged over a 24-month block contiguous period commencing April 16, 2015.

Liquid fuel includes, but is not limited to, distillate oil and residual oil.

Monitoring system malfunction or out of control period means any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Natural gas means a naturally occurring fluid mixture of hydrocarbons (e.g., methane, ethane, or propane) produced in geological formations beneath the Earth's surface that maintains a gaseous state at standard atmospheric temperature and pressure under ordinary conditions. Natural gas contains 20.0 grains or less of total sulfur per 100 standard cubic feet. Additionally, natural gas must either be composed of at least 70 percent methane by volume or have a gross calorific value between 950 and 1,100 Btu per standard cubic foot. Natural gas does not include the following gaseous fuels: landfill gas, digester gas, refinery gas, sour gas, blast furnace gas, coal-derived gas, producer gas, coke oven gas, or any gaseous fuel produced in a process which might result in highly variable sulfur content or heating value.

Natural gas-fired electric utility steam generating unit means an electric utility steam generating unit meeting the definition of "fossil fuel-fired" that is not a coal-fired, oil-fired, or IGCC electric utility steam generating unit and that burns natural gas for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year.

Net-electric output means the gross electric sales to the utility power distribution system minus purchased power on a calendar year basis.

Non-continental area means the State of Hawaii, the Virgin Islands, Guam, American Samoa, the Commonwealth of Puerto Rico, or the Northern Mariana Islands.

Non-continental liquid oil-fired subcategory means any oil-fired electric utility steam generating unit that burns liquid oil and is located outside the continental United States.

Non-mercury (Hg) HAP metals means Antimony (Sb), Arsenic (As), Beryllium (Be), Cadmium (Cd), Chromium (Cr), Cobalt (Co), Lead (Pb), Manganese (Mn), Nickel (Ni), and Selenium (Se).

Oil means crude oil or petroleum or a fuel derived from crude oil or petroleum, including distillate and residual oil, solid oil-derived fuel (e.g., petroleum coke) and gases derived from solid oil-derived fuels (not meeting the definition of natural gas).

Oil-fired electric utility steam generating unit means an electric utility steam generating unit meeting the definition of "fossil fuel-fired" that is not a coal-fired electric utility steam generating unit and that burns oil for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year.

Particulate matter or *PM* means any finely divided solid material as measured by the test methods specified under this subpart, or an alternative method.

Pulverized coal (PC) boiler means an EGU in which pulverized coal is introduced into an air stream that carries the coal to the combustion chamber of the EGU where it is fired in suspension.

Residual oil means crude oil, and all fuel oil numbers 4, 5 and 6, as defined by ASTM Method D396–10, "Standard Specification for Fuel Oils" (incorporated by reference, see § 63.14).

Responsible official means responsible official as defined in 40 CFR 70.2.

Shutdown means the cessation of operation of a boiler for any purpose. Shutdown begins either when none of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on-site use), or at the point of no fuel being fired in the boiler, whichever is earlier. Shutdown ends when there is both no electricity being generated and no fuel being fired in the boiler.

Startup means either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing

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of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on-site use).

Stationary combustion turbine means all equipment, including but not limited to the turbine, the fuel, air, lubrication and exhaust gas systems, control systems (except emissions control equipment), and any ancillary components and sub-components comprising any simple cycle stationary combustion turbine, any regenerative/recuperative cycle stationary combustion turbine, the combustion turbine portion of any stationary cogeneration cycle combustion system, or the combustion turbine portion of any stationary combined cycle steam/electric generating system. Stationary means that the combustion turbine is not self propelled or intended to be propelled while performing its function. Stationary combustion turbines do not include turbines located at a research or laboratory facility, if research is conducted on the turbine itself and the turbine is not being used to power other applications at the research or laboratory facility.

Steam generating unit means any furnace, boiler, or other device used for combusting fuel for the purpose of producing steam (including fossil-fuel-fired steam generators associated with integrated gasification combined cycle gas turbines; nuclear steam generators are not included).

Stoker means a unit consisting of a mechanically operated fuel feeding mechanism, a stationary or moving grate to support the burning of fuel and admit undergrate air to the fuel, an overfire air system to complete combustion, and an ash discharge system. There are two general types of stokers: underfeed and overfeed. Overfeed stokers include mass feed and spreader stokers.

Subbituminous coal means coal that is classified as subbituminous A, B, or C according to ASTM Method D388-05, "Standard Classification of Coals by Rank" (incorporated by reference, see § 63.14).

Unit designed for coal > 8,300 Btu/lb subcategory means any coal-fired EGU

that is not a coal-fired EGU in the "unit designed for low rank virgin coal" subcategory.

Unit designed for low rank virgin coal subcategory means any coal-fired EGU that is designed to burn and that is burning nonagglomerating virgin coal having a calorific value (moist, mineral matter-free basis) of less than 19,305 kJ/kg (8,300 Btu/lb) that is constructed and operates at or near the mine that produces such coal.

Unit designed to burn solid oil-derived fuel subcategory means any oil-fired EGU that burns solid oil-derived fuel.

Voluntary consensus standards or VCS mean technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The EPA/OAQPS has by precedent only used VCS that are written in English. Examples of VCS bodies are: American Society of Testing and Materials (ASTM), American Society of Mechanical Engineers (ASME), International Standards Organization (ISO), Standards Australia (AS), British Standards (BS), Canadian Standards (CSA), European Standard (EN or CEN) and German Engineering Standards (VDI). The types of standards that are not considered VCS are standards developed by: the U.S. states, e.g., California (CARB) and Texas (TCEQ); industry groups, such as American Petroleum Institute (API), Gas Processors Association (GPA), and Gas Research Institute (GRI); and other branches of the U.S. government, e.g., Department of Defense (DOD) and Department of Transportation (DOT). This does not preclude EPA from using standards developed by groups that are not VCS bodies within an EPA rule. When this occurs, EPA has done searches and reviews for VCS equivalent to these non-VCS methods.

Wet flue gas desulfurization technology, or wet FGD, or wet scrubber means any add-on air pollution control device that is located downstream of the steam generating unit that mixes an aqueous stream or slurry with the exhaust gases from an EGU to control emissions of PM and/or to absorb and neutralize acid gases, such as SO₂ and HCl.

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Work practice standard means any design, equipment, work practice, or operational standard, or combination

thereof, which is promulgated pursuant to CAA section 112(h).

[77 FR 9464, Feb. 16, 2012, as amended at 77 FR 23405, Apr. 19, 2012]

TABLE 1 TO SUBPART UUUUU OF PART 63—EMISSION LIMITS FOR NEW OR RECONSTRUCTED EGUS

As stated in §63.9991, you must comply with the following applicable emission limits:

If your EGU is in this subcategory . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (e.g., specified sampling volume or test run duration) and limitations with the test methods in Table . . .
1. Coal-fired unit not low rank virgin coal.	a. Filterable particulate matter (PM). OR Total non-Hg HAP metals OR individual HAP metals: Antimony (Sb) Arsenic (As) Beryllium (Be) Cadmium (Cd) Chromium (Cr) Cobalt (Co) Lead (Pb) Manganese (Mn) Nickel (Ni) Selenium (Se) b. Hydrogen chloride (HCl) ... OR. Sulfur dioxide (SO ₂) ³ c. Mercury (Hg)	7.0E–3 lb/MWh ¹ OR 6.0E–2 lb/GWh OR 8.0E–3 lb/GW. 3.0E–3 lb/GWh. 6.0E–4 lb/GWh. 4.0E–4 lb/GWh. 7.0E–3 lb/GWh. 2.0E–3 lb/GWh. 2.0E–3 lb/GWh. 4.0E–3 lb/GWh. 4.0E–2 lb/GWh. 6.0E–3 lb/GWh. 4.0E–4 lb/MWh 4.0E–1 lb/MWh 2.0E–4 lb/GWh	Collect a minimum of 4 dscm per run. Collect a minimum of 4 dscm per run. Collect a minimum of 3 dscm per run. For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 ² or Method 320, sample for a minimum of 1 hour. SO ₂ CEMS. Hg CEMS or sorbent trap monitoring system only.
2. Coal-fired units low rank virgin coal.	a. Filterable particulate matter (PM). OR Total non-Hg HAP metals OR Individual HAP metals: Antimony (Sb) Arsenic (As) Beryllium (Be) Cadmium (Cd) Chromium (Cr) Cobalt (Co) Lead (Pb) Manganese (Mn) Nickel (Ni) Selenium (Se) b. Hydrogen chloride (HCl) ... OR Sulfur dioxide (SO ₂) ³	7.0E–3 lb/MWh ¹ OR 6.0E–2 lb/GWh OR 8.0E–3 lb/GWh. 3.0E–3 lb/GWh. 6.0E–4 lb/GWh. 4.0E–4 lb/GWh. 7.0E–3 lb/GWh. 2.0E–3 lb/GWh. 2.0E–3 lb/GWh. 4.0E–3 lb/GWh. 4.0E–2 lb/GWh. 6.0E–3 lb/GWh. 4.0E–4 lb/MWh 4.0E–1 lb/MWh	Collect a minimum of 4 dscm per run. Collect a minimum of 4 dscm per run. Collect a minimum of 3 dscm per run. For Method 26A, collect a minimum of 3 dscm per run. For ASTM D6348–03 ² or Method 320, sample for a minimum of 1 hour. SO ₂ CEMS.

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If your EGU is in this sub-category . . .	For the following pollutants . . .	You must meet the following emission limits and work practice standards . . .	Using these requirements, as appropriate (e.g., specified sampling volume or test run duration) and limitations with the test methods in Table 5 . . .
	Selenium (Se)	1.2E0 lb/TBtu or 2.0E–2 lb/GWh.	
	b. Hydrogen chloride (HCl)	5.0E–3 lb/MMBtu or 8.0E–2 lb/MWh.	For Method 26A, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run.
	OR		For ASTM D6348–03 ³ or Method 320, sample for a minimum of 1 hour.
	Sulfur dioxide (SO ₂) ⁴	3.0E–1 lb/MMBtu or 2.0E0 lb/MWh.	SO ₂ CEMS.
	c. Mercury (Hg)	2.0E–1 lb/TBtu or 2.0E–3 lb/GWh.	LEE Testing for 30 days with 10 days maximum per Method 30B run or Hg CEMS or Sorbent trap monitoring system only.

¹ For LEE emissions testing for total PM, total HAP metals, individual HAP metals, HCl, and HF, the required minimum sampling volume must be increased nominally by a factor of two.

² Gross electric output.

³ Incorporated by reference, see § 63.14.

⁴ You may not use the alternate SO₂ limit if your EGU does not have some form of FGD system and SO₂ CEMS installed.

[77 FR 23405, Apr. 19, 2012]

TABLE 3 TO SUBPART UUUUU OF PART 63—WORK PRACTICE STANDARDS

As stated in §§ 63.9991, you must comply with the following applicable work practice standards:

If your EGU is . . .	You must meet the following . . .
1. An existing EGU	Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).
2. A new or reconstructed EGU	Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).
3. A coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGU during startup.	You must operate all CMS during startup. Startup means either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on site use). For startup of a unit, you must use clean fuels, either natural gas or distillate oil or a combination of clean fuels for ignition. Once you convert to firing coal, residual oil, or solid oil-derived fuel, you must engage all of the applicable control technologies except dry scrubber and SCR. You must start your dry scrubber and SCR systems, if present, appropriately to comply with relevant standards applicable during normal operation. You must comply with all applicable emissions limits at all times except for periods that meet the definitions of startup and shutdown in this subpart. You must keep records during periods of startup. You must provide reports concerning activities and periods of startup, as specified in § 63.10011(g) and § 63.10021(h) and (i).

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If your EGU is . . .	You must meet the following . . .
4. A coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGU during shutdown.	You must operate all CMS during shutdown. Shutdown means the cessation of operation of a boiler for any purpose. Shutdown begins either when none of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on-site use) or at the point of no fuel being fired in the boiler. Shutdown ends when there is both no electricity being generated and no fuel being fired in the boiler. During shutdown, you must operate all applicable control technologies while firing coal, residual oil, or solid oil-derived fuel. You must comply with all applicable emissions limits at all times except for periods that meet the definitions of startup and shutdown in this subpart. You must keep records during periods of startup. You must provide reports concerning activities and periods of startup, as specified in §63.10011(g) and §63.10021(h) and (i).

TABLE 4 TO SUBPART UUUUU OF PART 63—OPERATING LIMITS FOR EGUS

As stated in §63.9991, you must comply with the applicable operating limits:

If you demonstrate compliance using . . .	You must meet these operating limits . . .
1. PM CPMS	Maintain the 30-boiler operating day rolling average PM CPMS output at or below the highest 1-hour average measured during the most recent performance test demonstrating compliance with the filterable PM, total non-mercury HAP metals (total HAP metals, for liquid oil-fired units), or individual non-mercury HAP metals (individual HAP metals including Hg, for liquid oil-fired units) emissions limitation(s).

TABLE 5 TO SUBPART UUUUU OF PART 63—PERFORMANCE TESTING REQUIREMENTS

As stated in §63.10007, you must comply with the following requirements for performance testing for existing, new or reconstructed affected sources:¹

To conduct a performance test for the following pollutant . . .	Using . . .	You must perform the following activities, as applicable to your input- or output-based emission limit . . .	Using ² . . .
1. Filterable Particulate matter (PM).	Emissions Testing ..	a. Select sampling ports location and the number of traverse points. b. Determine velocity and volumetric flow-rate of the stack gas. c. Determine oxygen and carbon dioxide concentrations of the stack gas. d. Measure the moisture content of the stack gas. e. Measure the filterable PM concentration. f. Convert emissions concentration to lb/MMBtu or lb/MWh emissions rates.	Method 1 at Appendix A–1 to part 60 of this chapter. Method 2, 2A, 2C, 2F, 2G or 2H at Appendix A–1 or A–2 to part 60 of this chapter. Method 3A or 3B at Appendix A–2 to part 60 of this chapter, or ANSI/ASME PTC 19.10–1981. ³ Method 4 at Appendix A–3 to part 60 of this chapter. Method 5 at Appendix A–3 to part 60 of this chapter. For positive pressure fabric filters, Method 5D at Appendix A–3 to part 60 of this chapter for filterable PM emissions. Note that the Method 5 front half temperature shall be 160 ° ± 14 °C (320 ° ± 25 °F). Method 19 F-factor methodology at Appendix A–7 to part 60 of this chapter, or calculate using mass emissions rate and electrical output data (see §63.10007(e)).
	OR PM CEMS	OR a. Install, certify, operate, and maintain the PM CEMS. b. Install, certify, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems.	Performance Specification 11 at Appendix B to part 60 of this chapter and Procedure 2 at Appendix F to Part 60 of this chapter. Part 75 of this chapter and §§63.10010(a), (b), (c), and (d).

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1127 (and consolidated cases)

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

MURRAY ENERGY CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

**On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
81 Fed. Reg. 24,420 (Apr. 25, 2016)**

OPENING BRIEF OF STATE AND INDUSTRY PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and Amici Curiae

These cases involve the following parties:

Petitioners:

No. 16-1127: Murray Energy Corporation.

No. 16-1175: ARIPPA.

No. 16-1204: Michigan Attorney General Bill Schuette, on behalf of the People of Michigan; State of Alabama; State of Arizona; State of Arkansas; State of Kansas; Commonwealth of Kentucky; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of West Virginia; State of Wisconsin; State of Wyoming; Texas Commission on Environmental Quality; Public Utility Commission of Texas; and Railroad Commission of Texas.

No. 16-1206: Oak Grove Management Company LLC.

No. 16-1208: Southern Company Services, Inc.; Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company.

No. 16-1210: Utility Air Regulatory Group.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 16-1175, 16-1204, 16-1208, and 16-1210) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 16-1127 and 16-1206).

Intervenors and *Amici Curiae*:

Conservation Law Foundation; Environmental Defense Fund; Natural Resources Council of Maine; The Ohio Environmental Council; Sierra Club; Commonwealth of Massachusetts; Commonwealth of Virginia; State of California; State of Connecticut; State of Delaware; State of Iowa; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; Washington, the District of Columbia; City of Baltimore; City of Chicago; City of New York; County of Erie, New York; American Lung Association; American Public Health Association; Chesapeake Bay Foundation; Chesapeake Climate Action Network; Citizens for Pennsylvania's Future; Clean Air Council; Downwinders at Risk; Environmental Integrity Project; National Association for the Advancement of Colored People; Natural Resources Defense Council; Physicians for Social Responsibility; Calpine Corporation; and Exelon Corporation are Intervenors in support of Respondents.

There are no Intervenors in support of Petitioners.

The Institute for Policy Integrity at New York University School of Law is *amicus curiae* in support of Respondents.

There are no *amicus curiae* in support of Petitioners.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, “Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units,” and published on April 25, 2016, at 81 Fed. Reg. 24,420.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of the following related case that, as of the time of filing, has appeared before this Court:

(1) *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev’d*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 12-1100 and consolidated Nos. 12-1101, 12-1102, 12-1147, 12-1170, 12-1172, 12-1173, 12-1174, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1194, 12-1195, 12-1196).

Counsel is aware of the following related case that, as of the time of filing, is currently before this Court:

(1) *ARIPPA v. EPA*, No. 15-1180 (and consolidated Nos. 15-1191 and 15-1192) regarding EPA’s “Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards; Notice of Final Action Denying Petitions for Reconsideration,” 80 Fed. Reg. 24,218 (Apr. 30, 2015).

Recognizing the relationship between the instant case and *ARIPPA*, this Court has ordered that the two cases be scheduled for argument on the same day and before the same panel. Order at 2, *ARIPPA v. EPA*, No. 15-1180, and *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Aug. 29, 2016), ECF No. 1632520.

Counsel is aware of the following related cases that, as of the time of filing, have appeared before the United States Supreme Court:

- (1) *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46).
- (2) *Utility Air Regulatory Grp. v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-47, consolidated with No. 14-46).
- (3) *Nat’l Mining Ass’n v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-49, consolidated with No. 14-46).

CORPORATE DISCLOSURE STATEMENTS

Non-governmental Petitioners submit the following statements pursuant to

Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

Alabama Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Alabama Power Company's stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally-friendly circulating fluidized bed boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Georgia Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Georgia Power Company's stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

Gulf Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Gulf Power Company's stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

Mississippi Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Mississippi Power Company's stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

Murray Energy Corporation has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. Murray Energy Corporation

is the largest privately-held coal company and the largest underground coal mine operator in the United States, with combined operations that currently produce and ship about eighty-seven (87) million tons of bituminous coal annually.

Oak Grove Management Company, LLC is a wholly owned subsidiary of Vistra Asset Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Vistra Operations Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Vistra Intermediate Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Vistra Energy Corp., which is a publicly held corporation. Vistra Energy Corp. is traded publicly on the OTCQX market under the symbol “VSTE.” Apollo Management Holdings L.P., Brookfield Asset Management Private Institutional Capital Adviser (Canada), L.P., and Oaktree Capital Management, L.P. are publicly held entities and each have subsidiaries that own more than 10% of Vistra Energy Corp.’s stock.

Southern Company Services, Inc. is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Southern Company Services, Inc.’s stock. No publicly-held company holds 10% or more of Southern Company’s stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol “SO.”

Utility Air Regulatory Group (“UARG”) is a not-for-profit association of individual electric generating companies and national trade associations. UARG participates on behalf of certain of its members collectively in Clean Air Act administrative proceedings that affect electric generators and in litigation arising from those proceedings. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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GLOSSARY OF TERMS

Act (or CAA)	Clean Air Act
EGU	Electric Generating Unit
EPA (or Agency)	United States Environmental Protection Agency
GW	Gigawatts
HAP	Hazardous Air Pollutant
JA	Joint Appendix
MATS	Mercury and Air Toxics Standards, 77 Fed. Reg. 9304 (Feb. 16, 2012)
NAAQS	National Ambient Air Quality Standards
PM _{2.5}	Fine Particulate Matter
RIA	Regulatory Impact Analysis
Rule	Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units; Final Rule, 81 Fed. Reg. 24,420 (Apr. 25, 2016)
SO ₂	Sulfur Dioxide
UARG	Utility Air Regulatory Group

JURISDICTIONAL STATEMENT

These consolidated cases challenge a final action of the U.S. Environmental Protection Agency (“EPA” or “Agency”) under the Clean Air Act (“CAA” or “Act”), published at 81 Fed. Reg. 24,420 (Apr. 25, 2016) (the “Rule”), Joint Appendix (“JA”) ____-____. This Court has jurisdiction under CAA § 307(b)(1).¹ Petitions for review were timely filed.

STATEMENT OF ISSUES

The Supreme Court held in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), that EPA must consider cost in determining whether it is “appropriate and necessary” to regulate emissions of hazardous air pollutants (“HAPs”) from electric generating units (“EGUs”) under § 112 of the Act. The Rule consists of EPA’s supplemental finding that such regulation is appropriate and necessary, notwithstanding estimated quantifiable annual costs of \$9.6 billion and benefits of \$4 to \$6 million.

1. Whether EPA’s “preferred approach,” under which EPA finds that § 112 regulation is appropriate and necessary if it is affordable for the industry as a whole, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

2. Whether EPA’s alternative “formal benefit-cost analysis,” which relies on the “co-benefits” of incidental reductions of non-HAPs to justify the \$9.6 billion

¹ The Table of Authorities provides parallel citations to the U.S. Code.

annual cost of regulating EGU HAPs under § 112, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

3. Whether EPA's refusal to consider alternative strategies in lieu of regulating EGUs under § 112 and to consider *all* relevant costs and disadvantages, is contrary to *Michigan* and § 112(n)(1)(A), and is otherwise arbitrary, capricious, or unlawful.

STATUTES AND REGULATIONS

This case involves EPA's finding made pursuant to a claim of authority under CAA § 112(n)(1)(A). The addendum reproduces pertinent portions of cited statutes and regulations.

INTRODUCTION

There is no escaping these facts: the most expensive rulemaking in EPA's history—costing at least \$9.6 billion annually by EPA's estimation—would result in a paltry \$4 to \$6 million in purported public health benefits from reducing the pollutants it aims to address. In its previous attempt to justify regulating EGUs under § 112, EPA sought to avoid these inconvenient facts by asserting that costs do not matter at all under § 112(n)(1)(A). The Supreme Court emphatically rejected EPA's position, admonishing that “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Michigan*, 135 S. Ct. at 2707.

Instead of developing a thoughtful comparison of costs and benefits on remand, EPA fell back on its prior determination of small, uncertain, and largely unquantifiable benefits associated with regulation of HAPs² under § 112 and concluded those benefits are justified so long as the industry can afford to spend \$9.6 billion on this regulation annually. But affordability cannot satisfy the Supreme Court's direction that EPA weigh benefits and costs to ensure they are not disproportionate. *Id.* at 2707 (“No regulation is ‘appropriate’ if it does significantly more harm than good.”). In fact, EPA never examined whether the benefits of regulation under § 112 outweigh the substantial costs. EPA did not ask whether it is “even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for” the particular benefits it identified. *Id.* And it did not ask whether \$9.6 billion annual costs are “disproportionate to the[se particular] benefits.” *Id.* at 2710.

EPA alternatively relies on the co-benefits of reducing a non-HAP—fine particulate matter (“PM_{2.5}”), which in turn would result from mandating reductions in another non-HAP: sulfur dioxide (“SO₂”)—to justify the costs of regulating EGU HAPs under § 112. But the benefit-cost analysis EPA cites, which was developed for the original rulemaking, shows unequivocally that the costs dwarf the benefits attributable to reducing the regulated pollutants (i.e., the HAPs). EPA cannot properly

² In this brief, “HAPs” refers to substances listed under § 112(b).

conclude that it is “appropriate and necessary” to regulate HAPs under § 112 if virtually all the benefits of doing so derive from incidental reductions in non-HAPs that are regulated under numerous other CAA programs.

STATEMENT OF THE CASE

I. The Clean Air Act’s Regulation of HAPs

A. Section 112 Program Prior to 1990

Prior to 1990, § 112 required EPA to identify hazardous substances for regulation and develop emission standards for each to provide an “ample margin of safety” to protect public health. Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685 (1970); 42 U.S.C. § 1857c-7(a)(1), (b)(1)(B) (1970). EPA interpreted the phrase “ample margin of safety” to authorize a risk management decision considering “all health information ... as well as other relevant factors including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.” 54 Fed. Reg. 38,044, 38,045 (Sept. 14, 1989), JA____.

EPA listed eight hazardous substances and regulated seven of them before 1990, for a limited number of source categories. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). In part because emissions of these substances comprise a minuscule percentage of overall EGU emissions, every EPA evaluation of EGUs before 1990 under the “ample margin of safety” standard concluded their hazardous-substance emissions did not pose a significant public health risk. *See, e.g.*, 40 Fed. Reg. 48,292, 48,297, 48,298 (Oct. 14, 1975) (examining EGU mercury emissions), JA____,

____; 52 Fed. Reg. 8724, 8725 (Mar. 19, 1987) (same), JA____; 54 Fed. Reg. 51,654, 51,671-72 (Dec. 15, 1989) (radionuclides), JA____-____.

Over this same period, other CAA programs required EGUs to install controls for a variety of conventional (non-hazardous) pollutants, including flue gas desulfurization systems (known as “scrubbers”) for SO₂ emissions and fabric filters or electrostatic precipitators for particulate matter emissions. Hazardous substances emitted during EGU combustion were also “incident[ally]” reduced by these controls.³

B. Section 112 Program After the 1990 CAA Amendments

In 1990, Congress amended the CAA to substantially broaden the scope of substances to be addressed under § 112 and also transformed § 112 from a strictly health-based program to a control technology-driven program. S. Rep. No. 101-228, at 131-33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516-18, JA____-____; *New Jersey*, 517 F.3d at 578. Congress listed 189 HAPs, CAA § 112(b)(1), and required EPA to regulate any source category containing at least one source that emits more than either 10 tons per year of any one HAP or 25 tons per year of all HAPs, *id.* § 112(a)(1), (c)(1).

³ EPA, The Benefits and Costs of the Clean Air Act, 1970 to 1990, at 39 (Oct. 1997), <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1970-1990-retrospective-study>, JA____.

For listed categories, Congress directed EPA initially to promulgate “technology-based” emission standards under § 112(d), which are set at the levels of control achieved by the best performers in the category. *Id.* § 112(d)(2), (3). It directed EPA to later consider more stringent standards under § 112(f) if needed to protect public health with an “ample margin of safety.”

Congress in 1990 also enacted significant additional requirements to reduce EGU emissions of conventional pollutants (i.e., non-HAPs), such as SO₂, nitrogen oxides, and PM. These programs included the regional haze and acid rain programs, and imposed new criteria pollutant nonattainment requirements. These programs reduced EGU emissions of non-HAP, conventional pollutants by many millions of tons. The additional controls EGUs installed to comply with these programs also lowered EGU HAP emissions beyond already low, pre-1990 levels.⁴

Congress was concerned that regulating EGUs under § 112 also “would increase power rates, while potentially providing little or no public health benefit.” 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms), JA____. Indeed, EPA reported to Congress that regulating EGUs under § 112 “may result in several billion dollars of unnecessary costs with unknown environmental benefits.”

⁴ See National Acid Precipitation Assessment Program, National Acid Precipitation Assessment Program Report to Congress 2011: An Integrated Assessment (Dec. 2011), www.whitehouse.gov/sites/default/files/microsites/ostp/2011_napap_508.pdf, JA____-____.

Letter from William K. Reilly, Adm'r, EPA, to Members of the Senate (Jan. 26, 1990) (“Administrator 1990 Letter to Senate”), JA____. The Agency also warned that doing so would cost “billions of dollars” and yield only “very marginal environmental benefit.”⁵

To address the fact that Congress adopted in 1990 in other parts of the Act several comprehensive new programs to reduce EGU emissions, and recognizing the cost-benefit imbalance of further constraining EGU HAP emissions, Congress enacted an EGU-specific regulatory threshold: § 112(n)(1). Pub. L. No. 101-549, 104 Stat. 2399, 2558-59 (1990), JA____-____. That provision instructs EPA to conduct “a study of the hazards to public health reasonably anticipated to occur as a result of [the EGU HAP] emissions” that remain “*after* imposition of the [other] requirements of this [Act].” CAA § 112(n)(1)(A) (emphasis added). As part of that evaluation (commonly known as the “Utility Study”), EPA must “develop and describe ... alternative control strategies for [any HAP] emissions which may warrant regulation under this section.” *Id.* Then, for those HAP emissions that might “warrant” regulation, Congress authorized EPA to regulate them “under this section” *only* if it

⁵ *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearing Before the S. Comm. on Energy & Natural Resources*, 101st Cong. 241 (1990) (testimony of William G. Rosenberg, Assistant Adm'r, Air & Radiation, EPA) (“Energy Policy Hearing”), JA____; *see also* Comments of Murray Energy Corporation on EPA’s Proposed Supplemental Finding at 14-29 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20536 (“Murray Comments”), JA____-____ (presenting extensive legislative history).

determines that “such regulation is appropriate and necessary after considering the results of the study.” *Id.* Congress also directed EPA to perform a study (commonly known as the “Mercury Study”) to evaluate the “rate and mass” of EGU mercury emissions, “the health and environmental effects of such emissions,” and the cost of available control technologies for mercury. *Id.* § 112(n)(1)(B).

As a companion to § 112(n)(1), which required EPA to consider alternative control strategies, Congress agreed to the Administration’s proposal to provide one particular such alternative: flexible, cooperative state and federal regulation of existing EGU emissions under § 111(d). *See* H.R. 3030, 101st Cong. § 108(d) (1989) and S. 1490, 101st Cong. § 108(d) (1989) (as introduced), JA____, ____; Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990), JA____. EPA explained this proposal would “allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary.” Administrator 1990 Letter to Senate, JA____.

II. EPA’s § 112 Rulemakings for EGU HAPs

Most HAP emissions from EGUs result from chemical elements that are naturally present in trace amounts in the fuels they burn. They include mercury, non-mercury metals (such as chromium), and acid gases (such as hydrogen chloride).

The Mercury and Utility Studies – After the 1990 CAA Amendments, EPA began updating information on HAPs emitted by EGUs, and conducted modeling to determine how those emissions may affect public health. The results of these efforts

were reported in the December 1997 Mercury Study⁶ and the February 1998 Utility Study.⁷

EPA's studies found EGU HAPs presented limited exposure to humans. In particular, humans are exposed to mercury chiefly through consuming fish containing methylmercury formed in the first instance by aquatic microbes. 76 Fed. Reg. 24,976, 24,983 (May 3, 2011), JA____; Comments of the Utility Air Regulatory Group on EPA's Proposed Supplemental Finding at 10 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20557 ("UARG Comments"), JA____. EPA found in 1998 that U.S. coal-fired EGUs emitted about 51.5 tons of mercury, or about 1 percent of the 5,000 tons of worldwide mercury emissions, Utility Study at 7-8, Tbl. 7-1, which by 2010 had fallen dramatically to 29 tons, 76 Fed. Reg. at 25,002, JA____. Of the nine tons of domestic EGU mercury emissions deposited in the U.S., a very small portion ends up as methylmercury in fish people eat, and consequently human exposure to methylmercury resulting from coal-fired EGUs is exceedingly small. UARG Comments at 10 (citing, e.g., 70 Fed. Reg. 15,994, 16,019-21 (Mar. 29, 2005)), JA____.

Likewise, trace amounts of non-mercury metals, naturally present in coal and oil, adhere to particulate ash, virtually all of which is captured by control devices.⁸ In

⁶ EPA, Mercury Study Report to Congress, Vol. 1, EPA-452/R-97-003 (Dec. 1997), EPA-HQ-OAR-2009-0234-3054 ("Mercury Study"), JA____-____.

⁷ EPA, Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units, Final Report to Congress, Vol. 1, EPA-453/R-98-004a (Feb. 1998), EPA-HQ-OAR-2009-0234-3052 ("Utility Study"), JA____-____.

the Utility Study, EPA found that only two coal-fired facilities had cumulative carcinogenic risks from HAP metals greater than one in one million, and neither exceeded three in one million. Utility Study at 6-3 to 6-4, JA____-____. Exposure levels for non-carcinogenic effects were far below the reference concentration. *Id.*

And emission of the non-carcinogenic “acid gases” like hydrogen chloride, meanwhile, result in exposures an order of magnitude or more below health-protective thresholds, according to EPA’s own models. *Id.* at 6-7, JA____.

Given the uncertainties, however, EPA stated it “believes that mercury from coal-fired utilities is the HAP of greatest potential concern” and that “[f]urther research and evaluation are needed to gain a better understanding of the risks and impacts of utility mercury emissions.” *Id.* at ES-27, JA____. For other HAPs, EPA noted “potential concerns and uncertainties that may need further study.” *Id.*

The December 2000 “Notice of Finding” – In December 2000, well before EPA could complete the data collection and research on mercury it said was necessary, then-departing Administrator Browner published a “[n]otice of regulatory finding,” announcing her conclusion that regulation of two EGU HAPs—mercury from coal-fired EGUs and nickel from oil-fired EGUs—was “appropriate and

⁸ EGUs generally use electrostatic precipitators or fabric filters to capture 99 percent or more of particulate matter emissions to comply with other CAA requirements. *See, e.g.*, EPA, Air Pollution Control Technology Fact Sheet; Dry Electrostatic Precipitator (ESP) – Wire-Plate Type at 1, Tbl. 1, EPA-452/F-03-028 (undated), JA____.

necessary” under § 112. 65 Fed. Reg. 79,825, 78,829 (Dec. 20, 2000) (“2000 Finding”), JA____. EPA claimed “it is unnecessary to solicit ... public comment on today’s finding [because] ... [t]he regulation developed subsequent to the finding will be subject to public review and comment.” *Id.* at 79,831, JA____. In that future rulemaking, she explained, EPA would invite comment on the “notice of regulatory finding,” develop refined risk estimates, and consider alternative control strategies. *Id.* at 79,830, JA____.

The 2005 “Not Appropriate” Rulemaking Determination – In 2004, EPA initiated rulemaking to address emissions from coal- and oil-fired EGUs under § 112(n)(1)(A). 69 Fed. Reg. 4652 (Jan. 30, 2004), JA____. The Agency solicited comments on its 2000 “notice of regulatory finding” and a number of regulatory options including: (1) no further regulation of EGU mercury emissions; (2) adoption of a § 112(d) rule regulating only EGU mercury emissions; (3) adoption of rules under § 112(n)(1)(A) addressing any EGU emissions that warrant regulation as “appropriate and necessary”; and (4) adoption of rules under other CAA sections to confirm that further control under § 112 is not appropriate and necessary. *Id.* at 4659-62, JA____-____.

In support of this rulemaking, EPA’s modeling showed that only a small fraction of the mercury deposited in the U.S. comes from domestic EGUs, and that EGUs contribute a “relatively small percentage” to fish tissue methylmercury levels after implementation of other CAA requirements. 70 Fed. Reg. at 16,019-20, JA____-

____. “Because this new information demonstrates that the level of [mercury] emissions projected to remain ‘after imposition of’ section 110(a)(2)(D) does not cause hazards to public health,” consistent with earlier findings, *supra* pp. 4, 9-10, EPA “conclude[d] that it is not appropriate to regulate coal-fired Utility Units under section 112 on the basis of [mercury] emissions,” 70 Fed. Reg. at 16,004, JA____.

As it had under the 1970 and 1977 versions of the Act, EPA found that EGU emissions of non-mercury HAPs were too insignificant to warrant regulation. *Id.* at 16,006, JA____. Indeed, EPA found the excessive costs of § 112 regulation showed such regulation was not appropriate because “the lower bound cost of regulating under CAA § 112 beyond CAIR [a § 110 regulation for EGUs] (e.g., \$750 million) exceeds the upper bound estimate of the benefits of such regulation (e.g., \$210 million).” 71 Fed. Reg. 33,388, 33,394 (June 9, 2006), JA____. EPA instead regulated mercury emissions from EGUs under § 111 to ensure use of advanced emission controls regardless of public health risk, 70 Fed. Reg. 28,606 (May 18, 2005) (Clean Air Mercury Rule), JA____, reversed the 2000 Finding, and removed EGUs from the § 112(c) list of source categories, 70 Fed. Reg. at 15,994, JA____.

New Jersey v. EPA – In litigation over EPA’s 2005 finding and delisting of EGUs, no party challenged the determination that it is “not ‘appropriate’ to regulate power plants under section 112 because to do so would not be cost-effective.” *See* Final Br. of Resp’t EPA at 84, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097); *see also id.* at 10 (EPA’s counsel informing this Court that the costs of

regulating EGUs under the § 112 program are “extreme” while the health benefits are “nominal”). Nonetheless, this Court vacated both EPA’s decision to remove EGUs from the § 112(c) source category list and its rule regulating mercury emissions under § 111. *New Jersey*, 517 F.3d 574. The Court held that, once included on the § 112(c) list by way of the December 2000 “notice of finding,” the only way for EPA to remove EGUs from that list was by making the “de-listing” showings required by § 112(c)(9) for all other source categories. *Id.* at 581-82. Because EPA did not follow the § 112(c)(9) procedure, the Court vacated the § 112 finding and the § 111 Clean Air Mercury Rule. *Id.* at 583. The Court did *not* rule on EPA’s 2005 determination that regulation of EGU emissions under § 112 was not “appropriate and necessary.”

The MATS Rule – On remand from *New Jersey*, EPA proposed the Mercury and Air Toxics Standards (“MATS”) rule in May 2011, 76 Fed. Reg. 24,976 (May 3, 2011), JA____, and finalized it in February 2012, 77 Fed. Reg. 9304 (Feb. 16, 2012), JA____. In that rulemaking, EPA asserted, based on newer information, that EGU HAP emissions presented several public health and environmental risks. But those risks, in fact, were relatively small and had not changed much from EPA’s previous assessments.

For mercury, the only HAP for which EPA could quantify *any* benefits of regulation, the Agency found, as it had before, “potential health risks do not likely result from [mercury] inhalation exposures associated with [mercury] emissions from utilities.” 76 Fed. Reg. at 25,000, JA____; *see also* Utility Study at 6-3, Tbl. 6-1, 7-44, 7-

45, JA____, ____, _____. But the greatest health concern associated with mercury, EPA asserted, was consumption of methylmercury, 76 Fed. Reg. at 24,999, JA____, of which only an exceedingly small portion results from EGU emissions.⁹ EPA identified \$4 to \$6 million in benefits to reduce these emissions due to a very small calculated IQ loss for some hypothetically exposed persons, 77 Fed. Reg. at 9428, JA____, and asserted that there could be other unquantifiable benefits, *id.* at 9306, 9323, 9426-32, JA____, ____, ____-____.

For trace non-mercury metals, EPA found only four coal-fired EGUs in the entire industry presenting a cancer risk greater than the de minimis risk threshold of one in one million, with the highest just five in one million. *Id.* at 9319, JA____. While the results of these higher risks were associated with contaminated sampling data, *see* UARG Comments at 11-12, JA____-____,¹⁰ even if correct, a risk of five in one million from just a few units is well within the range that EPA has previously determined is

⁹ EPA, Revised Technical Support Document: National-Scale Assessment of Mercury Risk to Populations with High Consumption of Self-caught Freshwater Fish In Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units at 65, EPA-452/R-11-009 (Dec. 2011), EPA-HQ-OAR-2009-0234-19913 (“U.S. [mercury] deposition is generally dominated by sources other than U.S. EGUs”), JA____; *id.* at 64, Tbl. 2-2 (median “percent of total mercury deposition attributable to U.S. EGUs” in a given watershed is about 1%), JA____.

¹⁰ The issue of EPA’s arbitrary and capricious reliance on contaminated sampling data in its “appropriate and necessary” finding is the subject of an appeal by Petitioner UARG in a related case, *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. filed June 22, 2015), which will be submitted and argued before the same panel as the instant case. Order at 2, *ARIPPA v. EPA*, No. 15-1180, and *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Aug. 29, 2016), ECF No. 1632520.

sufficient to protect public health and the environment with an “ample margin of safety.” *See NRDC v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008). Accordingly, EPA did not quantify any benefits from regulating trace non-mercury metals.

For acid gases, EPA’s modeling showed, as it had before, that human exposures to EGU acid gas emissions are an order of magnitude or more below conservative health-protective levels. 76 Fed. Reg. at 25,016, JA____; *see* Utility Study at 6-7, JA____. Therefore, the only *potential* environmental risk EPA could identify was that in areas where acidification already exists, hydrogen chloride emissions “*could* exacerbate these impacts.” 76 Fed. Reg. at 25,050 (emphasis added), JA____.¹¹

Because risks associated with EGU emissions remained so small, EPA interpreted § 112(n)(1)(A) to require regulation of all HAPs emitted by EGUs under § 112 if *any* HAP emitted by *any* EGU was projected to create either an environmental risk or a public health risk greater than a “one-in-one million” risk level. *See* 77 Fed. Reg. at 9310-11, 9325-26, 9358, JA____-____, ____-____, _____. Because it found such risks for non-mercury metals and acid gases, and because mercury is a neurotoxin, EPA reversed its 2005 rulemaking determination that regulation of EGU HAP

¹¹ Arguing it had no obligation to do so, EPA did not quantify “the precise contribution of power-plant acid gas emissions to ecosystem acidification,” Br. for the Fed. Resp’ts in Opp’n at 31, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46), and did not identify any EGU contributing to such “exacerbation,” *see* 77 Fed. Reg. at 9404 (noting “information gaps regarding facility-specific emissions”), JA____.

emissions under § 112 was not “appropriate and necessary.” *Id.* at 9355-56, 9363, JA____-____, ____.

EPA found the annual cost of complying with the § 112(d) standards was \$9.6 billion,¹² even though the predicted health benefits were extraordinarily low (only about \$4 to \$6 million of quantified benefits, all from reducing mercury). *See id.* at 9428, JA____. The imbalance between costs and benefits is especially stark when examining the three control requirements EPA promulgated:

- EPA found that the controls required to meet the standards for mercury would cost \$3 billion per year, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-10, EPA-452/R-11-011 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131 (“MATS RIA”), JA____, to achieve only 20 tons of emission reductions, *id.* at Tbl. 3-4, JA____, and yield \$4 to \$6 million in quantified benefits, *id.* at 4-67, JA____.
- EPA found that the controls required to meet the standards for non-mercury metals would cost at least \$1 to \$2 billion per year to achieve an unspecified amount of emission reductions and *zero* quantified benefits.¹³
- EPA found that the controls required to meet the standards for acid gases (primarily scrubbers) would cost \$5 billion per year, Smith Statement at 6, Tbl. 1, JA____, to achieve 39.8 thousand tons of hydrogen chloride emission

¹² EPA’s \$9.6 billion cost figure focuses only on compliance costs, not other costs that EPA has recognized elsewhere, like effects on work force and consumers of electricity. EPA, *The Benefits and Costs of the Clean Air Act 1990 to 2010*, at iii, EPA-410-R-99-001 (Nov. 1999), <https://www.epa.gov/sites/production/files/2015-07/documents/fullrept.pdf>, JA____.

¹³ UARG Comments, Ex. 1, *The American Energy Initiative, Part 15: What EPA’s Utility MACT Rule Will Cost U.S. Consumers: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. (2012) (statement of Anne E. Smith, Ph.D., at 6, Tbl. 1), EPA-HQ-OAR-2009-0234-20557 (“Smith Statement”), JA____.

reductions, MATS RIA at 3-10, Tbl. 3-4, JA____, an unspecified amount of other acid gas emission reductions, and yield *zero* quantified benefits.

EPA interpreted § 112(n)(1)(A), however, to preclude consideration of these costs of regulation. 77 Fed. Reg. at 9326-27, JA____-____. EPA also claimed in its MATS RIA that the benefits of regulating EGUs under § 112 were substantially more than the costs of compliance because the SO₂ emission standard it promulgated as a “surrogate” for acid gas regulation would produce reductions in PM_{2.5}. MATS RIA at ES-3, JA____. According to EPA, the “co-benefits” of reductions in PM_{2.5} were the “great majority” of the quantifiable benefits to be achieved by the MATS rule. 77 Fed. Reg. at 9305, JA____.¹⁴ At the same time, EPA emphatically maintained that these co-benefits played no role in its threshold “appropriate and necessary” finding. *Id.* at 9320, JA____.

III. *Michigan v. EPA*

Numerous parties petitioned for review of the MATS rule, including EPA’s finding that regulating EGU HAP emissions is “appropriate and necessary” without consideration of cost. The D.C. Circuit upheld EPA’s determination. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court reversed, holding that “EPA strayed far beyond [the] bounds [of reasonable

¹⁴ In fact, the SO₂ standard for regulation of acid gases constitutes both the bulk of the costs for the MATS rule (about \$5 billion annually) and 95% of the alleged PM_{2.5}-related co-benefits (about \$32 to \$87 billion annually). Smith Statement at 6, JA____; *see also* MATS RIA at 5-14, JA____.

interpretation] when it read § [112](n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.” *Michigan*, 135 S. Ct. at 2707. The Court rejected EPA’s attempt to “harmonize[]” Congress’s treatment of EGUs under § 112(n)(1) with its treatment of other sources, noting that such an approach “overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources.” *Id.* at 2710.

Moreover, the Court explained that its underlying concern was not just that EPA ignored cost, but that EPA had “refused to consider whether the costs of its decision outweighed the benefits.” *Id.* at 2706. The Court held that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.” *Id.* at 2707. And while the Court did not require EPA to conduct “a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value,” *id.* at 2711, it stressed that EPA must weigh the benefits against the costs of regulating EGU HAP emissions under § 112, *id.* at 2707 (explaining “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions”). The Court emphasized that “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Id.*

For these reasons, the Supreme Court remanded the case for “further proceedings consistent with this opinion,” *id.* at 2712, and this Court remanded to the

Agency with the same instruction, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015).

IV. The Supplemental Finding

On remand, EPA proposed to address the Court's decision in *Michigan* by issuing a "supplemental finding" that "consideration of cost does not alter the agency's previous determination that it is appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 of the CAA." 80 Fed. Reg. 75,025, 75,026 (Dec. 1, 2015), JA____. In doing so, EPA made clear it would "accept[] comment *only* on the consideration of cost in making the appropriate determination." *Id.* at 75,027 (emphasis added), JA____. Neither the basis for EPA's previous determination that "regulation under [§ 112]" was "appropriate," nor the magnitude or significance of any public health or environmental risk associated with that determination, nor any opportunities to reduce those risks in less costly ways, were open for discussion. As EPA said, it "ha[d] already determined [in the MATS rulemaking] that HAP emissions from EGUs present significant hazards to public health and the environment," *id.* at 75,038, JA____, and that prior determination would stand unless EPA found industry compliance costs excessive, *id.* at 75,026, JA____.

EPA offered two alternative justifications for affirming, after a siloed consideration of costs, its prior finding that regulation of EGU HAPs under § 112 is "appropriate." First, under its "preferred" alternative, EPA "interpret[s] CAA section 112(n)(1)(A) as not requiring a benefit-cost analysis." *Id.* at 75,039, JA____; 81

Fed. Reg. at 24,429, JA____. Rather, the “focus” of EPA’s justification is whether the electric utility industry as a whole could “reasonably absorb” the costs of regulating under § 112 all of the HAPs emitted from EGUs. 80 Fed. Reg. at 75,030, JA____. In other words, if the industry were “ab[le] to afford compliance” with the MATS rule without disrupting “the generation, transmission, and distribution of affordable and reliable electricity,” regulation of all EGU HAPs would be automatically “appropriate” based on the benefits, however small, identified as the basis for the prior “appropriate and necessary” determination. Legal Memorandum Accompanying the Proposed Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) at 19-20 (undated), EPA-HQ-OAR-2009-0234-20519 (“Legal Memorandum”), JA____-____; *see also* 80 Fed. Reg. at 75,031, 75,038, JA____, ____; 81 Fed. Reg. at 24,424, 24,427, JA____, ____.

To determine whether the costs of regulating EGUs under § 112 are “affordable,” EPA relied on the RIA performed in 2011 for the MATS rule, which predicted compliance costs of \$9.6 billion per year. 80 Fed. Reg. at 75,032-33, JA____-____. This estimate reflects only the compliance costs with the MATS standards for the electric utility industry projected in 2011, and does not include more recent cost information or costs imposed on other sectors of the economy, nor even the full implications and attendant disadvantages and costs of regulating EGUs under § 112. EPA evaluated these projected costs using four metrics, *id.* at 75,033-36, JA____-____,

and concluded that “every one of [these metrics] supports its conclusion that costs are reasonable,” *id.* at 75,036, JA____. The Agency then concluded that because “the costs imposed by MATS are reasonable, it is appropriate for the EPA to regulate HAP emissions from EGUs in light of the meaningful progress the rule makes toward achieving key statutory goals and reducing the previously identified significant hazards to public health and the environment.” *Id.* at 75,038-39, JA____-____.

Second, EPA’s “alternative” approach purported to show that regulation of EGU HAPs is “appropriate” based on a “formal benefit-cost analysis” pulled from the 2011 RIA for the MATS rule. *Id.* at 75,039, JA____. The Agency explained a formal benefit-cost analysis “attempts to quantify all significant consequences of an action in monetary terms in order to determine whether an action ... [has] positive net benefits (i.e., benefits exceed costs).” 81 Fed. Reg. at 24,423 n.13, JA____.

Under this alternative approach, EPA compared the MATS rule’s estimated \$9.6 billion annual compliance costs to EPA’s estimated \$37 to \$90 billion in annual benefits. 80 Fed. Reg. at 75,040, JA____. Those cited benefits, however, almost exclusively consisted of the purported benefits of reductions in pollutants that are *not* regulated as HAPs under § 112, but are instead regulated under other CAA programs. EPA acknowledged that the monetary benefits from HAP reductions—due to health benefits from reducing mercury in fish—are worth no more than \$4 to \$6 *million* per year. *Id.* The remaining benefits—representing the overwhelming majority of EPA’s purported \$37 to \$90 *billion* in benefits—reflect reductions in PM_{2.5} ambient

concentrations due to lower SO₂ emissions (which form PM_{2.5} in the atmosphere) resulting from the acid gas SO₂ standard.¹⁵ When only HAP-related benefits are considered, the costs of compliance are “between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants.”

Michigan, 135 S. Ct. at 2706.

In the final Rule, EPA adopted its supplemental finding largely as proposed, relying on both its “preferred” and “alternative” approaches to considering cost. 81 Fed. Reg. at 24,425, JA____. At the same time, EPA rejected commenters’ requests to consider less costly alternative control strategies when “evaluating the cost reasonableness of” using § 112 to regulate EGUs, insisting that “EPA is not required to consider the potential cost of alternative approaches to regulating HAP emissions from EGUs before finding that regulation is appropriate and necessary.” *Id.* at 24,447 (emphasis removed), JA____. These alternatives included § 111, which EPA can use to impose less costly national standards for new sources under § 111(b) and to require States to impose individually achievable control requirements for existing EGUs under § 111(d), and can do so without requiring EPA to regulate every HAP.

EPA rejected considering § 111 as an alternative strategy, claiming commenters failed to “suggest a clear framework for developing standards” under § 111, 81 Fed. at

¹⁵ MATS RIA at 5-14 (explaining co-benefits), JA____; *id.* (“[T]he SO₂ emission reductions are the main driver for the health co-benefits of this rule.”).

24,447, JA____, even though commenters outlined the process, EPA itself has detailed regulations for using § 111, and EPA had previously promulgated regulations for new and existing EGU emissions of mercury under § 111. Murray Comments at 33; 40 C.F.R. pt. 60, subpt. B.

Another alternative strategy presented by commenters was to defer to States using their reserved authority under § 116 to regulate EGU emissions they conclude are worth reducing. Murray Comments at 32-33, JA____-____. In refusing “to evaluate the potential for state action” as an alternative control strategy, EPA interpreted § 112(n)(1) to *prohibit* EPA from considering such an alternative due to a purported “limitation” on its authority found in a reference in one of the studies to the “imposition of the requirements” of the CAA. EPA, Response to Comments for Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 23-24 (Apr. 2016), EPA-HQ-OAR-2009-0234-20578 (“RTC”), JA____-____; *see* 81 Fed. Reg. at 24,447 n.57, JA____.

Finally, EPA refused to consider the full range of disadvantages resulting from regulating EGUs under § 112, limiting its evaluation to four sector-wide cost metrics, 81 Fed. Reg. at 24,424-25, JA____-____. EPA’s narrow cost analysis thus ignored the costs imposed more broadly on States, workers, communities and electricity consumers. *See, e.g.*, RTC at 65, 90, JA____, ____.

SUMMARY OF ARGUMENT

In determining that it was “appropriate and necessary” to regulate EGUs under § 112 of the Act in the 2012 MATS rule, “EPA refused to consider whether the costs of its decision outweighed the benefits.” *Michigan*, 135 S. Ct. at 2706. The Supreme Court emphatically rejected EPA’s determination, explaining “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Id.* at 2707.

On remand, EPA recognizes *Michigan* requires the Agency to weigh the costs and benefits of regulating EGU HAPs under § 112 and advances two rationales for reaffirming the appropriate and necessary determination rejected by the Supreme Court. In its “preferred approach,” EPA concludes that its previously-determined benefits of such regulation—benefits that at best are small, uncertain, and in most instances unquantifiable—are justified, so long as the utility industry, as a whole, can afford to spend \$9.6 billion annually to obtain them. And other than a bald, conclusory declaration that these benefits outweigh the costs, EPA nowhere actually weighs anything, much less explains *how* it weighed the purported benefits against these very large costs. Nor does EPA ask whether it is “rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for” these particular benefits, 135 S. Ct. at 2707, or whether a cost of \$9.6 billion annually is

“disproportionate to the[se particular] benefits,” *id.* at 2710. EPA’s “preferred approach”—its affordability analysis—ignores *Michigan* and violates § 112(n)(1)(A).

Alternatively, EPA repackages its earlier MATS regulatory impact analysis into a “formal benefit-cost analysis” to claim large, monetized benefits from regulating EGUs under § 112. But EPA reaches this conclusion by ignoring the HAP-specific focus of § 112 and relying on purported benefits associated with incidental reductions in other, non-HAP pollutants (PM_{2.5}, as a result of SO₂ reductions). When the inquiry is properly limited to the effects of regulating EGU HAPs, EPA’s own evaluation shows that the \$9.6 billion price tag unequivocally outweighs the meager \$4 to \$6 million in benefits that EPA calculates, even accounting for unquantified benefits. EPA cannot lawfully rely on the purported benefits of reducing non-HAP pollutants—ones regulated under numerous other CAA programs—as the basis for concluding that regulation of *HAPs* under § 112 is “appropriate and necessary.”

In addition, considering costs in determining whether it is “appropriate” to regulate EGU HAPs under § 112 necessarily requires consideration of whether alternative, less costly control strategies are available. As the Supreme Court noted, this is reinforced by statutory context—which directs EPA to perform studies that focus on HAPs emitted by EGUs after other requirements of the Act have been implemented, to evaluate alternative control strategies for such HAPs that may warrant regulation, and to make the appropriate and necessary determination after considering these studies. *Michigan*, 135 S. Ct. at 2708. EPA’s refusal to consider such

alternative control strategies (especially regulation under § 111(d)—an alternative that Congress unlocked in the 1990 Amendments specifically for this purpose when it also enacted the current § 112) disregards the statutory framework and is inconsistent with *Michigan*.

Finally, EPA’s supplemental finding considers only the costs of compliance of meeting the § 112(d) MATS standards. EPA’s adamant refusal to consider *all* costs and disadvantages, including the impacts on coal companies, communities, and workers, as well as localized impacts, is contrary to the Supreme Court’s direction for EPA on remand to “consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary.” *Id.* at 2711; *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 737, (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (Agency must consider “*all* of the relevant costs.”).

STANDING

Petitioners have standing to challenge the Rule. The Rule sets forth EPA’s finding that it is “appropriate and necessary” to regulate HAP emissions from coal- and oil-fired EGUs under CAA § 112. This finding is a necessary legal prerequisite to such regulation. Several Petitioners own and operate EGUs or have members who own or operate them. By enabling EPA to regulate these units, the Rule subjects these Petitioners to emission standards that have, in some instances, required affected units to be idled; in others have required emission control technologies that are costly to install or to operate; and that have otherwise constrained EGUs’ operations. *See Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (when a party is the object of government regulation “there is ordinarily little question that the [governmental] action ... has caused him injury”).

The other petitioners also have standing. The Rule harms State Petitioners by raising the prices that State Petitioners themselves (not just their citizens) must pay as consumers of electricity. The Rule also subjects State Petitioners to ongoing regulatory burdens that require them to incur costs, including staff time. For example, the Michigan Department of Environmental Quality, operating under a delegation of authority from EPA, must “implement and enforce without changes the Section 112 standards promulgated by EPA,” which include the MATS rule. 63 Fed. Reg. 64,632, 64,633 (Nov. 23, 1998), JA____.

Likewise, because the Rule subjects coal-fired EGUs to costly regulation, it discourages the construction of new units and causes existing units to retire or operate less often. This has the effect of harming Petitioner Murray Energy Corporation by diminishing the demand for coal in the electric generating sector.

Both this Court in *White Stallion* and the Supreme Court in *Michigan* have recognized that Petitioners have standing to challenge the underlying MATS rule.

STANDARD OF REVIEW

The Court must set aside EPA’s action under the CAA if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” CAA § 307(d)(9); 5 U.S.C. § 706. Agency action is invalid if the agency failed to consider an

important aspect of a problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that the decision could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. EPA's "Affordability" Analysis Does Not Satisfy Its Obligation To Determine Whether the Benefits of Regulating EGUs Under § 112 Are Worth the Costs.

In *Michigan*, the Supreme Court directed EPA to weigh the benefits of regulation against the costs before determining whether it is "appropriate and necessary" to regulate HAP emissions from EGUs under § 112. 135 S. Ct. at 2707-11. In response, EPA's "preferred approach" is to simply determine that the costs of regulation are "afford[able]" for the electric utility industry as a whole, and are therefore reasonable. Legal Memorandum at 19, JA____; *see also* 80 Fed. Reg. at 75,030 ("focus [of cost inquiry is] on whether the power sector can reasonably absorb the cost of compliance"), JA____. Other than a bald claim that it weighed those costs against previously-identified benefits of regulation, EPA never explained how and what standard it used for such weighing, much less why "it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for" these uncertain and unquantifiable purported benefits. *Michigan*, 135 S. Ct. at 2707. Instead, EPA "interpret[ed] ... section 112(n)(1)(A) as not requiring a benefit-cost analysis"—i.e., that EPA need not compare benefits to costs in order to determine whether the

benefits outweigh the costs. 80 Fed. Reg. at 75,039, JA____. EPA's "preferred approach" ignores *Michigan* and violates the statute.

A. EPA Must Consider Costs in Relation to Benefits To Justify its "Appropriate and Necessary" Determination.

The Supreme Court held that the cost of regulation is an essential factor that EPA must consider when determining whether regulation of EGU HAP emissions under § 112 is "appropriate and necessary." *Michigan*, 135 S. Ct. at 2707 ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate."). The Court did not simply direct EPA to consider cost in the abstract: its underlying concern was that EPA had "refused to consider whether the costs of its decision outweighed the benefits" in any way. *Id.* at 2706. To be sure, the Court did not require "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. But the Court repeatedly stressed that EPA must weigh the benefits against the costs of regulating EGU HAP emissions under § 112. *Id.* at 2707 (explaining "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions"). As the Court succinctly put it, "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.*

The Court's emphasis on the need to compare the costs and benefits of § 112 regulation of EGU HAPs pervades its opinion in *Michigan*. The Court specifically faulted EPA's refusal to "consider whether the costs of its decision outweighed the

benefits,” *id.* at 2706, stating unequivocally that “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits,” *id.* at 2707. The Court indicated that the fundamental aim of considering cost in the “appropriate and necessary” analysis is to “ensure that the costs are not disproportionate to the benefits.” *See id.* at 2710. Even the dissent acknowledged an agency “acts unreasonably” in ignoring costs and benefits because “such a process would ‘threaten[] to impose massive costs far in excess of any benefit.’” *See id.* at 2716-17 (Kagan, J., dissenting) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 234 (2009) (Breyer, J., concurring in part and dissenting in part)).¹⁶

This emphasis on evaluating the costs of regulating EGU HAP emissions under § 112 in relation to their benefits is not novel: comparing costs and benefits is

¹⁶ The dissent argued, however, that the § 112(d) standard-setting process itself would ensure the costs of the regulation are reasonable because the standards are set at levels that are achieved in practice, albeit by only the best performing units in the category. *Michigan*, 135 S. Ct. at 2719 (Kagan, J., dissenting). The majority rejected that reasoning, not just because it was not advanced by EPA, but because it does not compare benefits to costs. Using a hypothetical example, the Court observed that if “regulating power plants would yield \$5 million in benefits, the prospect of mitigating cost from \$11 billion to \$10 billion at later stages of the program would not by itself make regulation appropriate.” *Id.* at 2711. That approach does nothing to “ensure cost-effectiveness,” *id.*, or to ensure “that the costs are not disproportionate to the benefits,” *id.* at 2710. EPA’s “preferred approach,” which considers costs merely by finding that they are “affordable,” is similar to the dissent’s argument in that it is divorced from any measure of cost-effectiveness and is thus inconsistent with *Michigan*.

an “established administrative practice” that has long been recognized as an essential feature of rational agency decisionmaking. *Id.* at 2707-08. The Court has long held an agency’s interpretation of its standard-setting authority “unreasonable” where it “would give [the agency] power to impose enormous costs that might produce little, if any, discernible benefit.” *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980). A standard “is neither ‘reasonably necessary’ nor ‘feasible’ ... if it calls for expenditures wholly disproportionate to the expected health and safety benefits.” *Id.* at 667 (Powell, J., concurring in part and concurring in the judgment). More recently, the Court recognized that when an agency considers costs, “whether it is ‘reasonable’ to bear a particular cost may well depend on the resulting benefits.” *Entergy Corp.*, 556 U.S. at 225-26. Justice Breyer observed that “every real choice requires a decisionmaker to weigh advantages against disadvantages,” *id.* at 232 (Breyer, J., concurring in part and dissenting in part); *see also id.* at 232-33 (“[I]t would make no sense to require plants to spend billions to save one more fish or plankton ... even if the industry might somehow afford those billions.”) (internal quotation marks and citation omitted).

Congress had these very concerns in mind when it chose to “treat[] power plants differently from other sources for purposes of the hazardous-air-pollutants program.” *Michigan*, 135 S. Ct. at 2707. Congress and the Administration, which was heavily involved in drafting the 1990 CAA Amendments, understood that, given the reductions in HAP emissions expected to result from the Act’s new Acid Rain

Program, the substantial costs of also regulating EGUs under § 112 (particularly for a pollutant such as SO₂ that is already extensively regulated under these other programs) “would increase power rates, while potentially providing little or no health benefit.” 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms), JA____; *see supra* pp. 6-8.

To avoid this result, Congress adopted § 112(n)(1)(A) so that EPA would be required to examine whether regulating EGU emissions under § 112 would be worth the costs. As Representative Oxley (co-sponsor of the 1990 CAA Amendments) explained, the purpose of § 112(n)(1)(A) was to “protect[] ... the public health while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity.” *See* 136 CONG. REC. 35,075 (Oct. 26, 1990) (statement of Rep. Michael Oxley), JA____. Administration officials likewise noted that the provision’s purpose was that “cost benefit and environment improvements to be achieved by application of these costs and technologies can be considered.” Energy Policy Hearing at 436, JA____.

The importance of comparing costs and benefits under § 112(n)(1)(A) is also evident in the studies that Congress mandated under that section, which ““provide a framework”” for EPA’s decision. *Michigan*, 135 S. Ct. at 2708. EPA was required to study “the hazards to public health reasonably anticipated to occur” from EGU HAP emissions after implementation of other CAA provisions—that is, to identify the benefits that could be gained by further regulation under § 112. CAA § 112(n)(1)(A).

Rather than addressing those emissions collectively, EPA's report must describe "alternative control strategies for emissions *which may warrant regulation* under this section." *Id.* (emphasis added). Likewise, Congress directed EPA to perform the Mercury Study to evaluate the "rate and mass" of EGU mercury emissions and "the health and environmental effects of such emissions" in addition to the cost of available control technologies, *id.* § 112(n)(1)(B), demonstrating that Congress was concerned with not just *whether* mercury emissions would remain after imposition of other CAA programs, but *how much* and *how significant* those emissions would be in relation to the costs of reducing them.

Thus, the statute, congressional purpose, and "established administrative practice," all require that EPA determine whether the benefits are worth the costs when deciding whether regulation under § 112 is "appropriate and necessary."

B. EPA's "Preferred Approach" Ignores *Michigan* and the Statute.

Despite the Court's directive, EPA in its "preferred approach" carefully walled off its cost analysis from any comparison to the benefits that regulating EGU HAP emissions under § 112 might achieve. As a result, the "preferred approach" is inconsistent with *Michigan* and violates § 112(n)(1)(A).

1. EPA Unlawfully Failed To Weigh Costs Against Benefits.

EPA asserts that "the regulation of and reduction in the significant amounts of HAP emissions from EGUs, *and the presumed reduction in risk* attendant to such reductions, is the benefit" that justifies EGU HAP regulation under § 112. Legal

Memorandum at 18 (emphasis added), JA____. As to the “risks” from EGU HAP emissions, EPA “maintain[s] [its] position from the MATS rule that *the volume* of HAP emissions from EGUs, including acid gas HAP emissions, may form the basis for finding that HAP emissions from EGUs pose a hazard to public health and the environment that is appropriate to regulate.” 81 Fed. Reg. at 24,450 (emphasis added), JA____. Otherwise, EPA merely points to its prior findings (findings EPA said were not open for comment, *see* 80 Fed. Reg. at 75,027, JA____) that at least one HAP emitted from EGUs (non-mercury metals) presents a public health risk above a one in one million risk level, that acid gases present an environmental risk, and that mercury is a known neurotoxin. 81 Fed. Reg. at 24,449, JA____; 80 Fed. Reg. 75,038, JA____.

Nowhere in its preferred approach did EPA actually evaluate whether purported benefits outweigh a cost of \$9.6 billion annually. Nor did EPA explain *how* purported benefits were weighed against such exceptionally large costs. Instead, EPA relied on an *ipse dixit*, declaring that it “weigh[ed] ... [costs] against the many identified advantages to regulation.”¹⁷ 81 Fed. Reg. at 24,421, JA____. All but ignoring *Michigan*, EPA did not even ask whether it was “rational, never mind ‘appropriate,’ to impose

¹⁷ EPA’s *ipse dixit* is reminiscent of a Churchill Martini. Reportedly, Sir Winston Churchill, when asked how much vermouth he wanted in his martini, replied, “I would like to observe the vermouth from across the room while I drink my martini.” Warren Dockter, *How to drink like Winston Churchill*, THE TELEGRAPH (Jan. 28, 2015), <http://www.telegraph.co.uk/news/winston-churchill/11374144/How-to-drink-like-Winston-Churchill.html>. Similarly, EPA here “weighs costs” by observing them from across the room.

billions of dollars in economic costs in return for” these particular benefits, 135 S. Ct. at 2707, or whether a cost of \$9.6 billion annually is “disproportionate to the[se particular] benefits,” *id.* at 2710.

Rather, as EPA described it, its focus was solely on whether the electric utility industry as a whole could “absorb” the costs of regulating all of the HAPs emitted from coal- and oil-fired EGUs under § 112. 81 Fed. Reg. at 24,424, JA____. In other words, if at least *one HAP emitted by one EGU* presented a one in one million public health risk of carcinogenic effects or an environmental risk, and the industry was “ab[le] to afford compliance” with the MATS rule without disrupting “the generation, transmission, and distribution of affordable and reliable electricity,” then regulation of *all EGUs for all HAPs they emit* would be “appropriate” regardless of the magnitude of the benefit. *See* Legal Memorandum at 19-20, JA____-____; 80 Fed. Reg. at 75,030, JA____; *see also id.* at 75,031, 75,038, JA____, ____; 81 Fed. Reg. at 24,424, 24,427, JA____, ____.

But finding that regulating EGUs under § 112 is “affordable” is a far cry from demonstrating its advantages are worth the burdens imposed, as § 112(n)(1)(A) and *Michigan* require. *See AFL-CIO*, 448 U.S. at 668 n.4 (Powell, J., concurring in part and concurring in the judgment) (“The cost of complying with a standard may be ‘bearable’ and still not reasonably related to the benefits expected.”).

Stated another way, under EPA’s “affordability” analysis, the fact that over 99 percent of EGUs present risks of carcinogenic effects from non-mercury metal

emissions of less than one in one million—and that *all* present risks of less than five in one million, 77 Fed. Reg. at 9319, JA____—is irrelevant. That EGU acid gas emissions present no public health risk and constitute less than one percent of U.S. emissions with acidification potential,¹⁸ is irrelevant. That EPA can quantify only \$4 to \$6 million in public health benefits associated with reducing EGU mercury emissions is irrelevant. Indeed, according to EPA, Congress determined that HAPs are “inherently harmful,” and the only way to avoid regulating EGUs under § 112 for HAP emissions that present no public health risk is not through a § 112(n)(1)(A) determination that “such regulation” is *not* appropriate, but rather “to petition the Administrator to remove those pollutants from the CAA section 112(b) list” for all sources, including non-EGU sources for which no cost-benefit analysis is allowed or required under § 112. *See* 81 Fed. Reg. at 24,450, JA____. This is not the cost-benefit analysis called for by *Michigan* or the statute. *See supra* Section I.A.

EPA’s rationale continues to ignore the fact that Congress treated EGUs differently from every other source of HAPs. *See Michigan*, 135 S. Ct. at 2707. If the main consideration for whether to regulate EGUs under § 112 was that EGUs emit a certain volume of HAPs—a basic fact that Congress and the other parties involved in drafting the 1990 CAA Amendments understood—then it would have made no sense

¹⁸ Comments of Electric Power Research Institute on EPA’s Proposed MATS Rule at 3-46 to 3-48 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17621, JA____-____.

to enact § 112(n)(1) at all. *See id.* at 2710 (“[I]f uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains ‘necessary,’ not whether regulation is ‘appropriate *and* necessary.’”). By relying simply on its finding that the costs are “affordable” and failing to weigh these costs against the benefits of its decision, EPA’s new determination continues to violate the statute and *Michigan*.

2. EPA Errs By Interpreting § 112(n)(1)(A) Not To Require Any Comparison of Costs and Benefits.

EPA attempts to justify its refusal to compare the costs and benefits of regulation under § 112 on the grounds that neither the statute nor *Michigan* require “benefit-cost analysis ... to support a finding that regulation is appropriate.” Legal Memorandum at 26, JA____; *see also* 80 Fed. Reg. at 75,031 (“[A] benefit-cost analysis is not required to support a threshold finding that regulation is appropriate.”), JA____; *id.* at 75,039 (EPA “interprets CAA section 112(n)(1)(A) as not requiring a benefit-cost analysis.”), JA____; 81 Fed. Reg. at 24,429 (“EPA disagrees that a benefit-cost analysis, particularly one that only ... monetized HAP ... benefits, ... is required by CAA section 112(n).”), JA____. In fact, EPA asserts the statute requires no “finding of an economic positive net benefit” associated with regulation “under this section” at all. 81 Fed. Reg. at 24,429, JA____. EPA says this position is consistent with what EPA calls § 112’s focus on “whether the *collective* HAP emissions from EGUs should be

regulated, not the manner in which they should be regulated” under § 112. Legal Memorandum at 18, 25 (emphasis omitted and added), JA____, ____.

To begin, the focus of § 112(n)(1)(A) is not on collective EGU HAP emissions, but only those posing “hazards to public health” “which warrant regulation.” EPA’s refusal to balance costs and benefits is inconsistent with § 112(n)(1)(A), as construed in *Michigan*, see *supra* Section I.A. There is no material difference between EPA’s “preferred approach” in the Rule and its 2012 “appropriate and necessary” analysis the Supreme Court rejected in *Michigan*. In the MATS rule, EPA found that regulation was “appropriate” because EGU HAP emissions pose some remaining but indeterminate risk to health or the environment that can be reduced through regulation. *Michigan*, 135 S. Ct. at 2705 (summarizing EPA’s rationale). The Supreme Court rejected this approach because, by focusing on the “need for regulation”—i.e., the existence of some remaining HAP emissions to reduce and the means to do so—EPA effectively read the term “appropriate” out of “appropriate and necessary.” See *id.* at 2710.

On remand, EPA essentially doubles down on its rationale, adding only one caveat that cannot possibly change the result. Now, EPA says, regulation is “appropriate” because EGU HAP emissions pose some remaining but indeterminate risk to health or the environment that can be reduced through regulation that the industry, as a whole, can afford. “Affordability” to the industry, however, imposes no constraint on EPA’s authority at all—especially with respect to this industry, in which

customers are heavily dependent on the service provided and there is a well-established process for regulated sources to recover costs of compliance. As the Supreme Court recognized in *AFL-CIO*, a program of “pervasive regulation limited only by the constraint of feasibility” would reflect “unprecedented power over American industry” and “would give [the agency] power to impose enormous costs that might produce little, if any, discernible benefit.” 448 U.S. at 645. Yet that is precisely how EPA envisions its authority under § 112(n)(1)(A).

EPA suggests in the Rule that it may refuse to evaluate costs in relation to benefits because the benefits of reducing EGU HAP emissions are not easy to quantify. *See* 81 Fed. Reg. at 24,429, JA____. But even if true, this difficulty does not relieve EPA of its burden to weigh costs against benefits. Whether EPA conducts a formal cost-benefit analysis or not, reasoned decision-making, *Michigan*, and the CAA require EPA to explain why and how the benefits outweigh the costs. At a minimum, EPA must evaluate and explain whether the specific benefits it identified are worth the costs it estimated, or that the costs would not “do[] significantly more harm than good.” *See Michigan*, 135 S. Ct. at 2707.

Moreover, as explained in Section II below, EPA routinely quantifies the benefits of regulation even where uncertain (as it did here when it quantified the purported IQ benefits of reducing mercury emissions). In fact, as the *Michigan* dissent noted, EPA is required to do so by Executive Order 12866. *See id.* at 2721. EPA was able to quantify the benefits associated with “the predominant exposure pathway,” 76

Fed. Reg. at 24,999, JA____, for EGU HAP emissions—and the record shows these benefits are far outweighed by the costs. EPA’s assertion that the collective volume of EGU HAP reductions can be a substitute for “benefit,” and its generalized reference to the “significant hazards to public health and the environment,” 81 Fed. Reg. at 24,428, JA____, is plainly an attempt to mask the minuscule benefits of regulating EGUs under § 112, especially as compared to its \$9.6 billion sticker price, *see supra* p. 16.

3. EPA Unlawfully Fails To Assess the Costs and Benefits of Each of the Three, Multi-Billion Dollar Control Mandates.

The cost-benefit imbalance is especially stark when examining each of the three control requirements EPA promulgated in MATS. *See supra* pp. 16-17. Any costs and benefits that exist derive solely from the pollutant-specific control requirements. Just because it may be appropriate to control one HAP under § 112 does not mean it is reasonable to control other HAPs under § 112 as well.

The statute focuses on each EGU HAP “*which may warrant regulation* under this section.” CAA § 112(n)(1)(A). Accordingly, and especially in light of alternatives available to EPA to regulate particular HAPs and not others, *see infra* Section III.A, EPA must consider the cost and benefits of regulating each HAP (or group of related HAPs, such as non-mercury metals) emitted by EGUs in evaluating whether it is appropriate and necessary to regulate each. EPA flatly refused to do so. RTC at 21-22, JA____. Thus, in a situation where the benefits of regulating mercury *did* outweigh the

costs, but controlling acid gases cost \$5 billion and yielded minuscule or no benefit, EPA would still illogically conclude it appropriate to regulate both (or even all) HAPs from EGUs. But in such a circumstance, “it is [not] even rational, never mind ‘appropriate’” for EPA to regulate under § 112 those HAPs that yield no benefit at all. *Michigan*, 135 S. Ct. at 2707. This is especially so where Congress unlocked the option of regulating only mercury under § 111 specifically to avoid such a result. *See infra* Section III.A.

EPA’s “preferred approach” cannot be squared with § 112(n)(1)(A) and the Supreme Court’s directive in *Michigan* to weigh costs against benefits in determining whether regulation is “appropriate and necessary.”

II. EPA’s “Alternative” Benefit-Cost Approach Is Also Invalid Because It Is Based on the “Co-Benefits” of Reducing Pollutants Other than HAPs.

EPA’s “alternative” approach to considering costs fares no better. The Agency claims that a “formal benefit-cost analysis” shows that the benefits of regulating EGUs’ HAP emissions outweigh the costs. 81 Fed. Reg. at 24,421, JA____. But EPA reaches this conclusion by ignoring the HAP-specific focus of § 112 and relying on purported benefits associated with incidental reductions in other pollutants (PM_{2.5}, resulting from SO₂ reductions) that are already regulated under other provisions of the Act.

Section 112(n)(1)(A) directs EPA to determine whether, after the implementation of other CAA requirements (with attendant reductions in HAP

emissions), the benefits of addressing the remaining risks posed by EGU HAP emissions justify the costs of regulating those HAP emissions under § 112. EPA cannot answer that question by relying on reductions in pollutants that are not the target of § 112—particularly when, as here, those reductions may not yield benefits at all. When the inquiry is properly limited to the effects of regulating *HAPs*, the costs unequivocally outweigh the benefits.

A. Congress Did Not Authorize EPA To Regulate EGU HAP Emissions Under § 112 Based on Reductions in Pollutants Regulated Under Other CAA Programs.

EPA has no authority to base its decision to regulate EGU HAP emissions under § 112 on the “co-benefits” of reducing pollutants that are not HAPs (i.e., pollutants that are not listed under § 112). Congress directed EPA in § 112(n)(1)(A) to address a specific problem: the hazards to public health caused by any HAPs emitted by EGUs after implementing other CAA programs. Congress explicitly required EPA to decide whether regulation of EGUs under § 112 is “appropriate and necessary” to address *that* problem, not to address health hazards caused by PM_{2.5} resulting from SO₂ or other emissions not listed under § 112. Nothing in Congress’s singular focus on HAPs in § 112(n)(1) suggests EPA may impose costly controls on EGU HAP emissions based on reductions in other pollutants that are already extensively regulated through entirely separate programs in the Act. EPA’s alternative finding impermissibly “relied on factors which Congress has not intended it to consider.”

State Farm, 463 U.S. at 43.

1. Section 112(n)(1)(A) Limits EPA's Consideration to Whether the Benefits of Reducing *HAPs* Are Worth the Costs.

Both the history and the text of § 112(n)(1)(A) demonstrate EPA has no authority to determine it is appropriate to regulate EGU HAP emissions under § 112 based on the benefits of reducing non-HAPs. As the Supreme Court noted in *Michigan*, Congress in 1990 “subjected power plants to various regulatory requirements” that “were expected to have the collateral effect of reducing power plants’ emissions of hazardous air pollutants.” 135 S. Ct. at 2705. These other regulatory requirements included, among others, the ongoing national ambient air quality standards (“NAAQS”) program and a new program to address acid rain under Title IV of the Act. CAA §§ 401 *et seq.* To comply with the latter, many plants installed “scrubbers” to reduce SO₂ emissions that contribute to acid rain. 70 Fed. Reg. at 16,003, JA____. Those measures also reduced HAP emissions.

Congress also enacted § 112(n)(1)(A) in 1990, requiring EPA to satisfy two conditions before it can regulate EGU HAPs. First, EPA was required to undertake the Utility Study to assess “the hazards to public health reasonably anticipated to occur as a result of emissions” of HAPs from EGUs “after imposition of the requirements” of the Act. CAA § 112(n)(1)(A). Second, EPA had to find that “such regulation is appropriate and necessary *after considering the results of the study.*” *Id.* (emphasis added). Thus, the operative statutory provision explicitly limits EPA’s

authority to regulate any remaining EGU HAPs to the extent that the effects of *those HAP emissions* justify regulation.

Nothing elsewhere in § 112(n)(1) gives EPA authority to base its “appropriate” finding on the benefits of regulating non-HAPs. For example, the next subsection—§ 112(n)(1)(B)—requires EPA to conduct a second study (the Mercury Study) on the costs of technologies that can control “mercury emissions from electric utility steam generating units.” And the following subsection requires EPA to conduct a third study on “the threshold level of mercury exposure below which adverse human health effects are not expected to occur.” *Id.* § 112(n)(1)(C). These additional studies confirm that Congress in § 112(n)(1) focused on the hazards to public health caused by EGU HAP emissions (including mercury), and required that EPA base its decision on the health risks from those pollutants, not the risks from non-HAPs. *See Michigan*, 135 S. Ct. at 2708 (studies required by § 112(n)(1)(B) and (C) inform scope of “appropriate and necessary” analysis).

EPA’s claim, 81 Fed. Reg. at 24,438-39, JA____-____, that § 112(n)(1) implicitly allows the Agency to rely on PM_{2.5} co-benefits as the basis for regulating EGU HAPs is also foreclosed by the Supreme Court’s ruling in *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457 (2001). *American Trucking* focused on whether EPA could consider cost when setting a NAAQS where the governing statutory provision—§ 109—expressly requires the standard to be set at a level “requisite to public health” with an “adequate margin of safety.” CAA § 109(b). The Court refused to interpret

the statute as providing implicit authority to consider cost where authority to do so had “elsewhere, and so often, been expressly granted.” *American Trucking*, 531 U.S. at 467. As the Supreme Court in *Michigan* explained, “*American Trucking* thus establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway.” 135 S. Ct. at 2709.

That principle of statutory interpretation applies with equal force here. Section 112(n)(1)(A) expressly directs EPA to make its “appropriate and necessary” finding on the basis of a factor (hazards to public health from HAPs emitted by EGUs) that on its face only addresses the benefits of reducing exposure to listed HAPs, which does not include PM_{2.5}. Because Congress expressly addressed regulation of PM_{2.5} health effects in the NAAQS program, *see* CAA §§ 108-109, and directed that EPA make its appropriate finding in § 112(n)(1)(A) based on health hazards from EGU HAP emissions, EPA has no implicit authority to consider PM_{2.5} co-benefits.

This Court has previously rejected EPA’s similar attempts to rely on factors other than those specified by Congress when deciding whether and how to regulate. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995) (“*APP*”) (EPA may not base fuel requirements for reducing toxics on incidental global warming benefits); *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) (EPA may not deny fuel additive waiver on public health grounds when statute only permits denial on emission control

interference grounds); *see also State Farm*, 463 U.S. at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.”). In *API*, the Court addressed a provision that directed EPA to promulgate regulations governing reformulated gasoline with the aim of reducing emissions of volatile organic compounds and toxic air pollutants. 52 F.3d at 1115 (citing CAA § 211(k)). In response, EPA adopted a regulatory program that promoted renewable oxygenates over others—not because it achieved greater reductions in volatile organic compounds and toxics, but because it would promote “global warming benefits” and would otherwise “effect the purposes of the Act” generally. *Id.* at 1116-17.

This Court held EPA exceeded its authority: “[t]he sole purpose of the [reformulated gasoline] program is to reduce air pollution ... through specific performance standards for reducing VOCs and toxics emissions,” and not to advance other goals not specified by Congress. *Id.* at 1119. This was true even though the statute allowed EPA to consider the “nonair-quality and other air-quality related health and environmental impacts and energy requirements” of its reformulated gasoline regulations. CAA § 211(k). Those considerations were “subordinate” to that section’s overarching goal of reducing specific pollutants, and “the statute does not authorize [EPA] to use these factors as a basis for imposing any additional restrictions on [reformulated gasoline], even if the additional restrictions would yield some benefit among the factors to be taken into consideration.” *API*, 52 F.3d at 1120.

Here, reducing emissions of non-HAP pollutants is not even a subordinate goal of § 112. “[T]he aims and limits of the section as a whole” are focused entirely on HAP emissions. *Id.* Because the “sole purpose” of § 112(n)(1) is to address EGU HAP emissions, *id.* at 1119, EPA erred by basing its decision that regulation is “appropriate and necessary” on the potential benefits of reducing non-HAPs.

2. Predicating § 112 Regulation of EGU HAP Emissions on PM_{2.5} Co-Benefits Resulting from SO₂ Reductions Is an End-Run Around CAA Programs That Already Regulate These Non-HAPs.

EPA’s lack of authority to consider PM_{2.5} co-benefits is further reinforced by the fact that PM_{2.5} is addressed under a completely different CAA provision—the § 109 NAAQS program. Under that program, EPA regulates PM_{2.5} and other “criteria” pollutants according to detailed legislative instructions regarding the manner and extent to which those pollutants are to be controlled. EPA cannot base a decision that it is “appropriate” to establish § 112 standards for EGU HAPs on alleged benefits of reducing another pollutant (PM_{2.5}) beyond the levels EPA has already determined meet the statutory directives applicable to that pollutant. Indeed, at oral argument in *Michigan*, Chief Justice Roberts described relying on co-benefits as “an end run” around § 109’s restrictions. Tr. of Oral Arg. at 59-61, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46); *see also id.* at 62-63 (noting EPA’s citation of co-benefits “raises the red flag”).

EPA’s reliance on PM_{2.5} co-benefits is particularly egregious here, because these co-benefits largely result from reductions in SO₂ obtained through the installation and

upgrade of scrubbers forced by the § 112(d) standard for acid gases. In the 1990 Amendments, Congress decided to treat EGUs differently from all other source categories under § 112 in no small part because of concerns that § 112(d) standards would undo the efficiency of the Title IV program by mandating uniform controls of acid gases so as to eliminate the flexibility, freedom of choice, and efficiency that are the core goals of Title IV. *See, e.g.*, Murray Comments at 16 (statement of Sen. Gerry Sikorski) (“[F]reedom of choice would be wasted” if § 112 is used to “require most, if not all coal-fired units to scrub.”), JA____; 136 CONG. REC. 35,013 (Oct. 26, 1990) (statement of Rep. Howard Nielson) (“It is the sense of the conferees that EPA’s ultimate decision avoid any conflict with title IV implementation, including the compliance flexibility and cost-effectiveness goals which are central to the acid rain program.”), JA____; Murray Comments at 18-19 (quoting statements of Sens. Malcolm Wallop and Wendell Ford), JA____-____.

Title IV’s Acid Rain Program was exhaustively negotiated by Congress to reduce EGU SO₂ emissions using “prescribed emission limitations,” “specified deadlines,” and an “emission allocation and transfer system.” CAA § 401(b). The trading program was included to provide for the strategic and non-universal deployment of scrubbers while allowing those with the highest retrofit costs to avoid installing them in exchange for subsidizing emission reductions achieved at other EGUs. Thus, Congress itself determined the best approach to cost-effectively reduce EGU SO₂ emissions. EPA’s attempt to justify using § 112 based on additional

reductions of this very same pollutant from these very same sources, but in a command-and-control program that is the antithesis of Title IV's market-based program, is plainly an "end run" around the latter.

B. EPA's Arguments for Relying on Co-Benefits Are Unavailing.

1. EPA's Invocation of General "Economic Principles" Is Irrelevant.

EPA maintains that its "formal" benefit-cost analysis may include incidental co-benefits because doing so is consistent with "standard economic principles." 81 Fed. Reg. at 24,439, JA____. "Standard economic principles," however, cannot override the requirements of § 112(n)(1)(A). Indeed, no economic principle endorses the consideration of costs or benefits that are irrelevant for a given context. And the context here, as discussed above, is Congress's command in § 112(n)(1)(A) for EPA to determine whether the risks from EGU HAP emissions justify the costs of regulating those emissions under § 112. Whatever role co-benefits may play in other economic analyses, they have no place in EPA's "appropriate and necessary" analysis.

Indeed, EPA's own policy for conducting benefit-cost analyses demonstrates this very point. *See* EPA, Guidelines for Preparing Economic Analyses (Dec. 17, 2010, updated May 2014), <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses>. The Guidelines do not advise that EPA consider all conceivable effects of a regulation: they state that EPA must identify the "*relevant* economic variables" based on the "environmental problem that the regulation addresses." *Id.* at 5-3 (emphasis added), JA____. The "environmental problem" that

Congress instructed EPA to address in § 112(n)(1)(A) is the hazard to public health from EGU HAP emissions after implementation of other CAA programs, not the risks posed by emissions of other pollutants already regulated under other provisions of the Act. Under EPA's own guidelines, PM_{2.5} co-benefits are not a "relevant economic variable" and cannot be used as the basis for a determination to regulate EGU HAPs.

2. EPA's Justification for Considering Co-Benefits Relies on a Logical Fallacy.

Congress understood that programs targeted at reducing pollutants other than HAPs (like SO₂ in Title IV's Acid Rain Program) may result in collateral reductions of HAPs. Congress therefore required EPA to perform the Utility Study to determine "the hazards to public health reasonably anticipated to occur as a result of emissions by" EGUs of HAPs "after imposition of" these programs. CAA § 112(n)(1)(A).

EPA asserts that because it must determine in the Utility Study the extent to which CAA programs addressing *non-HAP pollutants* will reduce risks from EGU *HAP* emissions, it may conversely consider risks from *non-HAP pollutants* when determining whether regulation of EGU *HAP* emissions is "appropriate and necessary." 81 Fed. Reg. at 24,438-39, JA____-____. The Agency's argument is a red herring.

Had Congress intended that EPA regulate under § 112 based on health effects of HAP and non-HAP EGU emissions, it would have said so. It did not. Congress in the Utility Study asked EPA to address two questions: (1) what EGU HAP emissions

remain after controls under other programs; and (2) what HAP risks are posed by those remaining HAP emissions. Congress's exclusive focus in § 112(n)(1)(A) is on EGU *HAP* emissions. The sole purpose of the Utility Study and the “appropriate and necessary” requirement in § 112(n)(1)(A) is thus to determine whether EGUs’ *remaining* HAP emissions pose significant risks and should be regulated under § 112. Ancillary PM_{2.5} “co-benefits” play no role in answering that question.

3. EPA Relies on the Illusory Co-Benefits of Reducing PM_{2.5} Below Levels That the Agency Has Already Found Protect the Public Health.

Even if EPA had the legal authority to consider PM_{2.5} co-benefits for its “appropriate and necessary” finding, the PM_{2.5} co-benefits on which it relies are illusory. The Agency determined in 2013 when it analyzed the PM_{2.5} NAAQS that its confidence in the association between reducing PM_{2.5} below the level already required by the NAAQS (12 µg/m³) and the health benefits from such additional reductions is inadequate to conclude that any additional reductions are warranted. 78 Fed. Reg. 3086, 3116 (Jan. 15, 2013), JA____; *see also id.* at 3089 (stating that 12 µg/m³ provides the “*appropriate* degree of increased public health protection”) (emphasis added), JA____. Yet most of the PM_{2.5} reductions EPA cites to support its “appropriate and necessary” finding occur in areas that have already attained the NAAQS. MATS RIA at ES-4, JA____. EPA cannot justify its decision to regulate EGU HAPs under § 112 based on asserted public health benefits it only recently concluded did not justify regulation of those non-HAPs.

Section 109 requires EPA to promulgate “primary” NAAQS for criteria pollutants, like PM_{2.5}. CAA § 109(b). Primary NAAQS are defined as standards “which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.” *Id.* § 109(b)(1).¹⁹

When setting a primary NAAQS with an “adequate margin of safety,” the Administrator must decide “what margin of safety will protect the public health from the pollutant's adverse effects—not just known adverse effects, but those of scientific uncertainty or that ‘research has not yet uncovered.’” *Am. Lung Ass’n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (quoting *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980)). The NAAQS must protect “not only average healthy individuals, but also ‘sensitive citizens.’” *Id.* at 389; see *American Trucking*, 531 U.S. at 475-76.

In 2013, EPA reviewed the most recent scientific research and revised the NAAQS for PM_{2.5}. 78 Fed. Reg. 3086, JA____. The Administrator explained that when selecting the ambient concentration that would protect public health with an adequate margin of safety, her judgment was informed by “the degree of confidence in the observed associations in the epidemiological studies” between exposure to PM_{2.5} and

¹⁹ The Act also requires EPA to promulgate “secondary” standards to protect the public welfare, including crops and buildings, from the effects of air pollution. CAA §§ 109(b)(2), 302(h). The secondary NAAQS for PM_{2.5} are all less stringent than or equal to the corresponding primary NAAQS. See 40 C.F.R. §§ 50.13, 50.18.

adverse health effects. *Id.* at 3161, JA____. As to the level of the standard, EPA found, “the available evidence interpreted in light of the remaining uncertainties does not justify a standard level set below $12\text{ }\mu\text{g}/\text{m}^3$ as necessary to protect public health with an adequate margin of safety.” *Id.* at 3162, JA____. Put another way, although NAAQS are “precautionary and preventive” in nature, *Lead Indus. Ass’n, Inc.*, 647 F.2d at 1155, and intended to protect the most sensitive subgroups in the population, EPA did not have confidence that a level below $12\text{ }\mu\text{g}/\text{m}^3$ was needed to provide the rigorous protections the Act requires.

Indeed, EPA explained any health benefits that may occur at $\text{PM}_{2.5}$ concentrations below $12\text{ }\mu\text{g}/\text{m}^3$ are not merely “less certain”—they are so uncertain that it is not appropriate to include exposures below $12\text{ }\mu\text{g}/\text{m}^3$ within the “adequate margin of safety” provided by the NAAQS. *See* 78 Fed. Reg. at 3161, JA____. EPA’s lack of confidence in any such benefits was so low that a standard below $12\text{ }\mu\text{g}/\text{m}^3$ “would not be warranted.” *Id.*

Yet EPA now claims that reductions of $\text{PM}_{2.5}$ (as a result of a § 112(d) standard that forces installation of scrubbers to reduce SO_2) below the current $\text{PM}_{2.5}$ NAAQS level will provide additional health benefits worth \$37 to \$89 *billion* each year. EPA has not identified any new scientific information that would overcome its 2013 determination that an ambient $\text{PM}_{2.5}$ concentration of $12\text{ }\mu\text{g}/\text{m}^3$ is not only sufficient to protect the public health—including sensitive citizens—but will do so with an adequate margin of safety. Nor has it explained why it now has sufficient confidence

in the existence of health benefits from further reductions in PM_{2.5} when in 2013 it did not.

In fact, EPA asserts that almost all of the “estimated avoided premature deaths” on which the purported co-benefits are based would occur in areas where the concentration of PM_{2.5} in the ambient air is below 10 µg/m³—lower than even the current 12 µg/m³ PM_{2.5} NAAQS. MATS RIA at ES-4, JA____. Nevertheless, EPA, without explanation, “considers them to be legitimate components of the total benefits estimate.” *Id.*

In sum, EPA’s recent findings establish that reductions in PM_{2.5} concentrations beyond those already required by the revised NAAQS do not provide any reliable benefits at all, much less benefits that could amount to \$37 to \$89 billion every year. Equally important for this case, EPA has not explained its reliance on the “benefits” of reducing PM_{2.5} concentrations below the NAAQS in light of its 2013 conclusion that it has no confidence in the existence of those benefits. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (Where action “rests upon factual findings that contradict those which underlay its prior policy a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”). Because EPA has not provided an “explanation for its action” that includes “a ‘rational connection between the facts found and the choice made,’” the appropriate finding is arbitrary and capricious. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Finally, even if EPA now has greater confidence that health benefits would accrue from further reductions in PM_{2.5} levels, the Act's NAAQS provisions—and not § 112(n)(1)—provide a mechanism for implementing such reductions. Each NAAQS and the related scientific evidence supporting it must be reviewed at least every five years, resulting in NAAQS revision if appropriate. CAA § 109(d)(1). In fact, EPA has already begun to review the 12 µg/m³ PM_{2.5} NAAQS. *See* 81 Fed. Reg. 22,977 (Apr. 19, 2016), JA____. Any health benefits potentially available from further reducing PM_{2.5} levels are properly addressed and accounted for through the NAAQS program, not through regulating EGU HAP emissions under § 112.

C. EPA's Vague Reference to Unquantifiable Benefits Does Not Support Its "Appropriate and Necessary" Finding.

The cited PM_{2.5} co-benefits of \$36 to \$89 billion per year are the primary justification for EPA's conclusion in its alternative approach that the benefits of regulating EGU HAP emissions under § 112 outweigh its costs. *See* MATS RIA at ES-3, JA____. When these co-benefits are eliminated from EPA's analysis, the quantified net benefits are overwhelmingly negative: as the Supreme Court noted, the costs of the MATS rule are "between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of [HAPs]." *Michigan*, 135 S. Ct. at 2706. In light of this imbalance, regulating EGU HAP emissions under § 112 clearly "does significantly more harm than good" and is not "appropriate." *Id.* at 2707. The vague un-monetized HAP-related benefits EPA alludes to cannot alter this conclusion. *See* 80 Fed. Reg. at

75,040 (claiming EPA “accounted for” unquantified benefits “by adding a ‘+B’ to denote the sum of all unquantified benefits”), JA____.

Aside from the meager \$4 to \$6 million in benefits EPA quantified for “the predominant exposure pathway by which humans are affected by [methylmercury],” 76 Fed. Reg. at 24,999, JA____, the Agency otherwise points to empty generalities and speculative claims regarding health and environmental effects. For example, EPA asserts that the benefits of regulation include “the statutory goal of reducing the inherent hazards associated with HAP emissions.” 81 Fed. Reg. at 24,429, JA____. But the Supreme Court has already rejected this rationale, noting that the fact some reduction in HAPs will occur is not sufficient to make such regulation “appropriate.” *See Michigan*, 135 S. Ct. at 2710 (“[I]f uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains ‘necessary,’ not whether regulation is ‘appropriate *and* necessary.’”).

EPA also claims that, even though it was able to quantify highly uncertain IQ benefits purportedly resulting from mercury emissions, other health and environmental benefits of reducing EGU mercury, acid gas, and non-mercury metals emissions simply could not be quantified. 81 Fed. Reg. at 24,441, JA____; 80 Fed. Reg. at 75,040, JA____. But these purported benefits are too speculative to support an “appropriate and necessary” finding for the same reasons the Agency cannot quantify them: they are not supported by the scientific literature. *See* 80 Fed. Reg. at 75,040,

JA____. As the Agency acknowledges, at the low exposures presented by EGU HAP emissions, benefits cannot be quantified due to

gaps in toxicological data, uncertainties in extrapolating results from high-dose animal experiments to estimate human effects at lower doses, limited monitoring data, difficulties in tracking diseases such as cancer that have long latency periods, and insufficient economic research to support the valuation of the health impacts often associated with exposure to individual HAP.

Id. at 75,040 n.53, JA____; *see also, e.g.*, MATS RIA at 64-66, JA____-____.

Finally, even if the science allowed one to establish additional benefits of reducing EGU HAP emissions with any confidence, EPA makes no effort to demonstrate that these benefits would be significant enough—in combination with the \$4 to \$6 million in quantifiable benefits—to justify the \$9.6 *billion* in compliance costs required by the MATS rule. Even if the unquantified benefits EPA cites are worth ten times the benefits for the “predominant exposure pathway” it *can* quantify, they would still be orders of magnitude less than the costs of this regulation. The Court stated that “[i]f (to take a hypothetical example) regulating power plants would yield \$5 million in benefits, the prospect of mitigating cost from \$11 billion to \$10 billion ... would not by itself make regulation appropriate.” *Michigan*, 135 S. Ct. at 2711. Likewise, if regulating EGU HAP emissions would cost nearly \$10 billion, increasing the benefits from \$5 million to \$6 million (or even \$50 million) would not make regulation appropriate.

III. EPA's Refusal To Consider Alternative Control Strategies and All Relevant Costs, Is Contrary to the Statute and the Supreme Court's Direction.

A. EPA Impermissibly Ignores Less Costly Alternative Control Strategies for Reducing Emissions from EGUs.

In the final Rule, EPA limited its analysis to the costs of MATS (and only to some of those costs, *see* Section III.B *infra*), and refused to consider alternative control strategies that would avoid many of the disadvantages resulting from costly regulation of EGUs under § 112, which requires emission standards based on uniform national standards set at the levels achieved by the best performing EGUs. CAA § 112(d)(3), (d)(3)(A). EPA's refusal to consider such alternatives as part of its "appropriate and necessary" determination is contrary to *Michigan* and violates the statute.

Congress directed EPA to perform the Utility Study and, in reporting on that study, to "develop and describe" "alternative control strategies for emissions which may warrant regulation under this section." *Id.* § 112(n)(1)(A). EPA may regulate EGUs under § 112 *only* if it finds "such regulation is appropriate and necessary after considering the results of the study required by this subparagraph." *Id.* This "[s]tatutory context reinforces the relevance" of considering less costly and more flexible alternatives in assessing cost and deciding whether § 112 regulation—as opposed to regulation under another program or not at all—is "appropriate and necessary." *Michigan*, 135 S. Ct. at 2708 (recognizing that "all three studies 'provide a framework for [EPA's] determination.'").

EPA's Rule disregards this statutory framework. EPA insists it "is not required to consider the potential cost of alternative approaches to regulating HAP emissions from EGUs before finding that regulation is appropriate and necessary" under § 112. 81 Fed. Reg. at 24,447 (emphasis omitted), JA____. EPA's refusal even to consider how § 112 regulation compares to less costly and more flexible alternatives "overlooks the whole point" of § 112(n)(1), *Michigan*, 135 S. Ct. at 2710: to address the many warnings from EPA and others that regulating EGUs under § 112 could lead to massive costs with little benefits, *see supra* pp. 6-7 (discussing these warnings). This is why Congress directed EPA to identify alternative control strategies for reducing HAP emissions before concluding that regulation under § 112 was both "necessary" and "appropriate." Section 112(n)(1) requires EPA to address alternatives that would "avoid any conflict with title IV implementation, including the compliance flexibility and cost-effectiveness goals which are central to the acid rain program." 136 CONG. REC. 35,013 (Oct. 26, 1990) (statement of Rep. Howard Nielson), JA____.²⁰

EPA did not need to look far in performing the required statutory analysis. As EPA itself has previously recognized, *supra* pp. 11-12 (discussing 2005 rulemaking),

²⁰ Title IV is "flexible" and "cost-effective" because it allows some sources to install larger and more expensive scrubbers such that others can install smaller and less expensive scrubbers or avoid installing scrubbers at all, all while still achieving the desired SO₂ emission reductions. *See* Murray Comments at 10, 13, JA____, _____. By contrast, the § 112 acid gas emission standard requires that nearly every EGU install or upgrade SO₂ controls.

the CAA provides more effective alternative strategies for controlling EGU emissions. Indeed, Congress provided in the 1990 Amendments one such alternative precisely to “allow[] the needed flexibility to identify and address the most significant toxic chemicals from utilities without mandating expensive controls that may be unnecessary.” Administrator 1990 Letter to Senate, JA____.

Specifically, § 111(d) of the Act allows EPA and States to regulate EGU emissions without imposing unreasonable burdens on existing sources, permitting States to tailor requirements for “any particular source” based on “consideration” of “remaining useful life” and “other factors.” EPA’s regulations allow States to establish “less stringent emission standards or longer compliance schedules” “on a case-by-case basis for particular” sources or “classes” of sources whenever necessary to avoid imposing any “[u]nreasonable cost of control resulting from plant age, location, or basic process design,” or to account for “[p]hysical impossibility” or any “[o]ther factors” “that make application of a less stringent standard or final compliance time significantly more reasonable.” 40 C.F.R. § 60.24(f).

EPA has recognized that the 1990 Amendments to § 111(d) “reflect[] a desire to change the pre-1990 approach and to expand EPA’s authority as to the scope of pollutants that could be regulated under section 111(d)” so as not to “preclude EPA from regulating under section 111(d) those pollutants emitted from source categories which were not actually being regulated under section 112” including “existing Utility Units.” 69 Fed. Reg. at 4685, JA____. Thus, *if* mercury is the HAP emitted by EGUs

after imposition of the requirements of the Act that “may warrant regulation,” CAA § 112(n)(1)(A), then EPA can regulate that pollutant under § 111(d) without regulating other pollutants—such as acid gases—at great cost, even though those other pollutants pose no public health risk. That is what EPA did in the Clean Air Mercury Rule, promulgated under § 111(d). *See supra* pp. 11-12. EPA’s disregard of a less costly option that Congress unlocked specifically for the purpose of providing an alternative for regulating EGUs is especially egregious.

In addition, Congress provided EPA with opportunities to defer regulation of EGU emissions to States, including using States’ preserved authority to regulate “emissions of air pollutants” under § 116. *See also* CAA § 102(a). To that end, § 112 requires EPA to provide States the technical information and assistance required for States to regulate HAPs, directing EPA to “establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies ... on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring.” *Id.* § 112(l)(3).

Congress also instructed EPA to “encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area,” with at least ten percent of funding to support “innovative and effective” areawide strategies. *Id.* § 112(k)(4). By interpreting § 112(n)(1) to *prohibit* EPA from considering the

alternative of deferring to State regulation of EGU emissions as part of the appropriate and necessary determination, 81 Fed. Reg. at 24,447 n.57, JA____, EPA “strayed far beyond” the “bounds of reasonable interpretation,” *Michigan*, 135 S. Ct. at 2707 (internal quotation marks omitted).

Besides avoiding the conflict with Title IV and the unreasonable results of imposing § 112(d) standards on EGUs, EPA’s § 111 and § 116 alternatives would give States far more say in the regulation of emissions from power plants. By interpreting § 112(n)(1) to require nationally-uniform § 112 regulation of EGU emissions if EPA found regulation was “appropriate,” EPA ignored the federalism implications of undoing a century of State and local effort and supplanting traditional State authority with the strict and inflexible § 112 program.²¹ EPA chose a regulatory program EPA knows will “level” the power industry by imposing national uniform emission standards. 76 Fed. Reg. at 24,979, JA____. Congress did not tie EPA’s hands in § 112(n)(1) to regulate EGUs the same as all other industries. Indeed, that was the point of § 112(n)(1), as the Supreme Court emphasized—treat EGUs differently.

In addition, well-settled principles of administrative law require “consideration of alternatives” and “an adequate explanation when ... alternatives are rejected.” *Int’l*

²¹ See Murray Comments at 4-11 (detailing state and local efforts and traditional state authority over EGUs) & 47-48 (identifying and explaining the need to consider federalism concerns), JA____-____, ____-____; see generally *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (statutes “must be read consistent with principles of federalism inherent in our constitutional structure”).

Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 817 (D.C. Cir. 1983); *see also id.* (“It is absolutely clear ... that ... an ‘artificial narrowing of options,’ ... is antithetical to reasoned decisionmaking and cannot be upheld.” (quoting *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C. Cir. 1973)).²² EPA’s decision “is lawful only if it rests ‘on a consideration of the relevant factors.’” *Michigan*, 135 S. Ct. at 2706 (quoting *State Farm*, 463 U.S. at 43). Thus, EPA may not “fail to consider an important aspect of the problem when deciding whether regulation” under § 112 “is appropriate” for EGUs. *Id.* at 2707 (internal quotation marks and alteration omitted). EPA’s refusal to consider alternatives and explain why it rejected them is a “complete failure to satisfy these quintessential aspects of reasoned decisionmaking.” *Donovan*, 722 F.2d at 818.

B. EPA Cannot Find § 112 “Appropriate” for EGUs Without Considering all Costs, Including Important Disadvantages and Localized Impacts.

The Rule is also flawed because it provides an incomplete account of the costs of regulating HAP emissions from EGUs under § 112. The Supreme Court directed EPA to account for “more than the expense of complying with regulations.” *Michigan*, 135 S. Ct. at 2707. Instead, EPA must consider “any disadvantage” of using § 112. *Id.*; *see also State Farm*, 463 U.S. at 43 (EPA must “consider ... important aspect[s] of the

²² *See also* 2 U.S.C. § 1535 (Unfunded Mandates Reform Act, requiring, *inter alia*, EPA to explain why the least costly method of achieving its objectives was not adopted); 5 U.S.C. § 602(c) (Regulatory Flexibility Act, requiring, *inter alia*, EPA to consider “significant” alternatives that minimize “significant economic impact” on small entities”).

problem”). EPA concedes it must “determine” that using § 112 “will, on the whole, be beneficial as opposed to detrimental to society.” 81 Fed. Reg. at 24,430, JA____. EPA cannot make that determination without considering “*all* of the relevant costs.” *See Mingo Logan*, 829 F.3d at 737 (Kavanaugh, J., dissenting).

Because EPA did not examine alternative control strategies, *see supra* Section III.A, it ignored the relative costs of available alternative control strategies that would—and should—have informed its decision whether “regulation under this section” was “appropriate.” Indeed, *if* EPA is going to interpret § 112 as requiring that EGUs be regulated the same as other source categories, it must address the full implications of that decision, including the applicability of all aspects of “regulation under this section.” This includes the disadvantage of a possible second round of regulation under the § 112(f) residual risk review provision.²³ *See* Murray Comments at 40, JA____. That possibility is a “cost” that must be considered as part of the § 112(n)(1)(A) determination, and EPA’s refusal to do so, RTC at 35, JA____, is contrary to *Michigan*, 135 S. Ct. at 2711.²⁴

²³ If this Court upholds the Rule, it would be unlawful for EPA to impose on EGUs in the future additional compliance costs that were not accounted for in the “appropriate and necessary” determination required by *Michigan*.

²⁴ EPA refused to consider § 112(f) because it said it was not possible, at this time, to look into the future to project precisely the contours of potential § 112(f) regulation. *See* RTC at 35, JA____. But even if true, in *Michigan*, the Court rejected EPA’s similar argument that it could not consider costs of a future § 112(d) rule at the time of a § 112(n)(1)(A) determination. 135 S. Ct. at 2706-08.

EPA's evaluation ignores myriad costs and disadvantages, including the localized impacts of § 112 regulation of EGUs on certain States, the coal mining industry, and consumers. Congress itself identified many disadvantages of using § 112 to regulate EGUs. *See generally* Murray Comments at 14-29, JA____-____. For example, Senator Ford specifically expressed concern that coal miners would be “out of work, absolutely out of work.” *See id.* at 19 (quoting statement of Sen. Ford, Hearing Before the Sen. Comm. on Energy & Nat. Res. (Jan. 24-25, 1990)), JA____. Members of industry raised important localized concerns before Congress in 1990, including impacts on consumers. *See, e.g., id.* at 15 (“[A] rate increase of this magnitude upon the rural impoverished people in our service territory would cause them undue harm.”) (quoting testimony of Gen. Counsel of Iowa Southern (June 22, 1989)), JA____; *id.* at 20 (“This drastic restructuring of section 112 would impose enormous cost[s] ... that are especially punishing to the poor and those on fixed income”) (quoting testimony of Dr. Goodman, Southern Co. Vice President of Research & Envtl. Affairs, Hearing Before the Sen. Comm. on Energy & Nat. Res. (Jan. 24-25, 1990)), JA____.

EPA refused to consider these disadvantages, asserting that “examining highly localized impacts ... is not required by Section 112(n)(1)(A).” RTC at 90, JA____. EPA also defended its refusal to consider impacts on coal companies, communities, and workers by citing EPA's projection in 2012 that “coal production for the electric power sector in 2015 would decrease about 1 percent.” *Id.* at 92-94, JA____-____.

But EPA was presented with data showing that it had vastly underestimated EGU retirements. For example, the State of Ohio identified roughly 6 GW of EGU closures *in Ohio alone* resulting from the decision to regulate EGUs under § 112, Comments of Ohio Environmental Protection Agency at 3 & Enclosure (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20542, JA____, ____, which is more than EPA predicted for *the entire country*. EPA rejected this evidence in favor of blindly relying on its erroneous 2012 projections. RTC at 76 (“EPA disagrees with the commenter’s assertion that the EPA must rely on a consideration of costs that includes data on recent plant closures”), JA____. EPA also ignored without explanation the estimate of 19 GW of EGU closures provided by NERA Economic Consulting, *id.* at 78, JA____, an estimate that is consistent with the Energy Information Administration’s finding of approximately 20 GW of closures and 5.6 GW of conversions from coal to natural gas as a result of EPA’s MATS rule. U.S. Energy Information Administration, Today in Energy: EIA electricity generator data show power industry response to EPA mercury limits at 1 (July 7, 2016), <http://www.eia.gov/todayinenergy/detail.php?id=26972>, JA____.

Thus, actual data confirm the numerous comments showing that impacts on coal companies, communities, and workers were far greater than EPA projected, and therefore even more important to consider. Reasoned decisionmaking requires that EPA “consider ... important aspect[s] of the problem” and “examine the relevant

data,” *State Farm*, 463 U.S. at 43, but EPA gave no thought at all to these especially concerning “highly localized impacts” of its decision. RTC at 90, JA____.

Instead of considering *all* costs of regulating EGUs under § 112, EPA restricted its evaluation in the Rule to the ability of the utility sector to “absorb” compliance costs. *See* 81 Fed. Reg. at 24,424-25, JA____-____; *supra* p. 20. EPA’s sector-wide approach to assessing costs masks the real impacts of § 112 regulation. For example, EPA included States with little or no coal generation in its cost metrics, 81 Fed. Reg. at 24,435, JA____, diluting the impact of the Rule in coal-generating States. *See also* Murray Comments at 41-46, JA____-____.

That EPA’s approach was unreasonable is further illustrated by EPA’s refusal to consider the impact of the MATS rule in the ERCOT market in Texas and on ARIPPA members. In finding the cost of the rule reasonable across the entire power sector, EPA repeatedly generalizes that “many of these sources are able to pass-through compliance costs to ratepayers.” 81 Fed. Reg. at 24,436, JA____; 80 Fed. Reg. at 75,035, JA____. Indeed, EPA’s assumption that compliance costs were recoverable was a key part of its (erroneous) conclusion that overall costs were *reasonable* (i.e., affordable). 81 Fed. Reg. at 24,424-25, JA____-____. But, as Luminant and other commenters pointed out, that is not true for the competitive ERCOT market, where costs are not passed on through rates and producers alone must bear the compliance costs, Comments of Luminant on EPA’s Proposed Supplemental Finding at 8-9 (Jan. 15, 2016), EPA-HQ-OAR-2009-0234-20533, JA____-____, or for Texas, ninety percent

of which “is covered by a single isolated grid with limited connections to external power supplies,” *see Texas v. EPA*, 829 F.3d 405, 431 (5th Cir. 2016). EPA’s response that it “consider[ed] all expenditures required under MATS whether these costs are borne either by electricity consumers or electricity producers,”²⁵ is no response at all; it confirms that EPA has given costs in the ERCOT market “no thought at all,” *Michigan*, 135 S. Ct. at 2706. EPA’s recognition elsewhere of the economic strains on generators in the ERCOT market and Luminant units in particular, 81 Fed. Reg. at 24,433 n.24, JA____, underscores the arbitrariness of its refusal to “analyze costs to ERCOT independently” when assessing the *reasonableness* of the rule’s costs, RTC at 67, JA____, as well as the fact that its conclusions run counter to the evidence before the Agency (*i.e.*, the acute economic pressures in ERCOT). *State Farm*, 463 U.S. at 43.

The impropriety of EPA’s approach in considering only *certain* costs imposed by MATS is further illustrated by EPA’s failure to evaluate the cost corresponding to the lost environmental benefits resulting from the forced shutdown of bituminous coal refuse-fired sources operated by ARIPPA members. ARIPPA facilities provide a unique environmental benefit by utilizing state-of-the-art circulating fluidized bed combustion technology to convert coal refuse into energy. Comments of ARIPPA on EPA’s Proposed Supplemental Finding at 2-3 (Jan. 14, 2016), EPA-HQ-OAR-2009-0234-20535 (“ARIPPA Comments”), JA____-____. ARIPPA facilities combust coal

²⁵ RTC at 67, JA____; *see also* 81 Fed. Reg. at 24,434, JA____.

refuse from both past and current mining activities, and thereby abate acid mine drainage from coal refuse piles, reclaim existing and idle or abandoned strip mines, and prevent uncontrolled air emissions caused by accidental burning of coal refuse piles, all at no cost to taxpayers.²⁶ *Id.* at 3, JA____. By converting coal refuse into alternative energy, ARIPPA members are removing one of the principal sources of contamination to surface water and groundwater in coal mining regions of the United States, a long-term environmental benefit estimated to amount to billions of dollars. *Id.* Moreover, in the absence of continued operation of these ARIPPA facilities, the removal and clean-up of the remaining hundreds of millions of tons of coal refuse using traditional methods would perpetuate indefinitely, with the costs fully borne by taxpayers. *Id.*

Due to the unique technical characteristics of circulating fluidized bed technology²⁷ and the importance of preserving ash characteristics essential to the

²⁶ In promulgating MATS, EPA itself recognized these benefits, acknowledging that “[u]nits that burn coal refuse provide multimedia environmental benefits by combining the production of energy with the removal of coal refuse piles and by reclaiming land for productive use. Consequently, because of the unique environmental benefits that coal refuse-fired EGUs provide, these units warrant special consideration” 76 Fed. Reg. at 25,066, JA____. Yet, EPA failed to consider the cost of these lost benefits in conducting its supplemental finding analysis.

²⁷ Because EPA’s cost assessment in response to *Michigan* was limited to conventional coal- and oil-fired units, EPA also failed to consider the additional compliance costs associated with the unique technical and operational characteristics inherent in circulating fluidized bed design and operational configuration, including limitations on the technical and economic feasibility of both add-on emission systems

beneficial reuse of ash in mine reclamation,²⁸ those ARIPPA circulating fluidized bed units firing bituminous coal refuse cannot satisfy the hydrogen chloride standard (or the SO₂ surrogate) imposed by the MATS rule. Absent a revision to such standard, these plants will be forced to close and the environmental benefits they provide will be eliminated. Although ARIPPA specifically reminded EPA of these critical and substantial benefits in its comments, *id.* at 2-4, JA____-____, EPA failed to acknowledge or respond to these comments. EPA's failure to consider the cost associated with the loss of these benefits as part of its Rule further confirms that EPA's evaluation of the costs imposed by the MATS rule was unreasonable and inconsistent with the Supreme Court's directive in *Michigan*.

At bottom, EPA's conclusion that "the record amply demonstrates that the advantages ... for society ... outweigh the disadvantages," 81 Fed. Reg. at 24,429, JA____, depends on its refusal to consider every cost identified in the record other than EPA's carefully selected system-wide "affordability" cost metrics. EPA cannot find advantages outweigh disadvantages unless EPA actually considers *all* of the relevant disadvantages.

and sorbent injection strategies for reducing hydrogen chloride emissions. ARIPPA Comments at 9-18, JA____-____.

²⁸ The continued ability to direct ash for beneficial use in mine reclamation, rather than dispose of the ash as a waste material, is not only central to the environmental benefits provided by these units, but also critical to the facilities' continued financial viability.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing Opening Brief of State and Industry Petitioners contains 17,884 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: November 18, 2016

/s/ Makram B. Jaber

Makram B. Jaber

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of November 2016, a copy of the foregoing Opening Brief of State and Industry Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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Makram B. Jaber

No. 15-1385 (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494)

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

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency
80 FED. REG. 65,292 (OCT. 26, 2015)

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 15-1385: Murray Energy Corporation.

No. 15-1392: State of Arizona; State of Arkansas; New Mexico Environment Department; State of North Dakota; and State of Oklahoma.

No. 15-1490: Sierra Club; Physicians for Social Responsibility; National Parks Conservation Association; Appalachian Mountain Club; and West Harlem Environmental Action, Inc.

No. 15-1491: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Petroleum Institute; Utility Air Regulation Group; Portland Cement Association; American Coke and Coal Chemicals Institute; Independent Petroleum Association of America; National Oilseed Processors Association; and American Fuel & Petrochemical Manufacturers.

No. 15-1494: State of Texas; and Texas Commission on Environmental Quality.

Respondents:

Respondents are the United States Environmental Protection Agency (in No. 15-1385) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1392, 15-1490, 15-1491, 15-1494).

Intervenors and *Amici Curiae*:

State of Wisconsin; Commonwealth of Kentucky; State of Utah; and State of Louisiana are Petitioner-Intervenors[†]

American Lung Association; Natural Resources Defense Council; Physicians for Social Responsibility; Sierra Club; Utility Air Regulatory Group; National Association of Manufacturers; American Forest & Paper Association; Chamber of Commerce of the United States of America; American Chemistry Council; American Coke and Coal Chemicals Institute; American Petroleum Institute; Independent Petroleum Association of America; American Iron and Steel Institute;

[†] This Brief uses the term “State Petitioners” to refer collectively to the Petitioners in Nos. 15-1392 and 15-1494 as well as the State Intervenors.

National Oilseed Processors Association; Portland Cement Association; American Wood Council; American Fuel & Petrochemical Manufacturers; and American Foundry Society are Respondent-Intervenors.

American Thoracic Society is *amici curiae* in support of Petitioners.

Institute for Policy Integrity at New York University School of Law is *amici curiae* in support of Respondents.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, “National Ambient Air Quality Standards for Ozone,” and published on October 26, 2015, at 80 FR 65,292.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of no other related cases.

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GLOSSARY

Agency	United States Environmental Protection Agency
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
FR	Federal Register
NAAQS	National Ambient Air Quality Standard
NASA	National Aeronautics and Space Administration
NOAA	National Oceanographic and Atmospheric Administration
O ₃	Ozone
ppb	Parts Per Billion
SIP	State Implementation Plan

JURISDICTIONAL STATEMENT

This case challenges the following final rule promulgated by the United States Environmental Protection Agency (EPA): “National Ambient Air Quality Standards for Ozone,” 80 FR 65,292 (October 26, 2015)) (the “Rule”). Petitioners filed their Petitions for Review under 42 U.S.C. § 7607(b) within 60 days of the Rule’s publication in the Federal Register, as required by the statute. This Court has jurisdiction pursuant to that provision.

ISSUES PRESENTED‡

1. Whether EPA violated the CAA by failing to address adequately the peak effect of uncontrollable sources on peak days, thus undermining States' ability to meet their obligation for ensuring that "national primary and secondary ambient air quality standards will be achieved and maintained." 42 U.S.C. § 7407(a).
2. Whether EPA's construction of the Act fails to give meaning to the "intelligible principle" needed to avoid an unconstitutional delegation of legislative authority.
3. Whether EPA provided adequate scientific justification for a new NAAQS.

‡ The Intervenor and Petitioner States also incorporate by reference the Industry Petitioners' argument that EPA has failed to provide a reasoned explanation for changing the conclusions it draws from the same basic scientific evidence considered in the prior NAAQS revision.

STATUTES AND REGULATIONS

All applicable statutes are contained in the Brief for the Industry Petitioners; the applicable regulations, 40 C.F.R. §§ 50.14, 50.19, appear in the Addendum to this brief.

INTRODUCTION

Sunland Park, NM, is a town of 15,000 people cornered between the New Mexico-Texas border to the east and the United States' international border with Mexico to the south. It has no major industry and contributes just 3% of the precursor substances that form ozone in the Paso del Norte airshed. Westar Comment at 19, (JA__). Its larger neighbors—El Paso, TX and Juarez, Mexico—are close in proximity but unreachable by the policies adopted in New Mexico, or (in the case of Juarez) even Washington, DC. In fact, New Mexico is virtually powerless to reduce the concentration of ozone around Sunland Park, which arises overwhelmingly from sources beyond the State's ability to control. Moreover, because the area abuts El Paso, it does not qualify for relief as a "rural transport area" under the Clean Air Act (CAA). Nor can it escape the Act's heavy regulatory burdens by pointing to pollution generated in Juarez. Instead, through no fault of its own, the State of New Mexico will now face heavy federal regulations and the threat of punitive sanctions, including loss of highway funds, for failing to do the impossible.

The story of how Sunland Park's attainment area became the target of regulations that New Mexico has no hope of satisfying begins with a legally flawed rule that fails to account for uncontrollable sources of ozone. By imposing an unachievable standard, the Rule has made it impossible for New Mexico and many other States to fulfill their "responsibility" for ensuring that "national primary and secondary ambient air quality standards will be achieved and maintained." 42 U.S.C. § 7407(a). Any rule that ignores the States' responsibility to "achieve[] and maintain[]" the standard violates the CAA and must be vacated.

STATEMENT OF THE CASE

A. The Clean Air Act and the NAAQS Program

The Clean Air Act requires EPA to issue and, at pentannual intervals, review National Ambient Air Quality Standards (NAAQS) for air pollutants that meet certain criteria. 42 U.S.C. §§ 7408(a)(1), 7409(d)(1). EPA must set primary NAAQS that are, "in the judgment of the Administrator, . . . allowing an adequate margin of safety, [] requisite to protect the public health." *Id.* § 7409(b)(1); *see also id.* § 7409(b)(2) (secondary NAAQS "requisite to protect public welfare").

“‘Requisite’ means the NAAQS must be sufficient, but not more than necessary.” *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013) (internal quotation omitted).

Every five years, EPA must “complete a thorough review” of a NAAQS and “make such revisions . . . as may be appropriate.” 42 U.S.C. § 7409(d)(1). That process involves consultation with the Clean Air Scientific Advisory Committee (CASAC), *id.* § 7409(d)(2)(A)-(B), and publication of “air quality criteria” explaining the “latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare,” *id.* §§ 7408(a)(2), 7409(a)(2).

Once a NAAQS is set, EPA classifies each air quality control region as “attainment,” “nonattainment,” or “unclassifiable.” 42 U.S.C. § 7407(d). For ozone, these classifications are based on the “3-year average of the annual fourth-highest daily maximum 8-hour O₃ concentration.” 40 C.F.R. § 50.19(b).

Each State has “primary responsibility” for ensuring that “national primary and secondary ambient air quality standards ***will be achieved and maintained***.” 42 U.S.C. § 7407(a) (emphasis added). After EPA sets or revises a NAAQS, the task then falls to the States to

propose state implementation plans (SIPs) for the “implementation, maintenance, and enforcement” of the new standard. *Id.* § 7410(a). If a State fails to provide a SIP or if the Administrator disapproves it, EPA may impose a federal implementation plan (FIP) of its own creation. *Id.* § 7410(c). Either way, nonattainment areas face a variety of regulations, including a census of all ozone-causing emissions and onerous permitting requirements for new sources. *See, e.g., id.* § 7511a(a) (listing requirements for “marginal” nonattainment areas). Even for areas designated as in attainment, the SIP must “contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality.” *Id.* § 7471.

B. Background Ozone from Uncontrollable Sources

Ground-level ozone (O₃) forms through the interaction of sunlight with volatile organic compounds, mono-nitrogen oxides, and, over longer periods, methane and carbon monoxide as well. 80 FR 65,299 (JA__). These precursor compounds arise from various sources: human activities within a State, which that State can control; human activities outside a State, which that State cannot control; and natural sources that no one can control. *Id.* Given the prevalence of uncontrollable

sources of ozone and its precursors, ozone measurements “can be substantially influenced by sources that cannot be addressed by domestic control measures.” 80 FR 65,300 (JA__).

EPA itself recognizes that background ozone can be significant, including “a non-de-minimis number” of locations where uncontrollable ozone levels can “exceed the [former] NAAQS (*i.e.*, 75ppb).” 79 FR 75,242 (JA__). According to NOAA, Las Vegas will “exceed EPA’s proposed range of ozone NAAQS almost entirely due to background ozone.” Eisenberg Testimony at 15-16 (JA__). Similarly, in Cochise County, Arizona, EPA’s own models anticipate that uncontrollable background ozone will account for 90.7% of the allowable 70ppb. Massey Comment at 7, (JA__).

Even if background alone does not exceed the standard and force an area into nonattainment, it can leave so little room for anthropogenic ozone that attainment is functionally impossible. *See, e.g.*, 79 FR 75,382 (JA__) (explaining that background levels can “prevent attainment” where there are “few remaining opportunities for local emission reductions”). Here, multiple studies show background levels at or near the new standard of 70ppb. One study found that significant

uncontrollable events could raise background ozone levels to 60–75 ppb. Lin at 14, (JA__). Another recent study concluded that “[i]f the NAAQS is lowered in the 60–70 ppbv range, areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls.” Zhang at 6774. Yet another study found that background ozone could reach levels of 60–70ppb. Emery 206-17, (JA__).

The issue of background ozone is particularly acute when dealing with peak effects of uncontrollable emissions on peak ozone days. Although some background sources are relatively constant producers, other sources are highly volatile and can produce significant spikes in ozone and its precursors. “Stratospheric intrusions,” for example—in which upper-atmosphere ozone descends to the surface, usually in connection with warm weather and high altitude—can dramatically increase ozone levels through no fault of the States or their industries. *See Tools Fact Sheet* at 4 (JA__). A recent study funded by NOAA found over a dozen intrusions during just three months, contributing as much as 20-40ppb to background ozone, and pushing eight-hour ozone

readings above the new NAAQS, sometimes as high as 86ppb. Lin Intrusions at 17, (JA__).

Similarly, transport from foreign industry increases ground-level ozone and can cause spikes in ozone under certain conditions. As foreign industry has expanded, the United States has seen a corresponding increase in the share of its background ozone attributable to foreign sources. Cooper 344-48 (JA__) (“[T]ransported ozone pollution from Asia . . . is increasing by approximately 0.63ppb per year.”). One modeling study found that 49% of springtime ozone readings above 70ppb in the southwestern United States “would not have occurred” without Asian emissions. Lin at 14 (JA__).

Wildfires and lightning also cause sudden increases in ozone levels. One modeling study found that lightning can add as much as 25-30ppb and wildfires can add more than 50ppb. Mueller & Mallard 4817-23 (JA__).

C. Recent NAAQS Revisions.

The Industry Petitioners have provided an extensive summary of the recent NAAQS revisions, which reduce the primary and secondary standards to 70ppb. Indus. Pets. Br. 7-16. In particular, the Industry

Petitioners have traced the gradual ratcheting down of the ozone NAAQS—beginning at 120ppb, proceeding to 80, then 75, and now 70ppb—to the point that the current standard is colliding with background levels in many parts of the country.

The Petitioner States adopt that summary but highlight several features of the key clinical study on which EPA relies. Unlike epidemiological studies that attempt to estimate the effects of ozone by studying respiratory illnesses in the general population, clinical studies control for the many other components of the atmosphere and isolate subjects' responses to an increase in ozone. The availability of new *clinical* evidence was central to this Court's affirmance of the 2008 NAAQS revision. *Mississippi*, 744 F.3d at 1343-44; *see also id.* at 1351 (“[T]he epidemiological studies are not themselves direct evidence of a causal link between exposure to O₃ and the occurrence of health effects.” (quoting 73 FR 16,479)); *see also* 80 FR 65,323 (JA__) (epidemiological evidence of health effects is “complicated by the presence of co-occurring pollutants or pollutant mixtures”).

In 2008, EPA had before it a pair of clinical studies in which 30 participants were exposed to ozone concentrations of 60 and 80ppb.

Mississippi, 744 F.3d at 1349-50. At the lower concentration, just six of the participants experienced lung-function decrements of at least 10%. *Id.* at 1349-50. EPA concluded that this minor deviation from normal lung function did not justify lowering the NAAQS to 60ppb and instead settled on 75ppb as the level requisite to protect public health. *Id.*

The current rulemaking cites two clinical studies and relies almost exclusively on one of them. Schelegle 265-72 (JA__). That study exposed 31 participants to over six hours of near-continuous activity in an environment of 72ppb ozone. It found that six of the 31 participants—almost exactly the same ratio that proved unpersuasive in 2008—reported (reversible) decrements of at least 10%. *Id.* at 269 (JA__); Feldman Comment at 4 (JA__). Even by EPA's definition, decrements alone do not constitute an "adverse health effect." They must appear "in combination with" respiratory symptoms. 80 FR 65,330 (JA__). Although the study found some evidence of both respiratory symptoms and reduced lung function, they were uncorrelated across study participants. *Id.*; Feldman Comment at 4 (JA__). EPA identified no other clinical evidence to support the existence of any harm to public health at levels below 80ppb.

In light of the paucity of new evidence, EPA took years to announce its latest revision to the standard. Seeking to compel the Agency to complete its rulemaking, several environmental organizations filed suit in the Northern District of California. *Sierra Club v. EPA*, No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014). In its brief opposing the plaintiffs' timeline, EPA argued that "[t]he public has a significant interest in ensuring that the government does not promulgate rules via a process that emphasizes expediency over quality and accuracy." EPA Opposition Br., No. 13-cv-2809, at 11-12 (N.D. Cal. Feb. 25, 2014) (quoting *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000)). The Agency countered the plaintiffs' arguments for feasibility, stating that "[i]t is difficult to imagine a circumstance where an agency could not sign some sort of a flawed rule by any particular date; but promulgating a flawed rule does nothing to advance the goals of Congress." *Id.* at 12. On April 30, 2014, the court ordered EPA to act on precisely the timeline plaintiffs requested, and EPA did just that.

Finally, the Petitioner States add that the Rule irrationally lengthens ozone monitoring seasons for several States based upon ozone readings above ~~60~~ppb between 2010 and 2013. 80 FR 65,416 (JA__).

The Agency took this approach even for States that demonstrated that they never had a single reading above 70ppb in the last twenty years over the majority of the new monitoring period. Stepp Comment at 3-5 (JA__).

STANDARD OF REVIEW

An agency rule must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 42 U.S.C. § 7607(d)(9)(A); *accord* 5 U.S.C. § 706(2)(A). While this Court considers challenges to NAAQS under the “same highly deferential standard of review that we use under the Administrative Procedure Act,” such challenges receive “a searching and careful inquiry into the underlying facts.” *Am. Trucking Ass’ns v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) (quotation omitted).

Moreover, “[a]n agency’s failure adequately to consider a relevant and significant aspect of a problem may render its rulemaking arbitrary and capricious.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009). In addition, “an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct.

2427, 2442 (2014) (citation omitted). EPA, in particular, violates the CAA if it wrongly considers itself bound not to consider “relevant factors.” *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

SUMMARY OF THE ARGUMENT

I. The Rule must be vacated because the Agency’s approach to the critical issue of background ozone violates the CAA.

A. Under the CAA, States have the “primary responsibility” for ensuring that “national primary and secondary ambient air quality standards *will be achieved and maintained*.” 42 U.S.C. § 7407(a) (emphasis added). EPA’s failure to address adequately the indisputably relevant issue of the States’ ability to “achieve[]” the new NAAQS, and concomitant failure to provide an adequate response to significant public comments on this issue, is reason enough to vacate the Rule.

Numerous commenters presented EPA with studies demonstrating that the peak effects of sources that the States cannot control, on peak days, will make compliance with the new standard unduly onerous, and sometimes impossible. Indeed, EPA’s own modeling illustrates the same problem. Yet, the Agency did not take account of this critical issue, instead choosing to focus on “average” and

“seasonal mean” impacts of uncontrollable sources. 80 FR 65,328 (JA__). This focus is unresponsive because nonattainment does not depend on averages, but instead requires just four exceedances per year.

EPA’s analysis thus fails the basic requirement that an agency must address “significant aspect[s] of a problem,” *Am. Farm Bureau*, 559 F.3d at 520, and respond to all “significant” comments on this issue, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977). The peak effects of uncontrollable sources on peak days will lead the Agency to impose burdensome pollution-control measures in areas where such measures have no potential to improve air quality or serve public health. This is the paramount problem with regard to the critical issue of background ozone, and EPA’s failure to address the problem requires that the Rule be vacated.

B. EPA also violated the CAA by unlawfully limiting its consideration of the impact of background ozone from uncontrollable sources. *See Michigan*, 135 S. Ct. at 2706. The Agency took the position that it may only consider ozone from uncontrollable sources in selecting a standard from within a “range of values” that EPA has

already deemed “reasonable.” 80 FR 65,328 (JA__). This is contrary to the text of the CAA, which requires EPA to set NAAQS such that States can fulfill their “responsibility” that the standard be “achieved and maintained.” 42 U.S.C. § 7407(a). Since States have no legal or practical ability to control ozone from uncontrollable sources, EPA has a duty to consider fully such sources in setting the standard. EPA’s contrary position would permit (and perhaps require) the Agency to set standards that cannot be “achieved and maintained” by the States. This result is not only contrary to the text of the CAA, but would transform the NAAQS program in violation of the bedrock administrative law principle that an agency’s interpretation is unlawful if it is “inconsisten[t] with the design and structure of the statute as a whole.” *UARG*, 134 S. Ct. at 2442.

C. Relying on the CAA’s provisions for enforcement-stage relief is no response to these defects. Provisions addressing “exceptional events” are ill-suited to addressing routine exceedances that will inevitably occur due to uncontrollable background ozone. Likewise, the Act’s limited measures for helping areas affected by rural transport and international pollution are intended for infrequent exceedances, as

demonstrated by the assumption that these areas should remain classified as nonattainment and subject to the corresponding burdens. More fundamentally, enforcement-stage relief measures require States to file onerous petitions with EPA, which the Agency may decline in its discretion.

II. EPA's construction of the CAA misapplies *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), to eschew any consideration that would halt the NAAQS for a "zero-threshold" pollutant at a level greater than zero. The Act offers several such "intelligible principles" to guide the Agency's work. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Its references to "achieve[] and maintain[]," "requisite," "appropriate," and "public health" all indicate that EPA must consider the burden of a NAAQS that is unprecedentedly close to background levels.

III. Finally, EPA failed to explain how the "latest scientific knowledge . . . on public health or welfare" justifies the new NAAQS. 42 U.S.C. § 7408(a)(2). This failure is apparent in the Agency's excessive reliance on a single clinical study with significant limitations.

STANDING

The Petitioner States have standing to challenge a Rule that requires them to revise their SIPs to comport with the new standard. 42 U.S.C. § 7410(a); *see West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). EPA's new standard also threatens to bring additional areas within the Petitioner States into nonattainment, which imposes an assortment of burdens. 42 U.S.C. §§ 7501-09a, 7511-15. As a result, the Petitioner States suffer an actual injury that is "fairly traceable" to the revised NAAQS and is likely to be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

ARGUMENT

I. EPA's Approach to Background Ozone Levels Caused by Uncontrollable Sources Violates the CAA.

The CAA provides that each State has "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards *will be achieved and maintained*." 42 U.S.C. § 7407(a) (emphasis added). As EPA has conceded, in carrying out this statutory duty, "states are not responsible for reducing emissions from background sources." Tools Fact Sheet at 1 (JA__). In the Rule, EPA attempted to retreat partially from this necessary concession, arguing

that achievability is relevant to choosing a NAAQS level “within the range of reasonable values” that the Administrator identified, but forbidden when setting the “reasonable” range in the first place. 80 FR 65,328 (JA__). The Agency thereafter ignored this textually-indefensible distinction and sought to explain away the problem of uncontrollable ozone through a series of non sequitur arguments.

There are two approaches that this Court could take to finding that EPA acted unlawfully in addressing the critical issue of background ozone from uncontrollable sources. The narrower approach is to declare that the Rule is unlawful because the Agency conceded that the “states are not responsible for reducing emissions from background sources,” *see infra* Part I.A, and then failed to explain adequately how the Rule’s new standard is consistent with that textually-mandated principle. Alternatively, and more broadly, this Court could definitively hold that EPA violated the CAA by casting aside concerns regarding “achiev[ability]” and vacate the Rule on that basis. *See infra* Part I.B.

A. EPA Violated the CAA by Failing to Address Adequately the Peak Effect of Uncontrollable Emissions on Peak Days.

1. EPA has conceded that even under its own modeling, uncontrollable sources of ozone can make it harder—and, sometimes,

impossible—for States to attain EPA’s new NAAQS standard. 80 FR 65,436 (JA__). Because EPA has acknowledged that the impact of uncontrollable ozone is a relevant, significant consideration for purposes of this rulemaking, the Agency was duty-bound to address rationally all “significant aspect[s] of [this] problem,” *Am. Farm Bureau*, 559 F.3d at 520; *State Farm*, 463 U.S. at 43, and to respond to all “significant” comments on this issue, *Home Box Office*, 567 F.2d at 35 & n.58.

Numerous commenters addressed the background ozone issue, raising the critical point that peak impacts from uncontrollable sources on days with peak ozone measurements make it difficult or impossible for States to “achieve,” 42 U.S.C. § 7407(a), the new NAAQS standard (the “peak/peak problem”). *See, e.g.*, Westar Comment at 6, (JA__) (noting the “significant difference” between average data and “actual exceedances of the standard, which EPA acknowledges is more relevant from a regulatory standpoint”).

The process for NAAQS nonattainment designations illustrates why EPA’s failure to address adequately the peak/peak problem is so consequential. 40 C.F.R. § 50.19(b). Every day during the monitoring

season, each site determines which eight-hour period has the highest average ozone reading, which then becomes the daily value. *Id.* Each area then determines the fourth-highest daily value in a given year. *Id.* Every year, the fourth-highest readings from the past three years are averaged to determine that year's "design value," which is compared to the NAAQS. *Id.* This process means that if uncontrollable sources cause high ozone readings even a few days per year, those infrequent peak readings will be sufficient to push an area out of attainment. The process thus magnifies—sometimes to the point of crowding out all other evidence—the peak effects of uncontrollable sources on peak days.

2. The administrative record unambiguously demonstrates that uncontrollable sources, at their peak, will make it difficult, and sometimes impossible, for States to meet EPA's new NAAQS on peak ozone days.

Multiple studies in the record demonstrate that uncontrollable sources will leave little to no room for U.S. manmade emissions at the new 70ppb NAAQS standard. One study, jointly funded by NOAA and NASA, found over a dozen instances in which ozone from stratospheric intrusions raised background levels to 60–75 ppb. Lin Intrusions

(JA__). Another study estimated that the annual fourth-highest background ozone levels in the intermountain west are 50–60ppb. *See* Zhang 6769, 6770 (JA__). This study concluded that “if the NAAQS is lowered in the 60–70 ppb range, areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls.” JA__. A different study modeled background ozone and found that it could reach levels of 60–70 ppb. Emery 206, 216 (JA__). And another estimated that “background ozone concentrations . . . ranged from 47ppb to 68ppb at six western cities during ozone episodes.” Sonoma Technologies at 3-1 (JA__).

Notably, many of these studies systematically underestimate the peak effects of uncontrollable sources of ozone on peak days because their models do not account for highly volatile events that can significantly impact ozone—such as wildfires, lightning, stratospheric intrusions, and unique meteorological conditions. *See* Zhang 6769, 6770 (JA__).

EPA’s own modeling confirms the widespread nature of this peak/peak problem. Specifically, EPA’s model identified a substantial number of days where uncontrollable sources are at, near, or above the

70ppb standard, and where uncontrollable source effects are also at peak levels.

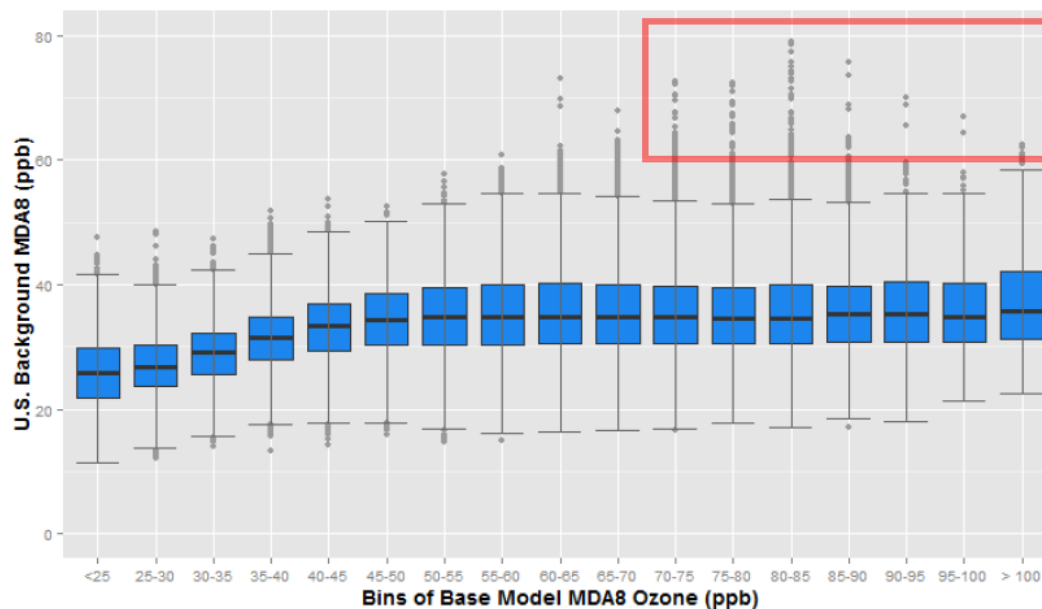


Figure 5c. Distribution of U.S. background MDA8 ozone (ppb) at monitoring locations across the U.S. (Apr-Oct), binned by base modeled site-day MDA8, as estimated by 2007 CMAQ simulations.

Policy Assessment at 2A-25 (JA__) (internal box added).¹ While EPA sought to downplay its model's results as "infrequent events," 80 FR 65,328 (JA__), EPA has no answer for the critical point that just a few high readings per year trigger a finding of nonattainment.²

¹ Each dot in the red box represents at least one day where ozone exceeded 70ppb *and* where background ozone would have been at least 60ppb without *any* U.S. manmade emissions.

² EPA also pointed to an alternative model (dubbed the "source apportionment" model), Policy Assessment at 2-14, which predicts fewer—although still some—exceedances resulting from uncontrollable

In addition, while EPA's own modeling confirms the prevalence of the peak/peak problem, the Agency's reasoning undercounts that problem in significant respects. As EPA concedes, its model "was not expressly developed to capture" events such as wildfires, lightning, stratospheric intrusions, and unique meteorological conditions, Policy Assessment at 2A-42 (JA__), even though EPA acknowledges that "the highest background episodic concentrations are typically associated with [these types of events]," *Id.* at 2A-14. For example, although EPA modeled wildfire emissions, the Agency admits that its model accounts only for "*monthly-average* wildfire emissions which are not intended to capture discrete events." *Id.* at 2A-8-9. And there is no indication that EPA's model included *any* input for stratospheric intrusions, despite studies showing that these events can cause spikes as large as 40ppb. Lin Intrusions at 17 (JA__). Likewise, wildfires can add over 50ppb, Mueller & Mallard 4817-23 (JA__), lightning can add 30ppb, and unique meteorological conditions can cause Asian emissions to add up to 15ppb,

ozone. This alternative significantly underestimates the peak effects of uncontrollable sources by classifying all ozone that is created by a combination of precursors emitted from both uncontrollable and controllable sources as controllable ozone. *Id.* at 2-16.

Lin Intrusions at 10 (JA__), beyond what they already contribute on an “average” day.

3. EPA’s primary response to this overwhelming record evidence demonstrating the peak/peak problem for the new 70ppb standard is to change the subject, focusing on the **average** effects of uncontrollable sources. For example, the Agency reports “seasonal mean” background levels of only 25-50ppb. 80 FR 65,328 (JA__); *see also id.* (attempting a similar sleight of hand for background levels on high-ozone days by “average[ing] over the entire U.S.”). But as explained above, States’ “responsibility” for ensuring that the new NAAQS “will be achieved and maintained,” 42 U.S.C. § 7407(a), flows from **peak** impacts—not averages. If the Agency’s attainment designations were based on seasonal-average ozone readings, then seasonal-average background concentrations would be relevant. As it stands, however, NAAQS designations depend on an area’s four worst days.

It is disingenuous for EPA to cite average figures when promulgating a new NAAQS only to use specific 8-hour data when determining nonattainment. The legal ramification of this legerdemain is that the Agency has not addressed a “significant aspect of [the]

problem,” *Am. Farm Bureau*, 559 F.3d at 520, which arises not from averages, but from the peak effects of uncontrollable ozone on the relatively few days that determine an area’s design value.

As a fallback to its “seasonal mean” response, the rulemaking briefly discusses the “average” effect of uncontrollable ozone sources on peak days. 80 FR 65,328 (JA__). This is not responsive to the problem commenters raised. The issue is not the average effect of uncontrollable sources of ozone on either average- or high-ozone days. Rather, the problem is peak effects of uncontrollable sources on peak ozone days. Given how NAAQS compliance is measured, these events are sufficiently common to make it difficult, or even impossible, for States to fulfill their “responsibility” for ensuring that the new 70ppb standard “will be achieved and maintained,” 42 U.S.C. § 7407(a). EPA provided no adequate answer for this significant problem, *Am. Farm Bureau*, 559 F.3d at 520, and failed to respond to “substantial” comments raising that issue, *Home Box Office*, 567 F.2d at 35 & n.58. The Rule is thus unlawful on this basis alone.

B. EPA Violated the CAA by Impermissibly Adopting a Non-Textual Limitation on Its Own Authority.

The Agency also acted unlawfully because it narrowed its consideration of the critical issue of the new standard's "achiev[ability]" in a manner unsupported by statutory text. 42 U.S.C. § 7407(a). In the Rule, EPA concluded that background ozone was relevant only to selecting the NAAQS level "within the range of reasonable values" the Administrator had already identified, but that background could not inform the selection of the "reasonable" range. 80 FR 65,328 (JA__). EPA thus recognizes that achievability is relevant but, without statutory justification, treats it as *selectively* relevant. The Agency's non-textual narrowing of the NAAQS analysis violates the CAA. *See Michigan*, 135 S. Ct. at 2606-07 (EPA's erroneous conclusion that a mandatory factor is "irrelevant" to a regulatory decision renders the rule unlawful).

EPA's claim that it had to consider background ozone only when selecting the NAAQS standard from "within the range of reasonable values" is unauthorized. As noted above, the CAA assigns to States the "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards will be achieved and

maintained.” 42 U.S.C. § 7407(a). EPA’s reading of the CAA as making “achiev[ability]” relevant *only* for selecting the NAAQS standard from “within a range of reasonable values,” 80 FR 65,328 (JA__), is irreconcilable with this statutory text. Put another way, nothing in the statute’s expectation of “achiev[ability]” suggests that the concept should be ignored entirely in determining a “reasonable range,” but then reemerge when selecting from within that range. EPA’s error here is remarkably similar to the violation that the Supreme Court recently found fatal in *Michigan*. In that case, just as here, EPA ignored a mandatory consideration (there, costs; here, achievability) at the first step of its regulatory analysis, but said that it could consider the factor at a later step. *See* 135 S. Ct. at 2710-11.

EPA’s position is also “inconsisten[t] with the design and structure of the statute as a whole,” *UARG*, 134 S. Ct. at 2442 (quotation omitted), and raises serious federalism concerns, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Under EPA’s interpretation, if the Administrator selected a range that no State could meet “without action affirmatively *extracting* chemicals from nature,” *Am. Trucking Ass’ns v. EPA* (“*ATA I*”), 175 F.3d 1027, 1036 (D.C. Cir. 1999), *opinion modified*

on reh'g, 195 F.3d 4, *aff'd in part, rev'd in part by Whitman*, the Agency would be duty-bound to impose upon States a standard within that impossible range. States, having no ability to “achieve” the impossible, would then be subject to severe sanctions under the CAA, including loss of highway funds. 42 U.S.C. § 7509(b)(1). It is hornbook administrative law that “[i]mpossible requirements imposed by an agency are perforce unreasonable.” *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991). EPA’s claim that Congress instructed the Agency to require the impossible here—especially in a context that carries severe punishments for noncompliance—is not credible.

In the Rule, EPA rested its argument on certain statements in *American Trucking* and *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981). 80 FR 65,328 (JA__). These cases do not support the Agency’s position.

First, in *American Trucking*, EPA had set the ozone NAAQS at 80ppb, in part because a 70ppb standard would be “too close to peak background levels.” 283 F.3d at 379. This Court rejected a challenge to the Agency’s reliance on the peak impacts of uncontrollable sources, explaining: “although relative proximity to peak background ozone

concentrations did not, in itself, necessitate a level of [80ppb], EPA could consider that factor when choosing among the three alternative levels.” *Id.* In the present case, the Agency inexplicably engrafted the word “only” into this holding, entirely changing the statement’s meaning: “[C]ourts have clarified that EPA may consider proximity to background concentrations . . . *only* in the context of considering standard levels within the [pre-determined] range.” 80 FR 65,328 (JA__) (citing *Am. Trucking*, 283 F.3d at 379) (emphasis added). But *American Trucking* never held that selecting a standard from within a “range” is the *only* situation in which EPA can consider proximity to background ozone concentrations, and the Agency’s attempt to suggest otherwise is incorrect.

Second, this Court’s statement in *American Petroleum* that EPA “may not consider economic and technological feasibility in setting air quality standards,” and later reiteration of the same point, similarly does not support the Agency’s position. 665 F.2d at 1185 (quoting *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)). *American Petroleum* first made this statement while responding to the specific argument raised by the American Petroleum Institute (API)

that the “costs of meeting [the new NAAQS]” were too high. *Id.* at 1184. As the Supreme Court explained in *Whitman*, 531 U.S. at 464, *American Petroleum* was merely one of several cases from this Court following the rule from *Lead Industries* that “economic considerations may play no part in the promulgation of ambient air quality standards.”

When *American Petroleum* turned to the city of Houston’s objections that the new standard would be “impossible” for the city to meet because of “natural factors,” this Court noted that its prior response to API’s cost argument addressed this objection “*in part.*” 665 F.2d at 1185 (emphasis added). Another “part” of this Court’s answer to Houston’s argument, however, was that the Agency need not “tailor national regulations to fit each region or locale.” *Id.*

The issue in the present case is entirely different. *American Petroleum* involved a single city asserting that it would not be able to meet the new standard, based primarily on concerns regarding the availability of emission-control technology. In the present case, the States argue that the new standard will make it extremely difficult, and sometimes impossible, for many of them to satisfy their statutory responsibility for ensuring that NAAQS “will be achieved and

maintained.” 42 U.S.C. § 7407(a). Given that the CAA imposed no such duty on the city of Houston, this Court’s rejection of the city’s arguments does not address the issues of statutory authority and achievability the States raise here. *American Petroleum* is also factually distinguishable because the current NAAQS is closer to the level of ozone from uncontrollable sources, and the role of foreign-generated pollution has mushroomed during the intervening 35 years.

C. EPA’s Promised Enforcement Relief Measures Are Impractical and Misuse Portions of the CAA Intended for Exceptional Rather than Routine Events.

Tacitly acknowledging that it would be unlawful to hold States responsible for ozone levels that they cannot control, the Rule suggests that the States may qualify for limited relief at the enforcement stage. 80 FR 65,436 (JA__). The tools EPA has in mind, however, are limited in their applicability and, even where applicable, do not undo the burdens created by the new standard.³ Promulgating a rule that depends on enforcement relief is problematic in its own right, but that

³ Of course, even if they were completely effective at responding to nonattainment resulting from uncontrollable background ozone, these mechanisms do not relieve EPA of its responsibility to engage in “reasoned decisionmaking” that addresses “all relevant factors.” *Michigan*, 135 S. Ct. at 2706; *see supra* Part I.A.

strategy becomes a basis for vacatur when the promised relief is illusory.

1. The Relief Mechanisms Identified by EPA Do Not Adequately Address Uncontrollable Background Ozone.

EPA identifies three measures that it promises will provide relief for areas where background ozone levels approach or exceed the revised NAAQS: (1) areas that would be classified as nonattainment under the 70ppb standard due only to exceptional events could avoid that designation “through exclusion of data affected by [those] exceptional events;” (2) nonattainment areas that qualify as “rural transport areas” could avoid certain more stringent requirements applicable to higher classifications of nonattainment areas; and (3) nonattainment areas that qualify for the international transport provisions could escape their obligation “to demonstrate attainment” and to adopt “more than reasonable controls” on local stationary sources. 80 FR 65,436 (JA__). Behind all three of these measures are provisions of the CAA. Unsurprisingly, none of them creates an exception so malleable that it can allow an area to demonstrate compliance with a standard that is set at, near, or below background levels.

First, the CAA’s “exceptional events” provision tasks the Administrator with promulgating “regulations governing the review and handling of air quality monitoring data influenced by exceptional events.” 42 U.S.C. § 7619(b)(2). It defines an “exceptional event” as one that “is not reasonably controllable or preventable” and “is caused by human activity that is unlikely to recur at a particular location or a natural event.” *Id.* § 7619(b)(1)(A).

In 2007, EPA announced a rule for excluding data based on the occurrence of an exceptional event. 40 C.F.R. § 50.14. The threshold is high. A State must show that a specific event “caused a specific air pollution concentration at a particular air quality monitoring location” and must establish “a clear causal relationship” between the event and the air-quality measurement at issue. 40 C.F.R. §§ 50.14(a)(1), (c)(3)(iv)(E). Moreover, the rule provides that an exceptional event cannot reflect “normal historical fluctuations, *including background.*” *Id.* § 50.14(c)(3)(iv)(C) (emphasis added). EPA also notes in the preamble to the revised NAAQS that exceptional events do not include “routine natural emissions from vegetation, microbes, animals, and lightning.” 80 FR 65,439 n.239 (JA__).

The reason the “exceptional events” provision does not encompass biological, meteorological and recurring anthropogenic events is that they are not exceptional, precisely because they are part of background conditions. As Harvard’s Daniel Jacob explains regarding a NAAQS of 70ppb, “[y]ou’re not talking about events anymore. You’re talking about the routine. . . . And at that point, I think the system is going to break.” Bennett Comment at 15 (JA__). The Act’s exclusion of truly exceptional events only underscores EPA’s failure to consider routine obstacles to achievability, in setting the NAAQS.

Moreover, the exceptional events provision does not allow an area to exclude anthropogenic foreign emissions because it applies only to “an event caused by human activity that is *unlikely to recur*.” 42 U.S.C. § 7619(b)(1)(A)(iii) (emphasis added). As recognized by all parties, international transport is very likely to recur, and with increasing intensity. Cooper 344, 344-48 (JA__). The provision also excludes “stagnation of air masses,” “meteorological inversions,” and other meteorological events “involving high temperatures or lack of precipitation.” 42 U.S.C. § 7619(b)(1)(B).

EPA has recently proposed a revision to the exceptional events rule. 80 FR 72,840 (Nov. 20, 2015). Even if EPA finalizes a revised rule, regulations and new agency guidance cannot alter the statutory criteria.⁴ Chief among these are the CAA's exclusion of recurring human-caused events and meteorological events that EPA recognizes are "the cause" of increased exceedances. Policy Assessment at 2-3 to 2-4. The only time EPA may consider these factors is in setting the NAAQS itself. At best, EPA peddles false hope in suggesting that it has the latitude to address background ozone through exceptional events regulations. At worst, the Agency has strategically refused to consider the impossibility of achieving its NAAQS rule while pointing to future enforcement-stage relief, only to claim later that its hands are tied by the statute.

⁴ EPA promulgated the NAAQS before making revisions to its exceptional events rule. But States are already at work designating nonattainment areas in order to meet an October 1, 2016 deadline. 79 FR 75,354 (JA__). As a result, the subsequent issuance of a revised rule is of little benefit, a fact compounded by the proposed rule's failure to address uncontrollable background ozone. For example, the revised rule would still exclude biological processes and lightning, as well as foreign anthropogenic emissions.

Second, the CAA’s provisions for rural transport areas fail to provide effective relief for nonattainment due to background. To begin with, designation as a rural transport area simply moves the area from one class of nonattainment to another, 42 U.S.C. § 7511a(h); it does not avoid the requirements applicable to all nonattainment areas. *See infra* Part II.B.

Even that minor accommodation excludes huge swaths of the country. Under the statute, a rural transport area cannot contain sources that make a “significant contribution” to ozone concentrations and cannot include or be adjacent to a Metropolitan Statistical Area (“MSA”). 42 U.S.C. § 7511a(h). When applied to large counties in the West, these criteria render the rural transport provision a nullity. White Pine County, Nevada, for example, covers 9,000 square miles and has a tiny population of just 10,000 inhabitants. It nevertheless cannot qualify as a rural transport area because it is adjacent to the Salt Lake City MSA, which is itself approximately the size of New Jersey. Westar Comment at 15 (JA__). In fact, due to the size of western counties, the Salt Lake City MSA has the potential to disqualify 46,023 square miles—an area the size of Pennsylvania—from being classified as rural

transport areas. Similar disqualifications occur around Phoenix, Las Vegas, Denver, and El Paso. In Cochise County, Arizona, which cannot benefit from the rural transport rule because of its proximity to Tucson, EPA estimates that background ozone contributes 92% of that county's design value. Westar Comment at 7 (JA__). The unlucky correspondence of large counties and high background ozone levels in western States means that the CAA's rural transport provision is ineffective medicine to cure a NAAQS set at or near background levels.

Third, the CAA's international transport provisions authorize limited relief for nonattainment areas that can establish "to the satisfaction of the Administrator" that they would have met the NAAQS "but for emissions emanating from outside of the United States." 42 U.S.C. § 7509a(b). Even where applicable, these provisions do not allow a State to avoid a nonattainment designation or even to obtain a lower nonattainment classification, *see* 80 FR 65,444 (JA__); they simply provide exemptions from a handful of nonattainment requirements. *See infra* Part II.B.

Relief under these provisions is further illusory because they require the ***States*** to establish that international transport is the "but

for” cause of nonattainment. The issue of which party bears the burden is important because quantifying the amount of pollution carried from outside the United States is difficult. *See* Response to Comments at 343 (JA__) (“there is no way to definitively measure or validate these numbers”); Workshop Slides at 21 (JA__) (using a “surrogate” for internationally transported ozone to identify a wide range—between 0.1 and 0.7 ppb/year—of annual increase in ozone attributable to foreign sources). Furthermore, by requiring States to show that international transport is the “but for” cause of nonattainment, these provisions fail to provide relief for situations where multiple background sources contribute to nonattainment.

By relying on these provisions to justify its rule, EPA attempts to duck its responsibility under the Act to take into account whether its NAAQS is achievable. Rather than the Agency “meet[ing] its obligation to explain and expose every step of its reasoning,” *Mississippi*, 744 F.3d at 1349 (quotation omitted), EPA’s reliance on Section 7509a is an impermissible attempt to impose on States the task of showing why achievability is impossible. The Act does not countenance this inversion of its relief measures.

2. Where They Apply, the Relief Measures Are Inadequate Solutions to the Problem of Uncontrollable Background Ozone.

Common to all of the enforcement-stage “tools” is their dependence on EPA’s discretion. 42 U.S.C. § 7511a(h)(1) (“in the Administrator’s discretion”); 42 U.S.C. § 7509a(b) (“to the satisfaction of the Administrator”). The discretionary nature of this relief renders it onerous to request, uncertain to obtain, and nearly impossible to challenge if denied. Utah, for example, has invested 4,000 hours since 2008 preparing a dozen exceptional event demonstrations that EPA has denied. Bennett Comment at 15 (JA__). Other States, like Nevada, have concluded that they lack the resources necessary to prove an exceptional event. *Id.* Even if a State shoulders the immense cost and lodges a request, EPA concedes that “few” nonattainment areas have ever obtained relief. 79 FR 75,384 (JA__). This admission is consistent with the experience of Wyoming, which has filed 25 exceptional event applications since 2012; EPA has granted only one. Bennett Comment at 14 (JA__); Wyoming DEQ (JA__). The Agency also has discretion in recognizing rural transport areas and has designated only four such areas in history, none of them for the 8-hour ozone NAAQS. 80 FR

65,438 & n.235 (JA__). Finally, EPA also has unfettered discretion to decide whether a State has made the required “but for” showing to qualify for the international transport provisions. *See* 42 U.S.C. § 7509a(a).

Because discretionary relief is uncertain, these tools do not provide the States any assurance that they will be able to fulfill their responsibility for ensuring that NAAQS be “achieved and maintained.” 42 U.S.C. § 7407(a). They are therefore no substitute for an achievable standard that addresses the issue of uncontrollable background ozone.

Even under the best of circumstances—when States can devote resources to seeking relief and EPA agrees to the request—the relief provided is incomplete. A rural transport area, for example, must still complete a “comprehensive, accurate, current inventory of actual emissions from all sources,” and must still comply with the onerous New Source Review permitting process “for the construction and operation of each new or modified major stationary source.” 42 U.S.C. §§ 7511a(a)(1), 7511a(a)(2)(C). Likewise, an area that satisfies the international transport requirements obtains relief from three provisions of the CAA, 42 U.S.C. § 7509a(b), but remains a

“nonattainment” area and therefore faces mandatory emission control measures and must meet special emission reduction targets, 79 FR 75,384 (JA__). These “remedies” are no substitute for a proper NAAQS.

Additionally, case-by-case discretionary relief creates obstacles for obtaining judicial review. Unlike the rulemaking at issue in this litigation, an EPA decision to deny relief under the foregoing mechanisms would take the form of an individual adjudication. In that posture, courts defer to the agency both on its fact-finding, *see NLRB v. Brown*, 380 U.S. 278, 292 (1965), and on the application of law to facts, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In fact, none of the State Petitioners is aware of a case in which EPA denied relief under any of the three provisions and a court later reversed that decision. This extreme deference undermines EPA’s argument that potential enforcement-stage relief is a substitute for enacting an achievable standard in the first place. By attempting to channel objections to the impossibility of compliance through adjudications, EPA endeavors to stack the deck in its favor, all while maintaining that this mechanism is itself a reason for this Court to rubberstamp an unachievable NAAQS.

EPA cannot redeem a rule that is unlawful by pointing to statutory “tools” that are cumbersome, discretionary, and, in any event, cannot provide adequate relief. The CAA’s provisions for exceptional events and rural and international transport are supposed to apply under rare circumstances. This Court should not read these provisions to cannibalize the more foundational principles of their parent statute, including the requirement that NAAQS be “achiev[able].” EPA’s reliance on these relief measures as a justification for its failure to account for background ozone is arbitrary, capricious, and inconsistent with the Clean Air Act as a whole.

II. Under EPA’s Construction of the Act, the NAAQS Review Process Would Lack an “Intelligible Principle.”

Because Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” U.S. Const., art. I, § 1, courts have insisted that Congress cannot delegate its legislative power. *Field v. Clark*, 143 U.S. 649, 692 (1892). So long as Congress provides “an intelligible principle” for an agency to follow, however, “such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

In *Whitman*, the Supreme Court found an “intelligible” principle in the language of the Act itself—“requisite”—which the Court defined as “not lower or higher than is necessary.” 531 U.S. at 475-76. But for that “principle” to be truly “intelligible,” EPA must also *apply* it in a way that is intelligible. Otherwise, the principle identified by the Supreme Court in *Whitman* would dissolve in EPA’s semantics, which was precisely what concerned this Court in *ATA I*:

For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

175 F.3d at 1034. In short, while *Whitman* held that EPA cannot supply a principle missing from the statute, the more relevant question here is whether EPA has “conform[ed]” to, not merely restated and then ignored, the “intelligible” principles that Congress provided. *See J.W. Hampton*, 276 U.S. at 409.

The new ozone NAAQS demonstrates how EPA’s current interpretation of Section 109(d) of the CAA, 42 U.S.C. § 7409(d), would in effect violate the nondelegation doctrine essential to the separation of powers embedded in the Constitution. Specifically, EPA’s

interpretation ignores several ways that EPA could give meaning to the principle identified in *Whitman*, including (i) ensuring standards are achievable, (ii) explaining any departures from prior standards, and (iii) considering potential detriment to “public health” from a standard that is too low. EPA’s failure to give any true meaning to its invocation of *Whitman* has left EPA “free to pick any point between zero and a hair below the concentrations yielding London’s Killer Fog.” *ATA I*, 175 F.3d at 1037.

EPA’s evaluation of the 1997 ozone standard—the standard at issue in *Whitman*—confirms that *Whitman* is not as infinitely malleable as EPA now suggests. In crafting the 1997 standard, EPA recognized that background levels provided a reasonable lower bound to the analysis, a concept this Court accepted as relevant in upholding EPA’s decision not to lower the standard to 70ppb. *Am. Trucking*, 283 F.3d at 379 (on remand after *Whitman*). Likewise, Judge Tatel, in dissenting from the initial panel decision that was overturned by *Whitman*, agreed with EPA that its decision was well-reasoned, in part because EPA “set the ozone level just above peak background concentrations.” 175 F.3d at 1061 (Tatel, J., dissenting in part). Thus,

at least one lower bound on EPA's standard-setting authority was well-understood and real—EPA would not set a standard that could be violated by “uncontrollable natural levels of ozone,” that would be too low, and therefore not “requisite” under *Whitman*.

Thus, in context, the holding in *Whitman* found an intelligible principle (“requisite . . . not lower or higher than is necessary”) and EPA gave that principle meaning and effect (a standard below peak background is too low). Here, in contrast, EPA has jettisoned that lower bound.

EPA also appears to have abandoned any meaningful attempt to allow prior standards to serve as a lower bound, at least in cases where EPA cannot articulate a meaningful reason for contradicting its prior analysis. To be sure, the determination of a certain standard as “requisite” on one date does not make that assessment “sacrosanct . . . until every aspect of it is undermined.” *Mississippi*, 744 F.3d at 1343 (2013). However, EPA must nevertheless explain any direct contradiction of its prior analysis, *id.*, and the decision to lower the standard itself must also be “appropriate,” 42 U.S.C. § 7409(d)(1). But when commenters pointed out that EPA itself agreed in 1997 that

70ppb would be too close to peak background levels, EPA's only response was to claim that a standard of 65ppb would present an even greater concern. *See* Response to Comments at 350 (JA__). The failure to directly answer the question exposes EPA's failure to conform to any "intelligible principle" in crafting the new standard. The same statutory provision cannot "intelligibly" mean that 70ppb was "lower ... than ... necessary" in 1997, due to peak background levels, but "appropriate" in spite of peak background levels in 2015, especially when peak background levels have only increased.

Citing *Whitman* and other cases, EPA also ignores all cost considerations. But ignoring all costs fails to give full effect to the statute's primary focus: "public health." As noted in *Whitman*, the Act's primary instruction governing NAAQS standards is not just that they be "requisite" in some undefined sense, but rather "requisite" to protect "**public health.**" 42 U.S.C. § 7409(b)(1) (emphasis added). Because "public health" is undefined, it must bear its "ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). When Congress added the language "public health" in 1970, the authoritative public health treatise defined that concept as "preventing disease, prolonging

life, and promoting physical health and efficiency [through] the development of social machinery which will ensure to every individual in the community *a standard of living* adequate to the maintenance of health.” Winslow at 28 (emphasis added). At a minimum, costs imposed on industry and the States—the “social machinery” that EPA regulates—influence the “standard of living” in the community. Justice Breyer recognized this concept in his concurring opinion in *Whitman*, noting that “requisite” protection of public health should not “lead to deindustrialization” because “[p]reindustrial society was not a very healthy society.” *Whitman*, 531 U.S. at 496 (Breyer, J., concurring).

Justice Breyer’s connection between a NAAQS’s impact on the economy and its ability to serve the public health is not limited to the word “requisite.” It is also present in the Act’s reference to “public health.” Recognizing this feature of the statutory language not only faithfully applies the law but also avoids a collision with the Constitution’s assignment of legislative power to Congress alone.

Having eliminated “achievability,” unexplained contradictions of prior determinations, and “public health” as principled boundaries on how low a NAAQS should go, EPA has reduced the intelligible principle

identified in *Whitman* to a nullity, particularly for a “non-threshold” pollutant “that inflict[s] a continuum of adverse health effects at any airborne concentration greater than zero.” *Whitman*, 531 U.S. at 475. EPA’s application of *Whitman* thus results in a standard that has all the hallmarks of an unconstitutional delegation of authority—an unbounded, essentially legislative policy announcement of how low is too low. If EPA is truly so unfettered in its application of the Act, then a reevaluation of the constitutionality of Section 109(d) is warranted—this time (and for the first time) in the context of a standard that fully exposes EPA’s ability to interpret away whatever intelligible principle the Supreme Court identified in *Whitman*.

III. EPA’s Reliance on a Single Clinical Study to Justify the New NAAQS Is Arbitrary and Capricious.

The State Petitioners incorporate by reference the Industry Petitioners’ argument that EPA has arbitrarily “changed the conclusions it drew from the same basic scientific evidence” available in 2008. *See* Indus. Pet. Br. 36-41. To that convincing exposition, the States add only that the 2009 Schelegle study does not bear the weight EPA places on it.

EPA recognizes the weaknesses in the Schelegle study, noting that, as several commenters pointed out: (1) “lung function decrements and respiratory symptoms . . . were not correlated with each other;” (2) average “decrements observed following exposures below 75 ppb are small (e.g., < 10% . . .);” and (3) the lung-capacity limitations observed were “transient and reversible, do not interfere with daily activities, and do not result in permanent respiratory injury.” 80 FR 65,330.

In response, EPA infers from the American Thoracic Society’s silence that ATS’s requirement of both decrements and symptoms “is not restricted to effects of a particular magnitude *nor* a requirement that individual responses be correlated.” *Id.* (emphasis added); *see also id.* (“Similarly, CASAC made no such qualification”). This position is unreasonable on both counts, regardless of whether EPA chooses to focus on average or individualized data. If focused on average data, Schelegle’s 6% average decrements fall well short of the 10% minimum that EPA requires. If individual data are controlling, meaning that six of the 31 study participants satisfy the 10% threshold, those six

individuals are not the same people who reported symptoms.⁵ EPA's claim that CASAC does not expressly forbid bundling decrements from one person with symptoms from another is also inconsistent with the requirement of both decrements and symptoms before finding an "adverse health effect," a concept that is necessarily tied to individual human bodies. The effect on individuals is, moreover, precisely the reason why EPA prioritizes controlled human-exposure studies over less reliable epidemiological evidence. *Mississippi*, 744 F.3d at 1343-44; 73 FR 16,479; 79 FR 75,288.

Either way, EPA must explain its choice. It is arbitrary and capricious to rely on uncorrelated individual results and a too-low average decrement based on ATS's failure to foreclose this particular portmanteau of unpersuasive data.

Ultimately, the 2009 Schelegle study does not present any new information on the effects of ozone. Additionally, EPA has not offered a reasoned explanation for how the study's predictable findings justify a lower NAAQS under the scientific framework the Agency itself

⁵ Additionally, EPA would need to provide a non-arbitrary explanation for how this tiny group—six of 31 participants—is compelling evidence today, when six of 30 was unconvincing in 2008.

endorses. It is arbitrary and capricious for EPA to dismiss the Schelegle study's limitations in the manner it has.

CONCLUSION

EPA's hastily-crafted ozone NAAQS imposes an unachievable standard, divorced from the scientific realities of background ozone. The Agency's only response is to promise a partial accommodation that the statute limits in both applicability and degree of relief. This model of rulemaking does not accord with the Clean Air Act, which demands that NAAQS be achievable. To abandon that expectation and instead impose standards that would require cessation of human activity across large parts of the country is either an abuse of discretion or proof that EPA's construction of the Act does not reflect an intelligible principle. This Court should vacate the Rule.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because this brief contains 9,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The total number of words contained in this brief and the Industry Petitioners' Brief is fewer than 19,000, per this Court's Order of March 9, 2016.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 22, 2016. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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40 C.F.R. § 50.14 Treatment of air quality monitoring data influenced by exceptional events.

(a) Requirements.

(1) A State may request EPA to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event from use in determinations by demonstrating to EPA's satisfaction that such event caused a specific air pollution concentration at a particular air quality monitoring location.

(2) Demonstration to justify data exclusion may include any reliable and accurate data, but must demonstrate a clear causal relationship between the measured exceedance or violation of such standard and the event in accordance with paragraph (c)(3)(iv) of this section.

(b) Determinations by EPA.

(1) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that an exceptional event caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section.

(2) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that emissions from fireworks displays caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section. Such data will be treated in the same manner as exceptional events under this rule, provided a State demonstrates that such use of fireworks is significantly integral to traditional national, ethnic, or other cultural events including, but not limited to July Fourth celebrations which satisfy the requirements of this section.

(3) EPA shall exclude data from use in determinations of exceedances and NAAQS violations, where a State demonstrates to EPA's satisfaction that emissions from prescribed fires caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section provided that such emissions are from prescribed fires that EPA determines meets the definition in § 50.1(j), and provided that the State has certified to EPA that it has adopted and is implementing a Smoke Management Program or the State has ensured that the burner employed basic smoke management practices. If an exceptional event occurs using the basic smoke management practices approach, the State must undertake a review of its approach to ensure public health is being protected and must include consideration of development of a SMP.

(4) [Reserved]

(c) *Schedules and Procedures.*

(1) Public notification.

(i) All States and, where applicable, their political subdivisions must notify the public promptly whenever an event occurs or is reasonably anticipated to occur which may result in the exceedance of an applicable air quality standard.

(ii) [Reserved]

(2) Flagging of data.

(i) A State shall notify EPA of its intent to exclude one or more measured exceedances of an applicable ambient air quality standard as being due to an exceptional event by placing a flag in the appropriate field for the data record of concern which has been submitted to the AQS database.

(ii) Flags placed on data in accordance with this section shall be deemed informational only, and the data shall not be excluded from determinations with respect to exceedances or violations of the national ambient air quality standards unless and until, following the State's submittal of its demonstration pursuant to paragraph (c)(3) of this section and EPA review, EPA notifies the State of its concurrence by placing a concurrence flag in the appropriate field for the data record in the AQS database.

(iii) Flags placed on data as being due to an exceptional event together with an initial description of the event shall be submitted to EPA not later than July 1st of the calendar year following the year in which the flagged measurement occurred, except as allowed under paragraph (c)(2)(iv) or (c)(2)(v) of this section.

(iv) For PM_{2.5} data collected during calendar years 2004-2006, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than October 1, 2007. EPA may grant an extension, if a State requests an extension, and permit the State to submit the notification of the flag and initial description by no later than December 1, 2007.

(v) For lead (Pb) data collected during calendar years 2006-2008, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2009. For Pb data collected during calendar year 2009, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2010. For Pb data collected during calendar year 2010, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than May 1, 2011.

(vi) When EPA sets a NAAQS for a new pollutant or revises the NAAQS for an existing pollutant, it may revise or set a new schedule for flagging exceptional event data, providing initial data descriptions and providing detailed data documentation in AQS for the initial designations of areas for those NAAQS. Table 1 provides the schedule

for submission of flags with initial descriptions in AQS and detailed documentation. These schedules shall apply for those data which will or may influence the initial designation of areas for those NAAQS. EPA anticipates revising Table 1 as necessary to accommodate revised data submission schedules for new or revised NAAQS.

Table 1—Schedule of Exceptional Event Flagging and Documentation Submission for Data To Be Used in Designations Decisions for New or Revised NAAQS

NAAQS Pollutant/ standard/(level)/ promulgation date	Air quality data collected for calendar year	Event flagging & initial description deadline	Detailed documentation submission deadline
PM _{2.5} /24-Hr Standard (35 µg/m ³) Promulgated October 17, 2006	2004-2006	October 1, 2007 ^a	April 15, 2008. ^a
Ozone/8-Hr Standard (0.075 ppm) Promulgated March 12, 2008	2005- 20072008 2009	June 18, 2009 ^a June 18, 2009 ^a 60 days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date	June 18, 2009 ^a June 18, 2009 ¹ 60 days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first. ^b

		occurs first ^b	
NO ₂ /1-Hour Standard (80-100 PPB, final level TBD)	2008 2009 2010	July 1, 2010 ^a July 1, 2010 ^a April 1, 2011 ^a	January 22, 2011 ^a January 22, 2011 ^a July 1, 2010 ^a
SO ₂ /1-Hour Standard (50-100 PPB, final level TBD)	20082009 2010	October 1, 2010 ^b October 1, 2010 ^b June 1, 2011 ^b	June 1, 2011 ^b June 1, 2011 ^b June 1, 2011 ^b
	2011	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first ^b	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first. ^b

^a These dates are unchanged from those published in the original rulemaking, or are being proposed elsewhere and are shown in this table for informational purposes—the Agency is not opening these dates for comment under this rulemaking.

^b Indicates change from general schedule in 40 CFR 50.14.

Note: EPA notes that the table of revised deadlines *only* applies to data EPA will use to establish the final initial designations for new or revised NAAQS. The general schedule applies for all other purposes, most notably, for data used by EPA for redesignations to attainment.

(3) *Submission of demonstrations.*

(i) A State that has flagged data as being due to an exceptional event and is requesting exclusion of the affected measurement data shall, after notice and opportunity for public comment, submit a demonstration to justify data exclusion to EPA not later than the lesser of, 3 years following the end of the calendar quarter in which the flagged concentration was recorded or, 12 months prior to the date that a regulatory decision must be made by EPA. A State must submit the public comments it received along with its demonstration to EPA.

(ii) A State that flags data collected during calendar years 2004-2006, pursuant to paragraph (c)(2)(iv) of this section, must adopt the procedures and requirements specified in paragraph (c)(3)(i) of this section and must include a demonstration to justify the exclusion of the data not later than the submittal of the Governor's recommendation letter on nonattainment areas.

(iii) A State that flags Pb data collected during calendar years 2006-2009, pursuant to paragraph (c)(2)(v) of this section shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify exclusion of the data not later than October 15, 2010. A State that flags Pb data collected during calendar year 2010 shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify the exclusion of the data not later than May 1, 2011. A state must submit the public comments it received along with its demonstration to EPA.

(iv) The demonstration to justify data exclusion shall provide evidence that: (A) The event satisfies the criteria set forth in 40 CFR 50.1(j); (B) There is a clear causal relationship between the measurement under consideration and the event that is claimed to have affected the air quality in the area; (C) The event is associated with a measured concentration in excess of normal historical fluctuations, including background; and (D) There would have been no exceedance or violation but for the event.

(v) With the submission of the demonstration, the State must document that the public comment process was followed.

[72 FR 13580, Mar. 22, 2007; 72 FR 28612, May 22, 2007; 73 FR 67051, Nov. 12, 2008; 74 FR 70598, Nov. 21, 2008; 74 FR 23312, May 19, 2009; 75 FR 6531, Feb. 9, 2010; 75 FR 35592, June 22, 2010]

40 C.F.R. § 50.19 Categorical exclusions not subject to the Federal laws and authorities cited in § 50.4.

(a) *General.* The activities and related approvals of policy documents listed in paragraphs (b) and (c) of this section are not subject to the individual compliance requirements of the Federal laws and authorities cited in § 50.4, unless otherwise indicated below. These activities and approvals of policy documents are also categorically excluded from the EA required by NEPA except in extraordinary circumstances (§ 50.20(b)). HUD approval or implementation of these categories of activities and policy documents does not require environmental review, because they do not alter physical conditions in a manner or to an extent that would require review under NEPA or the other laws and authorities cited at § 50.4.

(b) *Activities.*

- (1) Environmental and other studies, resource identification and the development of plans and strategies.
- (2) Information and financial advisory services.
- (3) Administrative and management expenses.
- (4) Public services that will not have a physical impact or result in any physical changes, including but not limited to services concerned with employment, crime prevention, child care, health, drug abuse, education, counseling, energy conservation and welfare or recreational needs.
- (5) Inspections and testing of properties for hazards or defects.
- (6) Purchase of insurance.
- (7) Purchase of tools.

- (8) Engineering or design costs.
- (9) Technical assistance and training.
- (10) Assistance for temporary or permanent improvements that do not alter environmental conditions and are limited to protection, repair or restoration activities necessary only to control or arrest the effects from disasters or imminent threats to public safety including those resulting from physical deterioration.
- (11) Tenant-based rental assistance.
- (12) Supportive services including, but not limited to, health care, housing services, permanent housing placement, day care, nutritional services, short-term payments for rent/mortgage/utility costs, and assistance in gaining access to local, State, and Federal government benefits and services.
- (13) Operating costs including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training and recruitment and other incidental costs; however, in the case of equipment, compliance with § 50.4(b)(1) is required.
- (14) Economic development activities, including but not limited to, equipment purchase, inventory financing, interest subsidy, operating expenses and similar costs not associated with construction or physical expansion of existing facilities; however, in the case of equipment purchase, compliance with § 50.4(b)(1) is required.
- (15) Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction, including closing costs and downpayment assistance, interest buydowns, and similar activities that result in the transfer of title.
- (16) Housing pre-development costs including legal, consulting, developer and other costs related to site options, project financing, administrative costs and fees for loan commitments, zoning approvals, and other related activities which do not have a physical impact.
- (17) HUD's insurance of one-to-four family mortgages under the Direct Endorsement program, the insurance of one-to-four family mortgages under the Lender Insurance program, and HUD's guarantee of loans for one-to-four family dwellings under the Direct Guarantee procedure for the Indian Housing loan guarantee program, without any HUD review or approval before the completion of construction or rehabilitation and the loan closing; and HUD's acceptance for insurance of loans insured

under Title I of the National Housing Act; however, compliance with §§ 50.4(b)(1) and (c)(1) and 24 CFR 51.303(a)(3) is required.

(18) HUD's endorsement of one-to-four family mortgage insurance for proposed construction under Improved Area processing; however, the Appraiser/Review Appraiser Checksheet (Form HUD-54891) must be completed.

(19) Activities of the Government National Mortgage Association under Title III of the National Housing Act (12 U.S.C. 1716 *et seq.*).

(20) Activities under the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*). (21) Refinancing of HUD-insured mortgages that will not allow new construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance; however, compliance with § 50.4(b)(1) is required.

(22) Approval of the sale of a HUD-held mortgage.

(23) Approval of the foreclosure sale of a property with a HUD-held mortgage; however, appropriate restrictions will be imposed to protect historic properties.

(24) HUD guarantees under the Loan Guarantee Recovery Fund Program (24 CFR part 573) of loans that refinance existing loans and mortgages, where any new construction or rehabilitation financed by the existing loan or mortgage has been completed prior to the filing of an application under the program, and the refinancing will not allow further construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance; however, compliance with §§ 50.4 (b)(1) and (c)(1) and 51.303(a) is required.

(c) Approval of policy documents.

(1) Approval of rules and notices proposed for publication in the **Federal Register** or other policy documents that do not: (i) Direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing (other than tenant-based rental assistance), rehabilitation, alteration, demolition, or new construction; or (ii) Establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy.

(2) Approval of policy documents that amend an existing document where the existing document as a whole would not fall within an exclusion in this paragraph (c) but the amendment by itself would do so;

(3) Approval of policy documents that set out fair housing or nondiscrimination standards or enforcement procedures or provide for assistance in promoting or enforcing fair housing or nondiscrimination;

(4) Approval of handbooks, notices and other documents that provide operating instructions and procedures in connection with activities under a **Federal Register** document that has previously been subject to a required environmental review.

(5) Approval of a Notice of Funding Availability (NOFA) that provides funding under, and does not alter any environmental requirements of, a regulation or program guideline that was previously published in the **Federal Register**, provided that (i) The NOFA specifically refers to the environmental review provisions of the regulation or guideline; or (ii) The regulation or guideline contains no environmental review provisions because it concerns only activities listed in paragraph (b) of this section.

(6) Statutorily required and/or discretionary establishment and review of interest rates, loan limits, building cost limits, prototype costs, fair market rent schedules, HUD-determined prevailing wage rates, income limits and exclusions with regard to eligibility for or calculation of HUD housing assistance or rental assistance, and similar rate and cost determinations and related external administrative or fiscal requirements or procedures which do not constitute a development decision that affects the physical condition of specific project areas or building sites.

[61 FR 50916, Sept. 27, 1996, as amended at 62 FR 15802, Apr. 2, 1997; 63 FR 48990, Sept. 11, 1998; 68 FR 56127, Sept. 29, 2003]

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1166 (and consolidated cases)

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

WALTER COKE, INC., *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

**On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 33,840 (June 12, 2015)**

OPENING BRIEF OF STATE PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

15-1166, 15-1216, 15-1239, 15-1243, 15-1256, 15-1265, 15-1266, 15-1267, 15-1268, 15-1270, 15-1271, 15-1272, 15-1300, 15-1301, 15-1302, 15-1308

(A) Parties, Intervenors, and Amici

Petitioners

Alabama Power Company
Big Brown Power Company, LLC
BCCA Appeal Group
Commonwealth of Kentucky
Environmental Committee of the Florida Electric Power Coordinating Group, Inc.
Georgia Coalition for Sound Environmental Policy
Georgia Industry Environmental Coalition
Georgia Power Company
Gulf Power Company
Luminant Generation Company, LLC
Mississippi Power Company
North Carolina Department of Environment and Natural Resources
Oak Grove Management Company, LLC
Sandow Power Company, LLC
Southern Company Services, Inc.
Southern Power Company
SSM Litigation Group
State of Alabama
State of Arizona
State of Arkansas
State of Delaware
State of Florida
State of Georgia
State of Kansas
State of Louisiana
State of Mississippi
State of Missouri
State of Ohio
State of Oklahoma
State of South Carolina

State of South Dakota
State of Tennessee
State of Texas
State of West Virginia
Texas Commission on Environmental Quality
Texas Oil and Gas Association
Union Electric Company d/b/a Ameren Missouri
Utility Air Regulatory Group

Respondent

Gina McCarthy, Administrator, United States Environmental Protection Agency
United States Environmental Protection Agency

Intervenors for Respondent

Citizens for Environmental Justice
Environmental Integrity Project
Natural Resources Defense Council
People Against Neighborhood Industrial Contamination
Sierra Club

(B) Rulings Under Review

All of the petitions for review challenge EPA's final rule entitled "State Implementation Plans: Responses to Petitions for Rulemaking, Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule," 80 Fed. Reg. 33840 (June 12, 2015).

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1983 Memo	Mem. from Kathleen M. Bennett, Ass't Admr. For Air, Noise and Radiation to Reg'l Admrs., Regions I-X (Feb. 15, 1983)
1999 Memo	Mem. from Steven A. Herman, Ass't Adm'r for Enforcement & Compliance Assur. to Reg'l Adm'rs, Regions I-X (Aug. 11, 1999)
2001 Memo	Mem. from Eric Shaeffer, Dir., Ofc. of Regulatory Enforcement, to John S. Seitz, Dir., Ofc. of Air Quality Planning & Standards, Ofc. of Air & Radiation (Dec. 5, 2001)
CAA or Act	Clean Air Act, 42 U.S.C. § 7401 <i>et seq.</i>
Comment Response	EPA, <i>Response to Comments on February 2013 and September 2014 Proposals for Action, "State Implementation Plans: Response to Petition for Rulemaking, Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction"</i> (May 2015)
EPA	United States Environmental Protection Agency
NAAQS	National ambient air quality standards
SIP	State implementation plan
SIP Calls	<i>State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Final Rule</i> , 80 Fed. Reg. 33,840 (June 12, 2015)
SSM	Startup, shutdown, and malfunction

JURISDICTIONAL STATEMENT

State Petitioners¹ seek review of a final rule promulgated by the U.S. Environmental Protection Agency (EPA) entitled “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Final Rule,” 80 Fed. Reg. 33,840 (June 12, 2015) (the SIP Calls), Joint Appendix (JA), ___. Petitions for review were timely filed under section 307(b)(1) of the Clean Air Act (CAA or Act), which provides this Court jurisdiction to review final EPA actions.

STATEMENT OF THE ISSUES

1. Whether EPA may satisfy CAA § 110(k)(5)’s requirement to “find[]” that SIPs are “substantially inadequate” and call States’ SIPs solely on the basis of an asserted mismatch between the SIPs and CAA legal requirements, without making factual findings supporting its determination that any inadequacies are substantial.
2. Whether, assuming EPA’s interpretation of its SIP call authority was permissible, EPA properly called SIPs because they contain what EPA terms

¹ State of Florida, State of Alabama, State of Arizona, State of Arkansas, State of Delaware, State of Georgia, State of Kansas, State of Louisiana, State of Mississippi, State of Missouri, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of West Virginia, Commonwealth of Kentucky, North Carolina Department of Environment and Natural Resources, State of Texas, and State of Tennessee.

“automatic exemptions,” “director’s discretion provisions,” and “affirmative defenses” for emissions during SSM periods.

3. Whether, to the extent applicable, EPA may call SIPs for reasons that it did not find constitute substantial inadequacies.

INTRODUCTION

The Clean Air Act (the Act) establishes a system of cooperative federalism to reduce air pollution in the United States. In that system, EPA and the States occupy distinct and complementary roles. EPA creates National Ambient Air Quality Standards (NAAQS) setting the maximum ambient-air concentration for certain air pollutants that will not jeopardize public health or welfare. The States may provide input, but the decision lies with EPA. States are responsible for determining the best approach to achieve the NAAQS through state implementation plans (SIPs). If the SIP meets the requirements of the Act, EPA must approve the SIP. EPA has no authority to substitute its policy preferences about the best means to reduce air pollution. This system has been in place since Congress passed the Act in 1970.

Once EPA approves a SIP, it cannot require a State to revise that SIP just because EPA interprets some aspect of the SIP as technically inconsistent. Instead, section 110(k)(5) of the Act requires EPA to “find[] that [the SIP] is substantially inadequate.” Only upon making such a finding can the EPA require a State to revise the SIP. This procedure is called a SIP call.

This case involves EPA's decision to call SIPs in 35 States and the District of Columbia (for provisions applicable in 45 statewide and local jurisdictions) because of how those SIPs treated periods of startup, shutdown, and malfunction (SSM). The SIP Calls do not purport to improve air quality. EPA made no findings at all about the air-quality effects of the States' SSM regulations in general, much less State-specific findings about the specific provisions that EPA has identified as substantially inadequate. Instead, EPA asserted that certain CAA requirements are "fundamental," such that any SIP provision that failed to satisfy them was substantially inadequate. In the absence of any factual finding of substantial inadequacy, however, EPA's SIP Calls do not comply with the Act. And even had it correctly construed its SIP call authority, EPA's superficial analysis of SIP provisions classified SIPs as substantially inadequate when, under EPA's own reading of the Act, they plainly are not. These failures require the SIP Call to be vacated.

STATUTES AND REGULATIONS

Pertinent statutes, regulations, and SIP provisions are set forth in the separately filed Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

I. THE SIP PROGRAM OF THE CLEAN AIR ACT

Under section 109 of the Act, EPA establishes primary and secondary NAAQS to protect human health and welfare. These air quality standards set maximum concentrations for the pollutants in the ambient air, *e.g.* 40 C.F.R. § 50.12 (1.5 µg/m³

for lead); they do not themselves set limitations on how much or how fast a source can emit a particular pollutant. In setting the NAAQS, EPA is to determine, based on available scientific information, the maximum concentration of the pollutant in the ambient air “requisite” to protect public health and welfare, CAA § 109(b)—that is, the standards must provide limits that are “sufficient, but not more than necessary,” with an adequate margin of safety to achieve those goals. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 473 (2001).

EPA is not, however, primarily responsible for attaining the NAAQS. The Act is an exercise in cooperative federalism. EPA “identifies the end to be achieved” by establishing the NAAQS, and States “choose the particular means for realizing that end” through their SIPs. *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) . Thus, States, not EPA, have the “primary responsibility for assuring air quality” through a “state implementation plan” (or SIP), through which a State “specif[ies] the manner in which national primary and secondary ambient air quality standards will be achieved and maintained.” CAA § 107(a).

Section 110 of the Clean Air Act sets requirements for SIPs. Two provisions are particularly relevant here. First, a SIP must contain “enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this chapter.” CAA § 110(a)(2)(A). The Act provides States with broad discretion to regulate through “emission limitations” and “other control measures” that the State deems “necessary

or appropriate.” *Id.* That discretion is apparent in the definition of “emission limitation”: any “requirement” that “limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.” *Id.* § 302(k). The definition includes “any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” *Id.* Separately, a SIP must contain a “program to provide for the enforcement” of various requirements, including emission limitations. CAA § 110(a)(2)(C).² Thus, the Act gives States discretion over how to design emission limitations and other control measures to attain the NAAQS and how those limitations should be enforced.

If the SIP meets CAA requirements, EPA “shall approve” the plan. CAA § 110(k)(3). In other words, if the SIP meets CAA requirements, the Act gives EPA “no authority to question the wisdom of a State’s choices of emission limitations.” *Train v. NRDC*, 421 U.S. 60, 79 (1975); *see also Virginia*, 108 F.3d at 1410 (“Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans.”). Once a SIP is approved, the Act also significantly limits EPA’s authority to require a State to change it. Under the SIP call authority at issue here, only if EPA “finds on the basis of information available to the

² This obligation is independent of the obligation to ensure that the State has sufficient resources to carry out the SIP. *Id.* § 110(a)(2)(E).

Administrator” that the SIP is not just inadequate, but “substantially” so, must a State revise its SIP. CAA §§ 110(a)(2)(H)(ii), 110(k)(5).

II. REGULATION OF SSM PERIODS

Since States first submitted SIPs in the 1970s, they have recognized that emissions controls may not work as well when sources are starting up, shutting down, or malfunctioning. EPA, too, has “recognize[d]” both that “even the best available emissions control systems may not be consistently effective during startup and shut-down periods” and “even equipment that is properly designed and maintained can sometimes fail.” 1999 Memo 2, 3, JA ___. Therefore, SIPs have “often included” special provisions for operation during SSM periods, relating both to what the limitations are during those periods, and also how enforcement should take place. 78 Fed. Reg. 12,460, 12,464 (Feb. 22, 2013), JA ___. The widespread nature of such provisions is best illustrated by the fact that the SIP Calls require revisions to SSM rules in 35 States and the District of Columbia. 80 Fed. Reg. at 33,847.

EPA first suggested its preferred approach to “excess emissions,” defined as any time an SSM period resulted in “an air emission rate which exceeds any applicable emission limitation,” in SIPs in 1982. 1982 Memo 3, JA ___. Although EPA determined that excess emissions should be treated as violations, it recognized that in some cases, excess emissions would result from unavoidable malfunctions. *Id.* Rather than offer an “automatic exemption where a malfunction is alleged by a source,” EPA advised States to use enforcement discretion. *Id.* Under EPA’s preferred approach, the

State could “require the source to demonstrate to the appropriate State agency that the excess emissions, though constituting a violation, were due to an unavoidable malfunction.” *Id.* For periods of startup and shutdown, EPA believed no enforcement discretion was appropriate, because sources should be able to plan for such events. *Id.* at 4, JA _____. The next year, EPA reversed course on start-up and shut-down periods, recognizing that sometimes “careful and prudent planning and design will not totally eliminate infrequent[,] short periods of excesses during startup and shutdown.” 1983 Memo 1-2, JA _____. Although the 1982 and 1983 Memos both addressed States’ treatment of emissions that exceeded applicable limitations, EPA did not purport to limit States’ authority to determine that certain emission limitations would not apply during SSM periods.

In 1999, EPA again revised its SSM policy to reduce the possibility that SSM emissions could cause sources with unavoidable SSM emissions to be subject to monetary penalties.³ For both malfunctions and startup and shutdown, EPA advised States that they could create affirmative defenses to monetary penalties subject to certain criteria 1999 Memo Attachment 3-5, JA _____. These defenses, if satisfied, would allow sources to avoid monetary penalties in citizen suits, but they would be subject to injunctions for violating the applicable emissions standard. EPA later clarified that the

³ This issue arose following the 1990 CAA amendments, which allowed citizen suits to seek monetary penalties for the first time. *See NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014).

1999 Memo applied only to future SIP revisions and “was not intended to affect existing permit terms or conditions.” 2001 Memo 2, JA ____.

III. THE SIP CALL

The SIP Calls arise out of a 2011 EPA settlement with Sierra Club. Under the consent decree, EPA was required to respond to the organization’s petition concerning SIP provisions addressing SSM periods. The petition asked EPA to call SIPs from 38 States and the District of Columbia because, among other reasons, they automatically exempted emissions during SSM periods, they gave the director of the State air pollution control agency discretion to provide exemptions from applicable emission limitations, or they provided affirmative defenses to an alleged violation. 78 Fed. Reg. 12,460, 12,464 (Feb. 22, 2013), JA ____.

EPA agreed with Sierra Club that automatic exemptions from emission limitations during SSM periods violate the requirement that a SIP contain continuous emission limitations under sections 110(a)(2)(A) and 302(k) of the Act, that director’s discretion provisions violate the prohibition on modifying SIPs without EPA approval, and reversing its previous position,⁴ that affirmative defenses improperly infringe on the courts’ jurisdiction to impose monetary penalties for violations in citizen suits. 80 Fed. Reg. at 33-889-924, JA ____.

EPA concluded that each type of provision failed “fundamental legal

⁴ EPA initially proposed to deny the Petition as to affirmative defenses to monetary penalties. 78 Fed. Reg. at 12,469. EPA reversed course after this Court disapproved such an affirmative defense in an EPA-created technology-based emission standard for certain hazardous air pollutants in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *See infra* p. 35.

requirements” of the Act, rendering a SIP “substantially inadequate,” as required for a SIP call. In the SIP Calls, EPA required States to revise SIPs that, in its judgment, might be construed as containing automatic exemptions, directors’ discretion provisions, or affirmative defenses, and also identified other issues as to which EPA had not made a substantial-inadequacy finding.⁵ Altogether, EPA called SIPs in 35 States and the District of Columbia (with provisions applicable in 45 statewide and local jurisdictions). 80 Fed. Reg. at 33,846, JA _____. Nineteen State Petitioners, along with other petitioners, timely sought review.

SUMMARY OF THE ARGUMENT

In the SIP Call, EPA did not set out to address threats to air quality. The only basis EPA identified for the calls was the SIPs’ alleged failure to meet certain legal requirements of the CAA as EPA now interprets it. But the SIP call process is not designed to address any and all perceived shortcomings. Contrary to the plain language of CAA § 110(k)(5), EPA has made no “find[ings]” that support its conclusion that these claimed inadequacies are “substantial.” This problem is exemplified by EPA’s decision to call SIPs containing affirmative defenses to monetary penalties, which went from EPA’s preferred approach to addressing SSM emissions to a substantial inadequacy requiring a SIP call—not because EPA’s assessment of the effects of those provisions changed, but because its view of the law

⁵ EPA also revised its SSM policy, though it did not determine that aspects of the policy other than those just discussed constituted substantial inadequacies. *See* 80 Fed. Reg. at 33,927-29, 33,976-82, JA ____.

did. Still more troubling, EPA interprets its SIP call authority to extend not just to such alleged technical inadequacies, but to potential ones. By reading the requirement to find a substantial inadequacy out of the Act, EPA significantly undermines Congress's cooperative federalism design.

Setting aside EPA's disregard of section 110(k)(5)'s plain text, EPA's decision to call various SIPs based on its conclusion that they contain improper automatic exemptions, director's discretion provisions, and affirmative defenses rests on a combination of impermissible interpretations of both the Act and SIP provisions. These errors fall into four categories. *First*, EPA refused to consider simultaneously operating general-duty requirements that limit emissions during SSM periods just because they were not cross-referenced in the SSM provisions EPA deemed inadequate. *Second*, EPA incorrectly applied its definition of emission limitation to determine that certain SSM provisions did not limit emissions, even though, on their face, those provisions require sources to limit emissions at all times, including SSM periods, to avoid a violation. *Third*, among other errors, EPA incorrectly interpreted provisions that guide State air agencies' exercise of their enforcement discretion to preclude EPA and citizen enforcement, notwithstanding those States' comments pointing out the incorrect interpretation. *Fourth*, EPA erred by asserting that the Act does not permit affirmative defenses, either to violations or just to monetary penalties. In doing so, it impermissibly relied on this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), to conclude that the Act prevents States from including

affirmative defenses to monetary penalties in their SIPs, notwithstanding that the Act specifically gives States the authority to design an enforcement regime for their SIPs, that *NRDC* explicitly does not address affirmative defenses in SIPs, and that the Fifth Circuit previously specifically approved the affirmative defenses that EPA now claims are impermissible.

Finally, it is unclear whether EPA also purports to call SIPs based on factors beyond those issues that it has determined to constitute substantial inadequacies. To the extent those issues are the basis for the SIP Call, EPA's action is improper.

For these reasons, the SIP Call should be vacated.

STANDING

State Petitioners have standing as States or State agencies required to revise SIPs to comply with EPA's SIP Call. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

STANDARD OF REVIEW

Final agency actions under the Clean Air Act must be vacated when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA § 307(d)(9)(A); *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008). When considering EPA's action under the CAA, courts must first determine *de novo* whether "the intent of Congress is clear" by "employing traditional tools of statutory construction." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). If so, EPA is accorded no deference, because "the court, as well as the agency

must give effect to the unambiguously expressed intent of Congress.” *Id.* Only when the statute does not resolve an issue will the Court defer to EPA, provided that the agency’s interpretation is reasonable. *Id.*

ARGUMENT

I. EPA HAS NOT PROPERLY FOUND THAT ANY SIP IS SUBSTANTIALLY INADEQUATE.

EPA’s most fundamental error was failing to comply with the Act’s requirement to “find[]” that a SIP is “substantially inadequate to attain or maintain the relevant national ambient air quality standard . . . or to otherwise comply with any requirement of” the Act before calling a SIP. CAA § 110(k)(5). Specifically, EPA erred by determining that the standard is satisfied whenever EPA interprets any SIP provision as not complying with a legal requirement, regardless of the effects or magnitude of the inadequacy. Congress’s requirement of a “find[ing] on the basis of information available to the administrator,” *id.* § 110(a)(2)(H)(ii), contemplates that a SIP call will be based on facts, not speculation. Beyond that, EPA extends its authority to call SIPs to provisions that may not even be “inadequate . . . to comply” with CAA requirements, determining that ambiguous provisions, or even provisions it misread, can justify a SIP call. EPA’s misinterpretation of its SIP call authority alone requires vacatur and remand for EPA to apply the correct legal standard. *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

1. EPA's first error was to ignore the required factual finding of substantial inadequacy. To be subject to a call, a SIP must not only be "inadequate" to meet the NAAQS or comply with a CAA requirement; it must be "substantially" so—that is, "[c]onsiderable in importance, value, degree, amount, or extent." *Am. Heritage Dictionary of the English Language* 1284 (1981). Although Congress did not precisely define the point at which an inadequacy becomes substantial, it did tell EPA that the substantial-inadequacy determination must result from a "find[ing] on the basis of information available to the Administrator." CAA § 110(a)(2)(H)(ii); *see also id.* § 110(k)(5). By requiring that EPA find substantial inadequacy, Congress directed EPA to review evidence and make a factual determination to justify its SIP call. *Black's Law Dictionary* 707 (9th ed. 2009) (defining "find" as "[t]o determine a fact in dispute by verdict or decision"); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (administrative finding needed to be based on "substantial evidence"); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1034 (D.C. Cir. 2001) ("failure to examine the relevant data" rendered EPA rulemaking arbitrary). Moreover, Congress gave EPA the tools to require "[a]ny State" to submit "any . . . information" that EPA requires to assess the "need for revision" of any SIP. CAA § 110(p).

Comparing the SIP call standard to other standards of review in section 110 reinforces this interpretation. When a SIP is submitted for approval in the first instance, EPA must approve it only "if it meets all of the applicable requirements" of

the CAA. *Id.* § 110(k)(3). Similarly, when a State submits a new SIP revision, EPA must disapprove it if it “would interfere with any applicable requirement” of the CAA. *Id.* § 110(l). By their plain text, these are not substantial-compliance standards. They are absolute-compliance standards; EPA must approve a SIP or SIP revision only if it meets *all* applicable CAA requirements. Thus, although a SIP may be inadequate based solely on a mismatch between a legal requirement of the Act and the text of the SIP—and therefore not approvable in the first instance under sections 110(k)(3) or 110(l)—determining whether it is substantially so involves a factual question, not just a legal one. Rather than respecting the differences between these standards, EPA collapses them, contending that it may call SIPs “whenever the Agency later determines [revision] to be necessary to meet CAA requirements.” 80 Fed. Reg. at 33,937. In so doing, EPA alters the cooperative federalism balance that Congress designed.

Instead of the factual inquiry the Act demands, EPA created a category of “fundamental legal requirements” that must be satisfied absolutely to avoid a SIP call. EPA does not explain what separates fundamental requirements that create substantial inadequacies from those non-fundamental ones that do not. Congress found all of the Act’s requirements important enough to put in the Act and required EPA to ensure that all new plans and revisions satisfy them all. CAA §§ 110(k)(3), 110(l). More significantly, EPA’s argument that some requirements are fundamental implicitly concedes that facts about the practical effects of an inadequacy are the only

way to determine if that inadequacy is substantial. EPA justifies this new category based heavily on factual scenarios that could result if these “fundamental legal requirements” are not met. But rather than find those facts, as required, EPA speculated about what those facts might be. It hypothesized that the target SIP provisions would undermine “attainment and maintenance of the NAAQS, protection of PSD increments[,] and improvement of visibility,” 80 Fed. Reg. at 33,927, 33,929, JA ___, or allow “potentially dramatic adverse impacts inconsistent with the objectives of the CAA,” 80 Fed. Reg. 33928, JA ___.

Notably, EPA did not cite a single instance in which any State’s SSM provisions prevented attainment of the NAAQS, PSD increments, or improved visibility, or caused any other “potentially dramatic” adverse impacts in the SIP Calls. Nor did it cite any predictive studies or models demonstrating that its conclusion rested on anything other than conjecture. This is significant, because SSM rules, by their nature, apply to very limited periods of operation, leading one to expect their impact would be minimal. EPA, of course, knows how to compile a factual record supporting its administrative actions, and it has done so in previous SIP calls.⁶ Because EPA’s determination rests only on speculation, it cannot constitute a finding. *See Virginia*,

⁶ *See, e.g.*, 76 Fed. Reg. 41424-01 (July 14, 2011) (SIP call in light of NAAQS exceedances); 76 Fed. Reg. 763-01 (Jan. 6, 2011) (proposed SIP call based on modeling); 71 Fed. Reg. 19432-01 (Apr. 14, 2006) (SIP call in light of NAAQS exceedances); 58 Fed. Reg. 41430-01 (Aug. 4, 1993) (SIP call based on predictive modeling anticipating NAAQS exceedances); 53 Fed. Reg. 34500-01 (Sept. 7, 1988) (SIP call in light of NAAQS exceedances).

108 F.3d at 1415 (noting that a finding of substantial inadequacy could not be made “[i]n the absence of applicable modeling,” and vacating a SIP call on that basis).

As important as the facts that EPA did not find is the “information available” that EPA simply ignored. *See* § 110(a)(2)(H)(ii). EPA requires States to submit ambient air quality data to EPA quarterly, pursuant to monitoring plans it approves. CAA § 110(a)(2)(B); 40 C.F.R. §§ 51.15, 58.16. In addition, SIPs require stationary sources to continuously monitor emissions, with annual reports to EPA. 40 C.F.R. §§ 51.15, 51.211, 51.214, 51.321. Further, States must demonstrate that submitted SIPs will result in attainment of the NAAQS, which includes consideration of actual source emissions, applicable emission limitations, and any applicable exemptions or alternative limitations. *Id.* §§ 51.15, 51.112. Had EPA considered this information, it is hard to imagine that EPA would have found States’ SSM provisions substantially inadequate across the board, or even State by State. For example, Georgia reported to EPA that in 2012, two-thirds of Georgia sources had no emissions exceeding numerical standards, and the average duration of excess emissions during SSM Periods for those that did was just six hours per reporting period. Ga. Comment 2, JA ___. South Dakota indicated it fully attains all NAAQS. S.D. Comment 3, JA ___. Delaware pointed out that its provision allowing the State to set specific rules for startup and shutdown periods has not caused excess emissions that contribute to its ozone nonattainment problem. Del. Comment 3, JA ___. Similarly, Arizona’s affirmative defense provision, which applies only if the emissions do not cause a

NAAQS violation and good design and maintenance procedures are followed, had never been invoked since it was created in 2001. Ariz. Comment 1-2, JA ____.

EPA's failure to point to any facts concerning adverse effects of the States' SSM provisions is particularly striking in light of the long and widespread experience with the SSM rules EPA has called. Many SIP provisions EPA now considers substantially inadequate have existed for decades. *E.g.*, Fla. Comment 4, JA ____ (Florida's SSM provision first approved in 1982); S.D. Comment 3, JA ____ (South Dakota's provision first approved in 1975); 54 Fed. Reg. 19,169-01 (May 4, 1989) (approving Kentucky's provision in 1989). If, in fact, any of the dozens of SIPs EPA called were substantially inadequate, one would expect that EPA could marshal some evidence as to the provisions' real-world detrimental effects. Instead, EPA did the opposite, acknowledging that States may permissibly respond to the SIP Call by loosening emission limitations on sources to ensure that increased emissions during SSM periods do not result in violations, paradoxically allowing for *more* air pollution, not less. 80 Fed. Reg. at 33,955, JA ____.

EPA's reversal on affirmative defenses perfectly illustrates the irrelevance of factual findings to the SIP Call. In its 1999 Memo, EPA recommended that States address SSM events by giving affirmative defenses to monetary penalties when sources could show that it was impossible to avoid excess emissions and satisfy other conditions. 1999 Memo Attachment 3-6, JA ____.

The February 2013 NPRM continued to authorize "appropriately drawn" affirmative defenses, albeit with several new

restrictions, 78 Fed. Reg. 12,469-70, 12,478-79, JA ___, and one month later, the Fifth Circuit approved EPA's longstanding view, holding that the CAA authorizes States to include affirmative defenses. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013); *accord* 79 Fed. Reg. 55,920, 55,945 (Sept. 17, 2014), JA ___.

EPA abruptly shifted course in its September 2014 supplemental notice, concluding that all affirmative defenses constitute substantial inadequacies. 79 Fed. Reg. at 55,929-30, JA ___. What changed during this one-and-a-half-year period? Nothing, except this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), that EPA was not authorized to create affirmative defenses in its hazardous air pollutant standards. 79 Fed. Reg. at 55,929-30, 55,935, 55,945, JA ___. But *NRDC* did not address state authority to include affirmative defenses to monetary penalties in SIPs under CAA § 110. *See infra* pp. 35-37. Regardless, EPA has identified no facts that would support "find[ing]" such an inadequacy "substantial," contrary to EPA's prior conclusion that Texas's SIP was appropriately drawn to balance air-quality protection with the reality of SSM periods. Just as before, Texas's affirmative defense applies only during unplanned and unavoidable "upset" periods, provided that such emissions do not "cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution." *Luminant*, 714 F.3d at 854 (quoting Tex. Admin. Code § 101.222(c)(9)).⁷

⁷ *Luminant* and Texas's affirmative defense provision are discussed in greater detail in the Texas Petitioner's brief.

2. EPA's interpretation of its SIP call authority does not stop at actual but trivial inadequacy to meet CAA legal requirements. EPA claims authority to issue a SIP call based on the mere *potential* for an inadequacy—in other words, EPA believes it may issue SIP calls “to address ambiguous SIP provisions that *could* be read by a court in a way that would violate the requirements of the CAA.” 80 Fed. Reg. at 33,926, JA __ (emphasis added). If a SIP might or might not contain a provision that is inadequate to comply with the CAA, then EPA has not shown that the SIP is inadequate, much less substantially so. *But see US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167-68 (10th Cir. 2012) (allowing EPA to call Utah's SIP in light of “potential conflicts” between the SIP and CAA requirements). Still more ambitiously, EPA suggests that the fact that it overlooked applicable limitations during its review of the called SIPs justifies a call. Faced with arguments that it failed to take into account provisions that applied simultaneously with SIP-specific provisions, EPA responded, “If the EPA was unable to ascertain, what, if anything, applied,” then “regulated entities, members of and [*sic*] the public, and the courts will have the same problem.” 80 Fed. Reg. at 33,943, JA __.

By transforming a standard that would protect any SIP that was not “substantially inadequate” into one that does not require even a genuine inconsistency with the Act, EPA makes the SIP call standard even lower than the standard for its initial review under section 110(k)(3). The CAA's text makes it clear that Congress did not intend such a result.

EPA's interpretation of its SIP call authority to force States to rewrite their SIPs on such a thin basis is particularly puzzling in light of its rejection of Sierra Club's request that EPA not rely on State interpretive letters in the rulemaking process to clarify ambiguous provisions. 80 Fed. Reg. at 33,885, JA ___. EPA recognized that "reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions." 80 Fed. Reg. at 33,885, JA ___; *see also Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (EPA "should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act"). The alternative, as EPA recognizes, is to require States to "reinitiate a complete administrative process merely to resolve perceived ambiguity in a provision in a SIP submission." 80 Fed. Reg. at 33,885.

Relying on interpretive letters is particularly important in the SIP context, because the Act does not "specify that air agencies must use specific regulatory terminology, phraseology, or format" in SIP provisions. *Id.* But in pronouncing SIP provisions substantially inadequate, EPA rejected States' explanations of state law and how their SIPs worked, often focusing on word choice. *See, e.g.*, 78 Fed. Reg. at 12,503 (asserting that Fla. Admin. Code § 62-210.700(1) is an exemption, not a limitation, and focusing on the phrase "shall be permitted"). EPA's decision to call SIPs in the face of States' reasonable resolution of any EPA-perceived ambiguities is not the

cooperation that Congress envisioned. By extending its SIP call authority to reach provisions that it views as ambiguous or difficult to read, EPA substitutes its desire that States rewrite provisions that are at most potentially inadequate for Congress's clear instruction that a SIP call requires not just actual, but substantial inadequacy.

3. In requiring EPA to meet a higher standard before calling a SIP, Congress protected States from the administrative burdens of rewriting SIPs every time EPA decides that a SIP could be written better. As EPA acknowledges, developing a SIP involves “time and resource-intensive administrative processes.” 80 Fed. Reg. at 33,885, JA ___. In addition to months-long State rulemaking procedures, States must also determine just how, as a policy and technical matter, to comply with EPA's new interpretation. This is no small matter. SSM events are not all created equal. Different sources face different challenges, and it may be difficult to develop the kinds of narrowly tailored SSM provisions that EPA apparently envisions, particularly in a cost-effective manner. *See generally* Colo. Comment 5-6, JA ___. By forcing States to revise SIPs based on new interpretations of the Act without any finding that noncompliance has substantial effects, EPA undermines the balance of power Congress set in the Act.

Because EPA called SIPs without “find[ing]” any SIP to be “substantially inadequate,” the SIP Calls must be vacated and remanded in their entirety.

II. EVEN IF EPA PROPERLY INTERPRETED ITS SIP CALL AUTHORITY, IT MISINTERPRETED THE ACT'S REQUIREMENTS AND SIPs.

EPA's SIP Calls are unlawful even under its expansive view of its SIP call authority. In calling SIPs for containing so-called automatic exemptions, director's discretion provisions, and affirmative defense provisions, EPA incorrectly interpreted both the Act and the SIPs. These errors require vacatur.

A. EPA's Decision to Ignore "General Duty" Requirements Violates the Act.

First, EPA erred by refusing to consider what it calls "general duty" provisions that operate simultaneously with the SSM provisions EPA claims are substantially inadequate. These provisions require sources to control emissions through work-practice standards. For example, Tennessee's SIP requires sources to "take all reasonable measures to keep emissions to a minimum" even during SSM periods. Tenn. Comp. R. & Regs. § 1200-3-20-.02(1). Moreover, emissions failures constitute violations if they exceed otherwise-applicable limits and result from "poor maintenance, careless operation or any other preventable upset condition or preventable equipment breakdown." *Id.*⁸ General-duty provisions like Tennessee's are

⁸ Similarly, while South Dakota's SIP excepts from its visible emissions ("opacity") restrictions for brief periods of SSM and soot blowing, and malfunctions. S.D. Admin. R. § 74:36:12:02(3), other rules in the SIP require sources to be in compliance with all criteria pollutant emission limitations or restrictions at all times, except where federal regulations provide exceptions. In its 40-plus year existence, South Dakota's visible emission exception has not interfered with meeting or

plainly “requirement[s] relating to the operation or maintenance of a source” that, in conjunction with other provisions of the SIP, continuously limit emissions, albeit “without necessarily applying a single standard.” *Sierra Club*, 551 F.3d at 1027.

EPA claims that general-duty provisions cannot be considered part of an emission limitation because they “are often located in different parts of the SIP and often not cross-referenced or otherwise identified as part of the putative continuously applicable emission limitation.” 80 Fed. Reg. at 33,903, JA ___. But EPA identifies no statutory basis for requiring Tennessee or any other State to cross-reference all applicable requirements that form a continuous emission limitation or collect them in any other manner EPA prefers. On the contrary, it acknowledges elsewhere that the Act specifies no “specific regulatory terminology, phraseology, or format.” 80 Fed. Reg. at 33, 885, JA ___. Because EPA can point to nothing in the Act that requires States to include all facets of a limitation in the same “part” of the SIP, or to cross-reference all applicable provisions, its cannot dictate to States that their SIPs be worded or structured in a particular manner. *See Texas v. EPA*, 690 F.3d 670, 679 (5th Cir. 2012) (noting that a “state’s ‘broad responsibility regarding the means’ to achieve better air quality” includes the ability to choose “its own sentence structure”). Nothing in the Act permits EPA to ignore general-duty provisions.

maintaining compliance with the NAAQS., and the State is in attainment for all of the NAAQS. *See* S.D. Comment, JA ___.

B. EPA Incorrectly Interpreted SIPs As Containing Automatic Exemptions During SSM Periods.

The first category EPA faults is so-called “automatic exemptions” from otherwise-applicable requirements.⁹ Assuming that merely containing a provision that provides a limited automatic exemption renders a SIP “substantially inadequate,” *but see supra* pp. 12-22, EPA errs both in its interpretation of the CAA and its reading of the SIPs. In rejecting comments that the provisions are “enforceable emission limitations” under CAA § 110(a)(2)(A), EPA has ignored that the provisions set enforceable requirements, which is all the Act requires.

Under the CAA, an emission limitation is any “requirement” that “limits the quantity, rate, or concentration of emissions . . . on a continuous basis.” CAA § 302(k). The requirement need not be numerical; it includes any “requirement relating to the operation or maintenance of a source” and “any design, equipment, work practice or operational standard.” *Id.* This “broad phrase” means that an emission limitation can “‘assure continuous emission reduction’ without necessarily continuously applying a single standard.” *Sierra Club*, 551 F.3d at 1027 (quoting CAA

⁹ Eleven State Petitioners’ SIPs were called on this basis. *See* 80 Fed. Reg. at 33,960 (Delaware), 33,961-62 (West Virginia), 33,962 (Florida), 33,962-63 (Georgia), 33,964 (North Carolina and South Carolina), 33,966-67 (Ohio), 33,967 (Arkansas), 33,967-68 (Louisiana), 33,969 (Kansas), 33,971 (South Dakota). Delaware’s SIP was not called for malfunction provisions, and Delaware does not join arguments concerning malfunction periods.

§ 302(k)).¹⁰ All Congress sought to do in requiring continuity was “exclude intermittent control technologies from the definition of emission limitations.” *Id.*

EPA claims to share this understanding. In the SIP Calls, it “wishe[d] to be very clear” that emission limitations “may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements.” 80 Fed. Reg. at 33,889, JA ___. Specifically, EPA contemplates that SIPs “may include alternative emission limitations” for SSM periods, substituting for “otherwise applicable emission limitations.” *Id.* at 33,913, JA ___. Moreover, EPA recognizes that States have “considerable discretion in how they elect to structure or word their state regulations” to provide enforceable emission limitations. *Id.* at 33,886. In the SIP Calls, however, EPA failed to apply this understanding, and instead called SIPs based on formal requirements for SIP drafting invented out of whole cloth.

Georgia’s SIP well illustrates the problems with EPA’s approach. EPA claims that Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)7 provides an automatic exemption during SSM periods. 80 Fed. Reg. at 33,963, JA ___. EPA ignores that Rule 391-3-1.02(2)(a)7 itself requires sources to use “best operational practices to minimize emissions,” and “minimize[]” the duration of excess emissions to avoid a violation, and it specifically does not allow excess emissions due to “poor maintenance, poor operation, or any other equipment or process failure which may reasonably be

¹⁰ As the Industry Petitioners’ brief explains, EPA has incorrectly interpreted the emissions limitation requirement of continuity. As explained here, even if EPA’s interpretation were correct, it has incorrectly applied it to SIPs.

prevented.” Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)7. The provision is an “emission limitation” because it is a “requirement relating to the operation . . . of a source” that “assure[s] continuous emission reduction,” CAA § 302(k)—i.e., a requirement to use “best operational practices to minimize emissions,” even during SSM periods.¹¹

EPA focuses on form, not substance. It faults provisions like Georgia’s for not being independently enforceable. According to EPA, if the duties in Rule 391-3-1.02(2)(a)7 “were independent parts of an emission limitation (rather than merely preconditions for an exemption), then one would expect that periods of time could exist when the source was liable for violating those general duties rather than the default emission limitation.” *See* 80 Fed. Reg. at 33,904, JA ___. In other words, the problem appears to be that when EPA or someone else seeks to assert a violation, the plaintiff will claim the default limitation has been violated, not Rule 391-3-1.02(2)(a)7. What EPA does *not* assert is that Georgia has no “requirement” that “assures continuous emission reduction” during SSM periods. *See* CAA § 302(k). Although Rule 391-3-1.02(2)(a)7 provides that “excess emissions shall be allowed” if the provision’s conditions are met, failing to meet those conditions means the source is subject to penalties for violating the otherwise-applicable limitation. As with EPA’s

¹¹ Moreover, like many other SIPs, Georgia’s SIP imposes duties to avoid causing NAAQS violations, Ga. Comp. R. & Regs. § 391-3-1.02(4)(a); not to construct or operate a source in a manner that violates permit restrictions, PSD requirements or applicable increments, *id.* § 391-3-1.02(1)(c); and to report certain emissions due to malfunctions or breakdowns at major sources, facilitating enforcement *id.* § 391-3-1.02(6)(b)(1)(iv); *see also supra* pp. 22-23 (explaining why EPA’s failure to consider general duties requires remand).

rejection of general duty provisions, EPA's inadequacy determination for so-called "automatic exemptions" improperly rests on word choice, not the substance of what the SIPs require.

EPA's treatment of Georgia is not unique. Florida similarly requires "best operational practices to minimize emissions [to be] adhered to" during SSM periods, requires that such periods constitute no more than two hours of any twenty-four hour period, and prohibits emissions resulting from "poor maintenance, poor operation, or any other equipment or process failure which may reasonably be prevented." Fla. Admin Code § 62-210.700.¹² Similarly, Delaware sources are not in violation when "emissions from [a source] during start-up and shutdown are governed by an operation permit," *e.g.*, 7 Del. Admin. Code 1104, § 1.5. Arkansas provides an alternative limitation when increased emissions result from a "sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset of operation," provided that the increase is "not the result of negligence." Ark. Code Reg. § 19.1004(H). West Virginia requires that sources "[a]t all times, including periods of start-ups, shutdowns and malfunctions," be operated "in a manner consistent with good air pollution control practice for minimizing emissions," W. Va. Code St. R. § 45-2-9.2, and the same

¹² As EPA itself recognized when it approved Florida's SSM provision, "[i]n effect, the upset and startup rule revision recognizes the occurrence of unavoidable malfunctions and provides a definite control rule to deal with them." 47 Fed. Reg. 3,111, 3,111 (Jan 2, 1982).

standard applies to maintenance periods, *id.* § 45-7-10.3. EPA repeatedly ignores these limitations with no statutory basis.

Because EPA's decision to call SIPs for containing automatic exemptions lacks any basis in the Act's legal requirements, vacatur is required.

C. EPA Incorrectly Determined That Director's Discretion Provisions Violate the Act.

In the SIP Call, EPA directed many States to revise what it terms "director's discretion provisions."¹³ The U.S. Court of Appeals for the Fifth Circuit has held that director's discretion provisions comply with the CAA. *See Texas v. EPA*, 690 F.3d 670, 682-84 (5th Cir. 2012); *Luminant Generation Co. v. EPA*, 675 F.3d 917, 930-32 (5th Cir. 2012). Because EPA has yet again failed to show that such provisions are inconsistent with the CAA, this Court should do so as well. EPA's analysis of these provisions contains three kinds of error.

First, EPA mischaracterized provisions as giving States' air pollution control agency directors "unbounded" discretion to grant "complete exemptions" from all SIP emission limitations. 80 Fed. Reg. 33,917, JA ___. In reality, these provisions allow exemptions from numerical emission limitations only if the source has complied with alternative emission standards. In other words, as with its automatic exemption

¹³ Eleven State Petitioners' SIPs were called on this basis. *See* 80 Fed. Reg. at 33,960 (Delaware), 33,961-62 (West Virginia), 33,962 (Alabama), 33,963 (Kentucky), 33,964 (North Carolina), 33,965 (Tennessee), 33,966-67 (Ohio), 33,967-68 (Louisiana), 33,968 (Oklahoma), 33,969 (Kansas and Missouri), JA ___.

determinations, *supra* pp. 25-26, EPA has failed to recognize that these exemptions themselves contain non-numerical limitations. Kentucky's SIP illustrates the problem. Kentucky's SIP provides that "[e]missions which, due to shutdown or malfunctions, temporarily exceed" otherwise applicable emission standards "shall be deemed in violation of such standards unless" the source shows—and the State enforcement agency's director determines—that the source has complied with several work-practice and operational standards. 401 Ky. Admin. Reg. 50:055 § 1(1). Among other things, the source must establish that "[a]ll reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary," "all reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence," and the SSM event "was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown." *Id.* § 1(4). *See also, e.g.*, W. Va. Comment 11-12 (explaining a similar error with respect to West Virginia's SIP).

Second, EPA also argued that director's discretion provisions empower State enforcement agencies to unilaterally revise their SIPs without undergoing the procedure that the CAA requires for SIP revisions. *See* 80 Fed. Reg. at 33,918-19. Like its continuity objection, this argument rests on a misunderstanding of the SIPs. It is true that states generally may not suspend or otherwise modify SIP requirements with respect to any stationary source, *see* CAA § 110(i), and they may revise their SIPs only

through the procedure established in the CAA, *see id.* § 110(l). But the director's exercise of discretion according to established criteria does not revise a SIP or suspend or otherwise modify a SIP's provisions—it merely *applies* them.

EPA's assertion to the contrary defies common sense. Under EPA's reasoning, EPA “revises” the CAA whenever it exercises discretion that the Act confers to choose between a default and alternative manner of regulating emissions. For example, the CAA tasks EPA with the development of “standards of performance” for new stationary sources, as well as “emission standards” for control of hazardous air pollutants. CAA §§ 111(b)(1)(B), 112(d)(1). However, “if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance” or an emission standard, a “design, equipment, work practice, or operational standard” may be appropriate. *Id.* § 111(h)(1); *see also id.* § 112(h)(1).¹⁴ EPA surely would not contend that its exercise of discretion to promulgate alternative standards according to criteria outlined in the CAA is an amendment of the CAA, rather than just an application of it. Why, then, should a state director's exercise of discretion to apply an alternative standard according to criteria established in a SIP be treated differently? This Court should reject EPA's unfounded characterization of director's discretion provisions.

¹⁴ The CAA also gives EPA discretion to exempt sources from certain CAA requirements altogether. *See, e.g.*, CAA § 361a(a) (exemption of source categories from permitting requirements).

Third, EPA offered enforcement-related objections. Specifically, EPA asserted that certain director's discretion provisions prevent EPA and private citizens from enforcing emission limitations. *See* CAA §§ 113, 304. This claim suffers from a variety of errors, differing from State to State.

To start, at least one of the provisions does not involve enforcement discretion at all. Ohio Admin. Code 3745-15-06(A)(3) merely allows the State to approve requests to continue source operations while conducting maintenance of pollution control equipment—it plainly does not allow exceeding applicable emission limitations. Ohio Comment 3-4, JA ___. Indeed, Ohio has always interpreted this provision not to exempt emissions from applicable limitations or bar EPA or citizens from enforcing violations. In keeping with this understanding, Ohio instructs sources when it approves maintenance requests that all excess emissions are violations, and that its approval does not excuse them. *Id.* EPA declared the provision deficient anyway, complaining only that it was not as clearly worded as EPA would like: “The state official’s grant of permission to continue to operate during the period of maintenance *could be* interpreted to excuse excess emissions . . . and *could* thus be read to preclude enforcement by the EPA or citizens.” Comment Response 70, JA ___ (emphasis added). *But see supra* pp. 19-21 (explaining that potential inadequacy is not substantial inadequacy). Because the plain language of Ohio Admin. Code 3745-15-06(A)(3) does not permit EPA’s strained interpretation, the interpretation is arbitrary and capricious.

Furthermore, even where a director's discretion provision does relate to exceedances of numerical emission limitations, EPA acknowledges that such provisions are proper if they merely guide the State's exercise of its own enforcement. 80 Fed. Reg. at 33,919, JA __. For example, North Carolina's SIP provides that excess SSM emissions "are considered a violation of the appropriate rule" unless the source demonstrates compliance with alternative standards to the director. 15A N.C. Admin. Code 2D0535(c), (g). As North Carolina explained, the provision governs only the director's exercise of enforcement discretion: "Nothing in the existing SIP provisions prohibits or restricts in any way the ability of the EPA and/or a citizen to file an action in federal court seeking enforcement of the SIP provisions," including "the state developed emission standards . . . and general and specific SSM provisions." N.C. Comment 3, JA __. Similarly, EPA called Tennessee SIP provisions after concluding that they "could reasonably be construed" to preclude EPA and citizen enforcement, notwithstanding that Tennessee explained that the provisions guide only the State's own enforcement discretion. *See* Comment Response 64, JA __; *see also* Tenn. Comp. R. & Regs. § 1200-03-20-.07 (setting out procedure for responding to an administrative "notice of violation," including factors similar to those in the 1999 Memo).¹⁵ EPA's decision to call these SIP provisions unlawfully exceeds its SIP call authority by conflating potential inadequacy with substantial inadequacy and arbitrarily

¹⁵ Moreover, sources must always avoid emissions that cause NAAQS exceedances, and the State remains free to pursue violations of any other SIP provision. Tenn. Comp. R. & Regs. § 1200-03-20-.09.

refusing to defer to State constructions of their SIPs that would render them consistent with EPA's understanding of the Act's requirements. *See supra* pp. 19-21.

Finally, regardless of their scope, director's discretion provisions do not immunize SSM emissions from enforcement under separate general-duty standards in a SIP, or from enforcement of standards contained in operating permits. EPA and citizens always may seek enforcement of a SIP's generally-applicable design, equipment, work practice, or operational standards. *E.g.*, 401 Ky. Admin. Reg. 50:055, § 5 (categorically prohibiting "air pollution" as defined by statute). They also may seek enforcement of standards contained in operating permits issued pursuant to the SIP. *See* 40 C.F.R. § 70.6(a)(1) (requiring that operating permits contain "[e]missions limitations and standards"); *id.* § 70.6(b) (providing for enforcement of operating permits' terms and conditions by EPA and citizens). Furthermore, EPA and citizens may bring suit under SIP provisions that allow for direct enforcement of the NAAQS. *E.g.* 7 Del. Admin. Code 1103-2.0; La. Admin. Code tit. 33, pt. III, § 929; 15A N.C. Admin. Code 02D.0501(c). Because all of these provisions remain fully enforceable by EPA and others, and because nothing in the CAA requires that every emission limitation be applicable (much less enforceable) at all times, these provisions satisfy the CAA's requirements that SIPs provide for enforcement of the NAAQS, include enforceable emission limitations, and include a program that provides for enforcement of those limitations. *See* CAA §§ 110(a)(1), 110(a)(2)(A), 110(a)(2)(C); *cf.*

Sierra Club, 551 F.3d at 1027 (recognizing that the CAA does not require continuous application of a single standard).

For these reasons, the SIP Calls are unlawful as to director's discretion provisions.

D. The Act Permits States to Include Affirmative Defenses in SIPs.

EPA also called SIPs that contained affirmative defenses.¹⁶ These SIPs fall into two categories: (1) SIPs that offer defenses to violations subject to certain criteria and (2) SIPs that offer defenses to monetary penalties only, allowing injunctive relief for the violation, subject to certain criteria. Both fall within States' power to determine the "manner in which the [NAAQS] will be achieved," which includes designing a "program to provide for the enforcement" of emission limitations. CAA §§ 107(a), 110(a)(2)(C). Calling both was error.

First, SIPs that offer defenses to violations are permissible for the same reasons that so-called "automatic exemptions" are. If there are simultaneously operating general duties or a defense itself contains emission limitations, then the provisions would be consistent with EPA's continuous-limitation requirement. *See supra* pp. 22-23, 25-27. A State's decision to allocate the burden of proof to the operator to

¹⁶ Seven State Petitioners' SIPs were called on this basis. *See* 80 Fed. Reg. at 33,962 (West Virginia), 33,962-63 (Georgia), 33,963-64 (Mississippi), 33,964 (South Carolina), 33,967 (Arkansas), 33,968-69 (Texas), 33,971-72 (Arizona), JA___. Delaware's SIP was not called on this basis, and Delaware does not join this argument.

demonstrate a non-violation by meeting established criteria is a permissible State decision about how to design an enforcement program, CAA § 110(a)(2)(C), and EPA has identified nothing in the Act that specifically prohibits this regime. As explained below, this Court's decision in *NRDC v. EPA* concerns only EPA's authority to include an affirmative defense in a nationally-applicable emission standard; it does not impinge on States' ability to define a violation in the first instance or to design an enforcement program for SIP limits.

Second, EPA called SIPs that contained affirmative defenses to monetary penalties, notwithstanding the Fifth Circuit's prior holding that States have the discretion to include such provisions in their SIPs. *Luminant Generation Co. v. EPA*, 714 F.3d 841, 853 n.9 (5th Cir. 2013) (holding that affirmative defenses to monetary penalties do "not negate the district court's jurisdiction to assess civil penalties" under section 113(e)(1)). These affirmative defenses differ from the first category, because they treat the emissions as a violation subject to injunction, but if certain criteria are met, the source is protected from monetary penalties. EPA's change of policy is based on this Court's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *NRDC* holds that EPA does not have the authority to provide an affirmative defense to monetary penalties for violations of hazardous air pollutant standards promulgated under CAA § 112, because the Act assigns courts the jurisdiction to determine whether monetary penalties are appropriate once a violation is found. *Id.* at 1063 (citing CAA §§ 113(e)(1), 304(a)). *NRDC* did not address whether SIPs could contain

such affirmative defenses, and the case explicitly acknowledged the Fifth Circuit's holding in *Luminant* that it was permissible for States to include affirmative defenses in SIPs. *Id.* at 1064 n.2. Notably, the *NRDC* court did not see anything in *Luminant* that required either distinction or disagreement; rather, it treated the case as addressing a fundamentally different question, and in fact, it is.

EPA's argument in *NRDC* failed not just because of sections 113(e)(1) and 304(a), but because EPA failed to identify any textual authority to create an affirmative defense. It could only identify language in CAA § 301(a)(1) allowing it to “prescribe such regulations as are necessary to carry out [its] functions under’ the Act,” a general assignment of authority that was not sufficiently specific to allow EPA to create affirmative defenses. *NRDC*, 749 F.3d at 1063. Congress, however, specifically tasked States with providing “a program to provide for the enforcement of” emission limitations. CAA § 110(a)(2)(C). Allowing States to create defenses to monetary penalties is consistent with the text of both section 113(e)(1) and section 304(a), which authorizes citizen suits. Section 304(a) allows a court to “apply any appropriate civil penalties” in a citizen suit, and section 113(e)(1) speaks to how a court should “determin[e] the amount of any penalty to be assessed.” Neither provision speaks to how to determine whether monetary penalties are “appropriate,” as distinct from the “amount” of penalties if a monetary penalty is appropriate, or more specifically, whether a State can determine that monetary penalties are not appropriate for certain SIP violations. Accordingly, contrary to EPA's interpretation

of NRDC, including affirmative defenses in SIPs “does not negate the district court’s jurisdiction to assess civil penalties” in an enforcement action. *Luminant*, 714 F.3d at 853 n.9.

III. EPA CANNOT CALL SIPs FOR REASONS IT DID NOT CLAIM CONSTITUTED SUBSTANTIAL INADEQUACIES.

The SIP Call must also be vacated and remanded to the extent that EPA calls SIPs based on factors other than those on which it made findings of substantial inadequacy. It is unclear whether or to what extent EPA actually did this, but EPA should not be allowed to urge additional bases for finding substantial inadequacy here. *See Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015) (court cannot affirm administrative action by substituting a “more adequate or proper basis”). Moreover, to the extent those factors are without basis in CAA requirements, they are unlawful. *Texas*, 690 F.3d at 682 (EPA cannot insist on “a standard that the CAA does not empower the EPA to enforce”). For example, EPA claims that even if Fla. Admin. Code § 62-210.700 were an alternative emission limitation, it is nonetheless problematic because it does “not apply only to ‘specific, narrowly-defined source categories using specific control strategies.’” 78 Fed. Reg. at 12,503, JA ____ (quoting EPA’s revised SSM policy); *see also* 80 Fed. Reg. at 33,961 (asserting a similar flaw in West Virginia’s SIP). But EPA never determined that absolute compliance with its revised SSM policy was required to avoid substantial inadequacy—only that automatic exemptions, affirmative defenses and the like created substantial

inadequacies. *See* 80 Fed. Reg. at 33,927-29, JA ___ (explaining EPA’s substantial inadequacy determinations). Moreover, finding substantial inadequacy would have been arbitrary, as EPA simultaneously decided to “remov[e] the word ‘must’ from the criteria” for properly designed alternative emission limitations, as the criteria were merely “recommendations to states.” 80 Fed. Reg. 33,913, JA ___; *see also id.* (“A state *may* choose to consider these criteria in developing such a SIP provision.” (emphasis added)).

To the extent EPA relied on such considerations in the SIP Calls, EPA’s action must be vacated.

CONCLUSION

The SIP Calls should be vacated as to the State Petitioners’ SIPs.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I certify that the foregoing brief contains 9,433 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

/s/ Jonathan L. Williams
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CERTIFICATE OF SERVICE

I certify that, on this 16th day of March, 2016, a copy of the foregoing Opening Brief of State Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Jonathan L. Williams

Jonathan L. Williams

No. _____

In the Supreme Court of the United States

STATE OF OKLAHOMA; OKLAHOMA
INDUSTRIAL ENERGY CONSUMERS;
OKLAHOMA GAS AND ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; SIERRA CLUB,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit*

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QUESTION PRESENTED

The Regional Haze Program of the Clean Air Act allocates to the States the task of fashioning and then implementing plans to improve the aesthetic quality of air over certain federal lands. The question presented is whether, despite that allocation of powers to the States, the United States Environmental Protection Agency may nonetheless conduct a *de novo* review of the State of Oklahoma's plan, in conflict with both the limited authority granted to the agency under the Act and decisions of this and other courts that have recognized the primary role given to the States in implementing the Clean Air Act.

PARTIES TO THE PROCEEDINGS

Petitioners State of Oklahoma, Oklahoma Gas and Electric Company, and Oklahoma Industrial Energy Consumers were petitioners in the court below. Respondents are the United States Environmental Protection Agency and the Sierra Club, and were respondent and intervenor-respondent, respectively, in the court below.

RULE 29.6 STATEMENT

Oklahoma Gas and Electric Company is a wholly-owned subsidiary of OGE Energy Corp. No publicly held corporation owns 10% or more of the stock of OGE Energy Corp. Petitioner Oklahoma Industrial Energy Consumers is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

A divided panel of the Tenth Circuit filed its opinion on July 19, 2013. App. 1. That opinion is reported at 723 F.3d 1201.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2013. Petitions for panel and en banc rehearing were denied on October 31, 2013. App. 209. This petition for certiorari is filed within ninety days of the denial of the petitions for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a challenge to a final rule that the United States Environmental Protection Agency (“EPA”) promulgated under sections 110, 169A and 169B of the Clean Air Act, 42 U.S.C. §§ 7410, 7491, 7492. EPA published the final rule on December 28, 2011, at 76 Fed. Reg. 81,728. Also involved are regulations that EPA promulgated to effectuate the relevant sections of the Clean Air Act. Those regulations are found at 40 C.F.R. pt. 51, subpt. P.

The full text of pertinent statutory and regulatory provisions are set forth in the appendix to this petition. App. 211.

INTRODUCTION

This case raises recurring issues of national importance concerning the ability of the States to exercise their statutory authority under the Clean Air Act’s “Regional Haze Program”—a program that affects forty-five States and territories. The Regional Haze Program was added to the Clean Air Act in 1977, and aims to mitigate and ultimately prevent any “impairment of visibility in mandatory Class I Federal areas” due to “manmade air pollution.” 42 U.S.C. § 7491(a)(1).¹

The Clean Air Act recognizes that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a). Even in the Clean Air Act, where cooperative federalism is a dominant theme, the Regional Haze Program is unique in the amount of power reserved to the States. *See, e.g., Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975); 70 Fed. Reg. 39,104, 39,137 (July 6, 2005) (“the Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision makers.”). Congress was especially concerned with maximizing state authority in this context

¹ According to EPA, “[h]aze is caused when sunlight encounters tiny pollution particles in the air. Some light is absorbed by particles. Other light is scattered away before it reaches an observer. More pollutants mean more absorption and scattering of light, which reduce the clarity and color of what we see. Some types of particles such as sulfates, scatter more light, particularly during humid conditions.” *See* <http://www.epa.gov/airquality/visibility/what.html>.

because the Regional Haze Program’s goals and standards are purely aesthetic, unrelated to public health and safety.

Congress thus vested the States—not EPA—with the authority to develop and implement “State Implementation Plans” under the Regional Haze Program that include “reasonable progress” measures and “best available retrofit technology” (“BART”) determinations (i.e., determinations as to what technology might best control emissions from certain qualifying sources, like electricity generating plants). *See* 42 U.S.C. § 7491. Congress further *mandated* that States, not EPA, decide what constitutes BART for eligible facilities. *See* 42 U.S.C. § 7491(g)(2). And the Clean Air Act does not require the State to reach any particular result in doing so; rather, it only requires that the State balance five statutory factors, and reach a decision of its own based on that balancing. 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii)(A).

Oklahoma’s Regional Haze State Implementation Plan accordingly balanced the five BART factors, and determined that the BART for reducing sulfur dioxide (SO₂) emissions from its six qualifying sources (i.e., electricity-generating power plants) was to require those facilities to use only low sulfur coal, which burns significantly cleaner than cheaper high sulfur coal, and emits about fifty percent less SO₂. Oklahoma submitted its Plan to EPA with this BART determination for SO₂.

Under the guise of reviewing Oklahoma’s BART determination for compliance with the statutory requirement that Oklahoma balance the five prescribed factors, EPA conducted a *de novo* review of those determinations and rejected Oklahoma’s Plan. EPA

then substituted a Federal Implementation Plan in place of Oklahoma's Plan that required the power plants to reduce SO₂ emissions to virtually zero. Without this Court's intervention, Petitioner Oklahoma Gas and Electric Company ("OG&E") must either convert its power plants to natural gas long before necessary or install "scrubbers" onto them, at an estimated cost of \$1.2 billion. Worse still, EPA admits that either option will result in visibility improvements that are barely perceptible to the human eye.

A divided panel of the Tenth Circuit held that not only did EPA have the authority to review and reject Oklahoma's Plan, but that EPA's reasoning in doing so was entitled to highly deferential "arbitrary and capricious" review. That decision is unquestionably wrong, and demands this Court's urgent review. In overriding Oklahoma's BART determination in this manner, EPA usurped authority that the Clean Air Act clearly delegates to the States, upsetting the balance of power that Congress carefully sought to create in the Clean Air Act and its Regional Haze Program. And in conflict with decisions of other courts recognizing the proper allocation of authority under the Clean Air Act, the Tenth Circuit sanctioned that result, reflexively deferring not to the States, as the Regional Haze Program required, but to EPA.

The Tenth Circuit's decision threatens every State's ability to exercise the statutory authority vested in them by Congress to make BART determinations under the Regional Haze Program. And the threat runs deeper. The same question of understanding, respecting, and implementing the shared authority between the States and the federal government arises

under a broad range of other federal statutes with a similar cooperative-federalism approach.

The Court should resolve the question presented without delay. Waiting for further percolation is not a practical option, as the multi-billion dollar federal plans that are being foisted upon the States cannot practically be undone once implementation has begun, and at least nine other States have had their State Implementation Plans rejected and replaced with Federal Implementation Plans. In Oklahoma alone, EPA's actions will cost OG&E \$1.2 billion dollars with no discernable return other than a marked increase in what Oklahoma ratepayers will pay for their electricity. Accordingly, this Court's immediate review is urgently needed to preserve the delicate balance of power that Congress established in the Regional Haze Program (and other federal statutes that reflect similar divisions of authority) and to settle this important issue that will recur time and again as Regional Haze State Implementation Plans are reviewed throughout the nation.

STATEMENT OF THE CASE

Statutory and Regulatory Background. In unequivocal terms, Congress intended that the States would implement the Regional Haze Program's aesthetic goal of "remedying . . . impairment of visibility in mandatory class I Federal areas." 42 U.S.C. § 7491(a)(1), (g)(2). As such, the Clean Air Act mandates that a State submit a Plan to EPA laying out the State's plan for achieving that goal. The Clean Air Act requires that, with regard to certain sources that contribute to visibility impairments, State Implementation Plans must include:

except as otherwise provided . . . a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, *as determined by the State* (or the Administrator in the case of a [Federal Implementation Plan]) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, *as determined by the State* (or the Administrator in the case of a [Federal Implementation Plan]) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment.

§ 7491(b)(2)(A) (emphases added). The twice-deployed phrase “as determined by the State” is unambiguous.

In other words, the State—not EPA—must: 1) determine which of the eligible major stationary sources in the State contribute to visibility impairment; and then 2) determine BART for controlling the emissions causing that impairment at that source. *Id.* When determining BART, the State must balance five factors for each qualifying source: (i) the costs of compliance; (ii) the energy and non-air quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii)(A).

The EPA's role, in turn, is limited to ensuring that each state plan "contain[s] such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal." § 7491(b)(2). To carry out this limited role, EPA is tasked with creating guidelines for the States "on appropriate techniques and methods for implementing this section." § 7491(b)(1). To this end, the Clean Air Act advises EPA that State Implementation Plans must contain "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting" the national visibility goal. § 7491(b)(2).² EPA has thus promulgated "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Final Rule." ("BART Guidelines"). 70 Fed. Reg. 39,104 (July 6, 2005) (codified at 40 C.F.R. pt. 51).

Pursuant to the Clean Air Act, a State must apply the BART Guidelines only when a State makes a BART determination for a powerplant of at least 750MW. For sources under 750MW, the Guidelines become discretionary. As the BART determinations at issue in Oklahoma were for sources greater than 750MW, Oklahoma was obligated to apply the BART Guidelines.

² In its regulations, EPA established that *the goal* of natural visibility conditions be attained by the year 2064. 40 C.F.R. §51.308(d)(1)(i)(B). BART is just the first of the reasonable progress control measures to be employed over the course of the sixty-year Visibility Program.

In the Guidelines, EPA acknowledges that it is the States that identify which BART sources “may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area,” 70 Fed. Reg. 39,106/1-2, and it is the States who “must determine the appropriate level of BART control for each source subject to BART.” 70 Fed. Reg. 39,107/3. In short, as emphasized by the D.C. Circuit, the Clean Air Act “give[s] the States broad authority over BART determinations” and how a state weighs the BART factors. *Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002).

The bottom line is EPA may only reject a State’s determination when it finds that the State’s determination does not accomplish the goals of the Regional Haze Program. *See* 42 U.S.C. § 7410; 40 C.F.R. 51.308(e)(1)(ii)(A). The Clean Air Act “gives the [EPA] no authority to question the wisdom of a State’s choices of emission limitations” if such choices are “part of a plan which satisfies the standards of § 110(a)(2).” *Train*, 421 U.S. 60, 79; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976) (the Clean Air Act provides that EPA “shall approve the proposed plan if it has been adopted after public notice and hearing” and if it meets the “specified criteria” set forth in Clean Air Act § 110(a)(2)). In short, the division of authority between EPA and the States “is strict,” and establishes a “federalism bar.” *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 29 (D.C. Cir. 2012). This “statutory federalism bar prohibits EPA from using the [State Implementation Plan] process to force States to adopt specific control measures.” *Id.*

Factual Background. Oklahoma contains a single area subject to the Regional Haze Program: the Wichita Mountains National Wildlife Refuge, which makes up a portion of a small mountain range in sparsely populated far southwestern Oklahoma. As required by the Regional Haze Program, Oklahoma identified six major stationary sources as contributing to visibility impairment at the Wildlife Refuge—two units at OG&E’s Muskogee Generating Station, two units at its Sooner Generating Station, and two units owned and operated by Public Service Company of Oklahoma.³ The units are located in northeastern Oklahoma. The closest is 145 miles from the Wildlife Refuge, while the farthest is 201 miles away.

Petitioner OG&E is Oklahoma’s largest electricity provider and serves approximately 785,000 customers over 30,000 square miles in Oklahoma and western Arkansas. Another Petitioner, Oklahoma Industrial Energy Consumers, represents many of Oklahoma’s largest consumers of electricity—mainly industrial consumers engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film and food processing, and who employ thousands of Oklahoma citizens. Both OG&E and the Oklahoma Industrial Energy Consumers participated in Oklahoma’s State Implementation Plan process.

Oklahoma’s State Implementation Plan. When Oklahoma began the process of determining BART for its six qualifying sources, before it were both a 2008

³ The Public Service Company of Oklahoma reached a negotiated settlement with EPA. Its two units are not at issue.

cost analysis for the OG&E Units—which both EPA and the Oklahoma Department of Environmental Quality had stated was prepared in conformity with EPA Air Pollution Control Cost Manual—and a 2009 cost analysis prepared at EPA’s and Oklahoma’s request that was more site-specific than the 2008 cost estimate.

Oklahoma’s “on the ground” analyses demonstrated that the installation of scrubbers on each of the four OG&E Units would cost more than \$1.2 billion, or between approximately \$7,000 and \$10,000 per ton of SO₂ removed, which is between three and one-half and five times the upper limit of EPA’s expected costs for this technology. *See* 70 Fed. Reg. at 39,132 (estimating an average cost of \$919 per ton and a cost range of \$400 to \$2,000 per ton of SO₂ removed). Additionally, because OG&E had voluntarily begun using low sulfur coal some years prior, the effectiveness of scrubbers to reduce actual SO₂ emissions was greatly reduced.

The State unequivocally concluded that scrubbers were not cost effective for the OG&E Units. Not only were the scrubbers too expensive in light of the minimal visibility benefits that would result from their use, but their high costs would compel OG&E to extend the life of the coal-fired units to allow it to recoup the enormous capital costs. A broad spectrum of other parties, such as environmental advocates like the Oklahoma Chapter of the Sierra Club, supported the State’s conclusion at the time.

Oklahoma concluded that making the continued use of low sulfur coal mandatory constituted BART for SO₂ emissions from the OG&E Units. Oklahoma determined that this requirement would result in an

annual average SO₂ emission rate of 0.55 lb/mmBtu, less than half the average annual emission rate of 1.176 lb/mmBtu that EPA projected if cheaper high sulfur coal was used.

On February 17, 2010, Oklahoma submitted to EPA its State Implementation Plan containing these BART determinations. Oklahoma explained in its Plan that:

[Oklahoma] conducted a thorough case-by-case five-factor BART analysis for each of the BART-subject units. [Oklahoma] determined that [scrubbers are] not cost-effective for SO₂ control for any of the six coal-fired . . . electric units reviewed. . . . This determination is based on the capital cost of add-on controls, the cost effectiveness both in dollars per ton and dollars per deciview of add-on controls, the long term viability of coal with respect to other environmental programs, and national commitments. . . . Revised cost estimates were provided by the affected facilities that are based on vendor quotes and go well beyond the default methodology recommended by EPA guidance. *The cost estimates are credible, detailed, and specific* for the individual facilities. The final estimate for [scrubbers] for the six coal-fired units was on average 153% greater than the high end costs assumed by [Oklahoma] in the Draft [State Implementation Plan]. These costs put the projects well above costs reported for other BART determinations, and above the levels [Oklahoma] considered reasonable for cost effectiveness both in terms of dollars per ton of

pollutant removed and dollars per deciview (e.g., \$10,000,000/dv) of improved visibility.

(Oklahoma Regional Haze State Implementation Plan), App. 245 (available at: http://www.deq.state.ok.us/AQDnew/rulesandplanning/Regional_Haze/SIP/index.htm) (emphasis added).

EPA’s Rejection of Oklahoma’s Plan. On December 28, 2011, EPA published a final rule with respect to the Oklahoma Plan, disapproving the State’s SO₂ BART determinations for the six Oklahoma units based on EPA’s own balancing of the five statutory factors. *See* Partial Approval of Oklahoma State Implementation Plan and Promulgation of Federal Implementation Plan, 76 Fed. Reg. 81,728 (Dec. 28, 2011) (“Final Rule”); App. 56. Instead of accepting Oklahoma’s approach, EPA implemented a markedly different approach through a Federal Implementation Plan that imposed a 30-day average SO₂ emission limit of 0.06 lbs/MMBtu for each of the four OG&E Units. App. 70. If OG&E wishes to continue to operate the four affected coal units, the limit imposed by EPA in the Final Rule would require the installation of a scrubber at each unit within five years.

To justify rejecting Oklahoma’s Plan, EPA hired its own analyst who expressly and remarkably:

1. assumed that OG&E was burning high-sulfur coal, even though that had not been the case for years, and despite the fact that EPA’s own BART Guidelines mandated the use of actual historic baseline emissions, App. 139;

2. assumed that OG&E could use smaller, cheaper scrubbers, despite the fact that OG&E showed that those smaller scrubbers would act as governors on its units and prevent the units from producing enough electricity to meet peak demand, *id.*;
3. concluded that the useful life of the scrubbers was thirty years—rather than the twenty-year useful life used by Oklahoma—despite the fact that EPA had itself used twenty years in prior cost analyses, App. 159; and
4. rejected Oklahoma’s cost estimates for deviating from EPA’s Control Cost Manual, even though EPA had previously acknowledged that “States have flexibility in how they calculate costs,” 70 Fed. Reg. at 39127, and the State had real-world, site-specific vendor quotes to support those estimates. App. 135-36. Ironically, EPA then turned around and itself deviated from the Control Cost Manual without any site-specific cost support in estimating much lower installation costs.

In short, EPA’s analyst dramatically overstated the cost-effectiveness of the scrubbers. EPA, in turn, used the analyst’s conclusions as a basis for rejecting Oklahoma’s Plan. Worse still, EPA’s final rule for the first time employed the “overnight method” for calculating costs (i.e., assuming that an entire plant could be constructed in a single day) and the days of visibility improvement metric for conducting visibility analysis (a cumulative analysis that fails to perform the required analysis *for each source*), depriving

petitioners of the opportunity to comment on those new methodologies.

Petitioners filed requests for reconsideration with EPA in February 2012, but no action has been taken on those requests.

Proceedings Below. On February 24, 2012, Petitioners filed petitions for review challenging EPA's partial disapproval of the Oklahoma Plan and simultaneous promulgation of EPA's Federal Implementation Plan as arbitrary and capricious, contrary to law, and in violation of the Administrative Procedure Act's notice-and-comment requirements.⁴ On June 22, 2012, the Tenth Circuit issued an order to stay the Federal Implementation Plan pending the hearing by the merits panel. App. 246.

A divided panel of the Tenth Circuit subsequently denied the petitions for review. Reasoning that "all the [Clean Air Act] did was shift the *initial* responsibility for making BART determinations from EPA to the State," App. 16 (emphasis added), the majority concluded that not only was Oklahoma entitled to no deference in its initial BART determination, but that EPA was entitled to deference in "reviewing" and rejecting Oklahoma's Plan. App. 19-20. The majority thus reviewed EPA's rejection of Oklahoma's Plan to see if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* In applying that review, the majority noted that the

⁴ The Tenth Circuit consolidated for review the separate petitions filed by the State of Oklahoma and Oklahoma Industrial Energy Consumers (No. 12-9526) and OG&E (No. 12-9527).

deference it afforded to EPA was “especially strong” because the challenged decisions involved technical matters within EPA’s area of expertise, and, therefore, “[l]eft to evaluate the arguments of the parties’ experts, we must give deference to the EPA.” App. 32-33.

Even affording such deference to EPA, the majority thought it a “close case,” but in its view, it “ultimately” could not adopt Oklahoma’s analyses “given that the EPA was aware of, and provided explanations contradicting, petitioners’ comments.” App. 33.

Turning to EPA’s Federal Implementation Plan, the majority applied “the same arbitrary and capricious standard...used to evaluate the EPA’s rejection of [Oklahoma’s Plan],” App. 28-29, and concluded that the Federal Implementation Plan was neither arbitrary nor capricious. App. 28-45.

Judge Kelly dissented, expressing the view that while “[u]sually the court grants deference to the EPA’s technical determinations...[t]he EPA deserves no such deference, however, where it does not support a conclusion contradicting Oklahoma’s first, reasonable, detailed technical conclusion.” App. 52. Judge Kelly further explained that while “the EPA has at least some authority to review BART determinations within a state’s [Plan], it has no authority to condition approval of a [State Implementation Plan] based simply on a preference for a particular control measure.” App. 53. Judge Kelly concluded that “Oklahoma considered the cost and resulting benefit of such a large investment in scrubbers, and its conclusion was not unreasonable.” *Id.* Judge Kelly concluded that EPA acted “arbitrarily and capriciously” by exaggerating the effectiveness of the scrubbers in

order to make them seem cost effective. EPA, “[k]nowing these calculations violated [its own] manual,” developed an alternative way to attempt to justify the scrubbers: it simply changed “the size of the scrubbers to smaller, less expensive ones,” but did so without providing “any evidence that a significantly smaller scrubber was sufficient to meet OG&E’s needs.” App. 51-52. Consequently, Judge Kelly would have found EPA’s actions unlawful and would not have deferred to EPA’s technical judgments and experts. App. 52. Judge Kelly also concluded that EPA failed to provide record evidence to support why its own contrary BART determinations were justified.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit’s decision conflicts with decisions of this Court and other federal courts of appeal on the allocation of federal-state authority.

In reflexively affording EPA *Chevron* deference, the panel below departed from other circuits, which have resoundingly recognized that States, not EPA, are entitled to deference in formulating plans under the Clean Air Act. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The decision below radically departed from the clearly-designed cooperative-federalism mechanism of the Clean Air Act (specifically, the Regional Haze Program), converting it into federal supremacy where EPA is permitted to replace a State’s determination with its own.

1. The decision below squarely conflicts with the D.C. Circuit’s decision in *American Corn Growers*

Association v. EPA, 291 F.3d 1 (D.C. Cir. 2002) (“*Corn Growers*”), in which the D.C. Circuit invalidated EPA’s attempt to mandate the manner in which States must consider one of the five BART factors and stressed that EPA’s actions were “inconsistent with the Act’s provisions giving the states broad authority over BART determinations.” *Id.* at 8. By dictating that the States make BART determinations in a particular manner, EPA had impermissibly “constrain[ed] authority Congress conferred on the states.” *Id.* at 9. The court emphasized that the “states . . . play the lead role in designing and implementing regional haze programs,” *id.* at 8 (citing Clean Air Act §§ 169A(b)(2)(A); 169A(g)(2)), and that the phrase “as determined by the State” is unique to the Regional Haze Program. Indeed, no similar language appears in other air programs regarding, for example, best available control technology (“BACT”) or National Ambient Air Quality Standards. As such, the D.C. Circuit had no trouble concluding that Congress had unequivocally left BART determinations to the States. *Id.* at 7–8.

Regardless, the panel below concluded that *Corn Growers* did “not alter [its] conclusion.” App. 14. The panel held that while *Corn Growers* recognized that the Clean Air Act “shift[ed] the power to determine BART from the EPA to the states,” Congress intended only to prevent “the EPA from *directly* making t[he] BART decisions, ” and that EPA retained the ability to *indirectly* make those decisions through its “authority to ensure that...BART decisions comply with the statute.” *Id.*

But that is a distinction without a difference. By replacing Oklahoma’s careful work in the State

Implementation Plan with EPA's own, *de novo* approach, driven by its hired consultant's post-State Implementation Plan work, EPA did make BART decisions directly. The fact that EPA operated under the cloak of reviewing Oklahoma's Plan is beside the point if, at the end of the day, the result is the same.

2. The decision below also cannot be reconciled with this Court's nearly four decades of recognizing the Clean Air Act's "division of responsibilities" between the States and the federal government. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). In *Train*, the Court observed that EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." But "[j]ust as plainly," EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphasis added). As the Court explained, "[t]he Act gives the [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id.* "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.*; see also *Union Elec. Co. v. EPA*, 427 U.S. at 269 ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

3. Likewise, the Court in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), examined EPA’s attempt to override Alaska’s “best available control technology” (“BACT”) determination under the National Ambient Air Quality Standards program—a program in which the Clean Air Act gives EPA an even greater supervisory role than in Regional Haze cases. Despite the express authority conferred by the Clean Air Act on EPA to reject a State’s BACT determination, this Court held that EPA’s role was limited to reviewing whether the State’s BACT determination was reasonably moored to the Clean Air Act and faithful to the statute’s definition of BACT. *Id.* at 484. Unwilling to accord its normal deference to EPA’s actions, this Court found that EPA’s oversight role was limited to determining whether the State’s determination “is not based on a reasoned analysis” and is “arbitrary.” *Id.* at 490-91. Even EPA agreed that it must accord appropriate deference to a State’s determination and that it lacked authority to “second guess” a state’s decision. *Id.*

Thus, in reviewing EPA’s purely supervisory role, this Court held that “the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency’s BACT determination was reasonable, in light of the statutory guides and the state administrative record.” *Id.* at 494.

This Court’s reasoning in *Alaska Department* should have applied with even greater force to EPA’s review of BART determinations. BACT is a continually-evolving, health-driven emission level applicable to new construction or modification. BART, on the other hand,

is a one-time, cost-benefit-based, visibility standard for sources constructed prior to and unmodified since 1977. The BACT provisions impose obligations reflected by such strong, normative terms as “maximum” and “achievable” that are not found in the Clean Air Act’s definition of BART. *Id.* at 484–91. There is also no provision in BACT that is comparable to the Regional Haze Program’s unequivocal mandate that BART is “as determined by the State.”

In evaluating EPA’s rejection of Oklahoma’s BART determination, the panel below largely ignored *Alaska Department*, and disregarded its guidance. The panel sanctioned EPA’s second-guessing of the cost estimates used in the State’s BART determination, contending that they failed to comply with EPA guidelines. EPA erroneously argued—and the panel majority agreed—that Oklahoma failed to follow a particular costing methodology, that OG&E’s costing assumptions were flawed, and that even OG&E’s detailed cost estimates, provided at EPA’s request, were inadequate. Oklahoma raised numerous objections and counter-arguments to these conclusions during the Federal Implementation Plan rulemaking process, but the panel found that Oklahoma failed to show that EPA’s approach was arbitrary and capricious. This finding requires Oklahoma to *disprove* the validity of EPA’s conclusions, but *Alaska Department* mandates otherwise. It is EPA that bears the burden of showing that Oklahoma’s costing methods, and ultimately its BART determination, were unreasonable, and the panel erred in holding EPA to a lesser standard.

4. Contrary to the approach taken by the majority, for regional haze, the State, not EPA, is the “authorized

agency” entitled to deference under *Arizona Public Service Co. v. EPA*, 562 F.3d 1116, 1123 (10th Cir. 2009). By according EPA the deference that is reserved by the Clean Air Act to the State, the panel majority’s decision undermined the State’s exercise of its authority under the Clean Air Act. Repeatedly throughout the course of its review of EPA’s decision, the panel deferred to EPA’s preferences as long as EPA’s hired consultant provided *some* explanation for EPA’s conclusions. But the test should not have been whether EPA’s approach could be justified. It should have been whether EPA had a basis to say that the State’s approach violated some mandatory requirement in the Regional Haze Regulations or was itself arbitrary. The panel’s decision leaves States unable to determine with certainty what approach to regional haze is acceptable because the majority gives EPA the freedom to rely on any one of multiple possible interpretations of baseline emissions, of the requirements of EPA’s Control Cost Manual, or even of the engineering necessary to identify technically feasible controls. By painting its review of EPA’s action in rejecting the Oklahoma Plan with the same broad, deferential brush that it viewed EPA’s adoption of its own Federal Implementation Plan, the panel improperly disturbed the State’s authority to determine BART, contrary to the Clean Air Act and the long line of decisions described above.

Because the majority was overly deferential in its review of EPA’s action, it failed to conduct a meaningful examination of the explanations underlying EPA’s cost analysis. The panel should have required EPA to show why the State’s rule was unreasonable before EPA could reject Oklahoma’s Plan, and the

panel should have done so giving deference to Oklahoma's determinations, not EPA's. If the panel had given EPA's rejection of Oklahoma's Plan that level of review, it would have found that EPA's explanations were frequently based on assumptions unsupported by the record, contrary to basic engineering or economic realities, or based on materials or analysis that EPA did not provide to Oklahoma as part of the state administrative record for its consideration during the State's lengthy process for making its BART determination. This aspect of the decision is particularly important because the majority recognized that even under its deferential standard of review, it was a "close case." The panel's wholesale deference allowed EPA to:

1. ignore technical design requirements for the scrubbers needed to maintain the existing functionality of the OG&E Units and ignored EPA's own guidelines requiring the use of past actual emissions to measure the effect of the addition of scrubbers.
2. deviate from the twenty-year useful life of scrubbers used by Oklahoma even though a twenty-year life has been used in other cost analyses and has been acknowledged by EPA as being consistent with its Control Cost Manual. That error alone resulted in understating the scrubber's annual capital costs by thirty percent.
3. reject Oklahoma's 2009 cost estimates that deviated from the Control Cost Manual even though the State had site-specific vendor quotes to support those costs. Meanwhile,

EPA deviated from the Control Cost Manual without any site-specific cost support.

4. support the Federal Implementation Plan by aggregating visibility improvements from multiple units, even though OG&E specifically objected to that methodology in the administrative proceeding for being inconsistent with the Regional Haze regulations.

EPA could not justify its rulemaking and achieve its desired result of requiring scrubbers on the OG&E Units without these errors because OG&E voluntarily adopted the use of low sulfur coal many years ago, thus minimizing any adverse impact on visibility. The Oklahoma Plan would have ensured reasonable further progress toward maintaining that limited impact by making that voluntary choice mandatory. EPA, however, was unsatisfied with anything less than the installation of scrubbers, which put it in the awkward position of having to justify huge costs from which only marginal visibility benefits will flow. It was thus little wonder EPA's rulemaking was not a model of expert agency work.

The only question for EPA on review of the State's determination should have been whether it represented a reasonable application of EPA guidelines based on the record that existed when the State made its decision, and in conducting this review, EPA should have given the State's determinations the same level of deference that it expects when *its* decisions are reviewed. Rather than review the State's determination for proper and reasonable exercise of its discretion, EPA hired a consultant to second-guess Oklahoma's

choices, App.9, created projections of scrubber costs using its discretionary choices and assumptions after the state administrative record was closed, *id.*, and substituted its judgments for the site-specific analysis conducted by Oklahoma. EPA did not give Oklahoma this information to consider in making its BART determination. The Clean Air Act does not authorize EPA to approach its review of the State's BART determinations in that way, and the majority's decision undermines the authority given to the State.

On this basis alone, this Court's review is warranted and urgently needed.

II. The conflict over federal-state authority is a recurring problem of national importance.

This Court's review is urgently needed in light of the important and recurring nature of the question presented—not only under the Regional Haze Program but also a broad range of other federal statutes exemplifying various allocations of authority between the States and federal government.

1. In this, just the first phase of the long-term Regional Haze Program,⁵ EPA has disapproved state BART determinations or taken similar action in twelve States and has a pending disapproval in another

⁵ Given the stringency of EPA's other regulations applicable to facilities in the eastern States, EPA has not for the most part required those States to make BART determinations for electricity generating sources.

State.⁶ While the Tenth Circuit's decision was the first of multiple expected judicial decisions reviewing EPA disapprovals of state BART determinations under the Regional Haze Program in circuits around the country, it will certainly not be the last. At least nine other proceedings are now pending, involving seven other state plans, including two more in the Tenth Circuit.⁷ And more may be yet to come.

Just as it rushed to do in North Dakota's case before the Eighth Circuit, EPA will certainly waste no time in using the Tenth Circuit's decision before court after court in these BART cases. And if those courts rely on the Tenth Circuit's decision like the Eighth Circuit did,

⁶ 77 Fed. Reg. 72,512 (Dec. 5, 2012) (Arizona); 77 Fed. Reg. 14,604 (Mar. 12, 2012) (Arkansas); 77 Fed. Reg. 39,425 (July 3, 2012) (Louisiana); 77 Fed. Reg. 71,533 (Dec. 3, 2012) (Michigan); 78 Fed. Reg. 8,706 (Feb. 6, 2013) (Minnesota); 77 Fed. Reg. 57,864 (Sept. 18, 2012) (Montana); 77 Fed. Reg. 40,150 (July 6, 2012) (Nebraska); 77 Fed. Reg. 50,936 (Aug. 23, 2012) (Nevada); 76 Fed. Reg. 52,388 (Aug. 22, 2011) (New Mexico); 77 Fed. Reg. 20,894 (Apr. 6, 2012) (North Dakota); 76 Fed. Reg. 81,728 (Dec. 28, 2011) (Oklahoma); 77 Fed. Reg. 74,355 (Dec. 14, 2012) (Utah); 77 Fed. Reg. 33,022 (June 4, 2012) (Wyoming) (proposed).

⁷ *Arizona v. EPA*, No. 13-70366 (9th Cir., filed Jan. 31, 2013); *Louisiana Dep't of Env. Quality v. EPA*, No. 12-60672 (5th Cir., filed Sept. 4, 2012); *Michigan v. EPA*, No. 13-2130 (8th Cir., filed May 22, 2013); *Cliffs Natural Res., Inc. v. EPA*, No. 13-1758 (8th Cir., filed Apr. 4, 2013) (Michigan and Minnesota); *PPL Montana, LLC v. EPA*, No. 12-73757 (9th Cir., filed Nov. 16, 2012); *Nebraska v. EPA*, No. 12-3084 (8th Cir., filed Sept. 4, 2012); *Martinez, et al. v. EPA*, No. 11-9567 (10th Cir., filed Oct. 21, 2011) (New Mexico); *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013); *Oklahoma v. EPA* (the instant case); *Utah v. EPA*, No. 13-9535 (10th Cir., filed Mar. 21, 2013).

see *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013), the ripple effect will magnify the harms caused by the Tenth Circuit's decision. Billion-dollar plan after billion-dollar plan will be forced on the States. And once construction begins in order to implement those plans, it cannot practically be unwound.

Additionally, the decision not only harms Oklahoma now, it also limits the technical tools Oklahoma has available to it in developing future Regional Haze State Implementation Plans for the remaining forty-six years of the Regional Haze Program. Oklahoma's next State Implementation Plan is due in 2018, and the BART determinations made now—whether by Oklahoma or EPA—will directly affect the choices and decisions made by Oklahoma for the next half-a-century. EPA's imposition of a Federal Implementation Plan in this first planning period of the Regional Haze program unlawfully ties Oklahoma's hands as to what it can do in the future—a direct repudiation of Congress's mandate that the States lead the design and implementation of the Regional Haze Program.

2. Much like it did in *Alaska Department*, EPA here has yet again called into question numerous other statutes that embody the principle of cooperative federalism. See, e.g., *New York v. United States*, 505 U.S. 144, 167-168 (1992) (identifying “numerous federal statutory schemes” of this nature, including the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*). Much like the Clean Air Act, these statutes are based on shared

federal-state responsibility, whereby the federal government sets standards and the States—if they opt to undertake the responsibility—are given broad flexibility in implementing those standards. Cooperative-federalism promotes federalism because “state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.” *New York v. United States*, 505 U.S. at 167-168. The Tenth Circuit’s decision, by transferring from the State to EPA core discretionary authority under the leading cooperative-federalism statutory regimes, threatens to undermine the balance of power struck by Congress and accepted by the States when they assumed the responsibilities offered under the Act. For this reason too, the decision merits review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

[Filed October 31, 2013]

No. 12-9526

STATE OF OKLAHOMA, et al.,)
Petitioners,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)
-----)
SIERRA CLUB,)
Intervenor - Respondent,)
)
and)
)
PACIFICORP, et al.,)
Amici Curiae.)
)

No. 12-9527

OKLAHOMA GAS & ELECTRIC)
COMPANY,)
Petitioner,)
)
v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)
-----)
SIERRA CLUB,)
Intervenor - Respondent,)
)
and)
)
PACIFICORP, et al.,)
Amici Curiae.)
_____)

ORDER

Before **BRISCOE**, Chief Judge, **KELLY**, and **LUCERO**, Circuit Judges.

Petitioners' petition for panel rehearing in 12-9526 is denied. Petitioner's petition for panel rehearing in 12-9527 is also denied. Judge Kelly would grant panel rehearing in both cases, consistent with his concurring and dissenting opinion.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

42 U.S.C.A. § 7491

**§ 7491. Visibility protection for
Federal class I areas**

Currentness

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in

paragraph (1). Such report shall include recommendations for--

- (A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and
- (B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and
- (C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

- (4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall--

- (1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and

methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including--

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air

pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

(g) Definitions

For the purpose of this section--

- (1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;
- (2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;
- (3) the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;
- (4) the term "as expeditiously as practicable" means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

- (5) the term “mandatory class I Federal areas” means Federal areas which may not be designated as other than class I under this part;
- (6) the terms “visibility impairment” and “impairment of visibility” shall include reduction in visual range and atmospheric discoloration; and
- (7) the term “major stationary source” means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

40 C.F.R. § 51.308

§ 51.308 Regional haze program requirements.

Effective: August 6, 2012

Currentness

(a) What is the purpose of this section? This section establishes requirements for implementation plans, plan revisions, and periodic progress reviews to address regional haze.

(b) When are the first implementation plans due under the regional haze program? Except as provided in § 51.309(c), each State identified in § 51.300(b)(3) must submit, for the entire State, an implementation plan for regional haze meeting the requirements of paragraphs (d) and (e) of this section no later than December 17, 2007.

(c) [Reserved]

(d) What are the core requirements for the implementation plan for regional haze? The State must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State which may be affected by emissions from within the State. To meet the core requirements for regional haze for these areas, the State must submit an implementation plan containing the following plan elements and supporting documentation for all required analyses:

(1) Reasonable progress goals. For each mandatory Class I Federal area located within the State, the State must establish goals (expressed in

deciviews) that provide for reasonable progress towards achieving natural visibility conditions. The reasonable progress goals must provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period.

(i) In establishing a reasonable progress goal for any mandatory Class I Federal area within the State, the State must:

(A) Consider the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, and include a demonstration showing how these factors were taken into consideration in selecting the goal.

(B) Analyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064. To calculate this rate of progress, the State must compare baseline visibility conditions to natural visibility conditions in the mandatory Federal Class I area and determine the uniform rate of visibility improvement (measured in deciviews) that would need to be maintained during each implementation period in order to attain natural visibility conditions by 2064. In establishing the reasonable progress goal, the State must consider the uniform rate of improvement in visibility and the emission reduction measures needed to achieve it for the period covered by the implementation plan.

(ii) For the period of the implementation plan, if the State establishes a reasonable progress goal that provides for a slower rate of improvement in visibility than the rate that would be needed to attain natural conditions by 2064, the State must demonstrate, based on the factors in paragraph (d)(1)(i)(A) of this section, that the rate of progress for the implementation plan to attain natural conditions by 2064 is not reasonable; and that the progress goal adopted by the State is reasonable. The State must provide to the public for review as part of its implementation plan an assessment of the number of years it would take to attain natural conditions if visibility improvement continues at the rate of progress selected by the State as reasonable.

(iii) In determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator will evaluate the demonstrations developed by the State pursuant to paragraphs (d)(1)(i) and (d)(1)(ii) of this section.

(iv) In developing each reasonable progress goal, the State must consult with those States which may reasonably be anticipated to cause or contribute to visibility impairment in the mandatory Class I Federal area. In any situation in which the State cannot agree with another such State or group of States that a goal provides for reasonable progress, the State must describe in its submittal the actions taken to resolve the disagreement. In reviewing the State's implementation plan submittal, the Administrator will take this information into account in determining whether the State's goal for

visibility improvement provides for reasonable progress towards natural visibility conditions.

(v) The reasonable progress goals established by the State are not directly enforceable but will be considered by the Administrator in evaluating the adequacy of the measures in the implementation plan to achieve the progress goal adopted by the State.

(vi) The State may not adopt a reasonable progress goal that represents less visibility improvement than is expected to result from implementation of other requirements of the CAA during the applicable planning period.

(2) Calculations of baseline and natural visibility conditions. For each mandatory Class I Federal area located within the State, the State must determine the following visibility conditions (expressed in deciviews):

(i) Baseline visibility conditions for the most impaired and least impaired days. The period for establishing baseline visibility conditions is 2000 to 2004. Baseline visibility conditions must be calculated, using available monitoring data, by establishing the average degree of visibility impairment for the most and least impaired days for each calendar year from 2000 to 2004. The baseline visibility conditions are the average of these annual values. For mandatory Class I Federal areas without onsite monitoring data for 2000-2004, the State must establish baseline values using the most representative available monitoring data for

2000-2004, in consultation with the Administrator or his or her designee;

(ii) For an implementation plan that is submitted by 2003, the period for establishing baseline visibility conditions for the period of the first long-term strategy is the most recent 5—year period for which visibility monitoring data are available for the mandatory Class I Federal areas addressed by the plan. For mandatory Class I Federal areas without onsite monitoring data, the State must establish baseline values using the most representative available monitoring data, in consultation with the Administrator or his or her designee;

(iii) Natural visibility conditions for the most impaired and least impaired days. Natural visibility conditions must be calculated by estimating the degree of visibility impairment existing under natural conditions for the most impaired and least impaired days, based on available monitoring information and appropriate data analysis techniques; and

(iv)(A) For the first implementation plan addressing the requirements of paragraphs (d) and (e) of this section, the number of deciviews by which baseline conditions exceed natural visibility conditions for the most impaired and least impaired days; or

(B) For all future implementation plan revisions, the number of deciviews by which current conditions, as calculated under paragraph (f)(1) of this section, exceed natural

visibility conditions for the most impaired and least impaired days.

(3) Long-term strategy for regional haze. Each State listed in § 51.300(b)(3) must submit a long-term strategy that addresses regional haze visibility impairment for each mandatory Class I Federal area within the State and for each mandatory Class I Federal area located outside the State which may be affected by emissions from the State. The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas. In establishing its long-term strategy for regional haze, the State must meet the following requirements:

(i) Where the State has emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area located in another State or States, the State must consult with the other State(s) in order to develop coordinated emission management strategies. The State must consult with any other State having emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area within the State.

(ii) Where other States cause or contribute to impairment in a mandatory Class I Federal area, the State must demonstrate that it has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area. If the State

has participated in a regional planning process, the State must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process.

(iii) The State must document the technical basis, including modeling, monitoring and emissions information, on which the State is relying to determine its apportionment of emission reduction obligations necessary for achieving reasonable progress in each mandatory Class I Federal area it affects. The State may meet this requirement by relying on technical analyses developed by the regional planning organization and approved by all State participants. The State must identify the baseline emissions inventory on which its strategies are based. The baseline emissions inventory year is presumed to be the most recent year of the consolidate periodic emissions inventory.

(iv) The State must identify all anthropogenic sources of visibility impairment considered by the State in developing its long-term strategy. The State should consider major and minor stationary sources, mobile sources, and area sources.

(v) The State must consider, at a minimum, the following factors in developing its long-term strategy:

(A) Emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment;

- (B) Measures to mitigate the impacts of construction activities;
 - (C) Emissions limitations and schedules for compliance to achieve the reasonable progress goal;
 - (D) Source retirement and replacement schedules;
 - (E) Smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the State for these purposes;
 - (F) Enforceability of emissions limitations and control measures; and
 - (G) The anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy.
- (4) Monitoring strategy and other implementation plan requirements. The State must submit with the implementation plan a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the State. This monitoring strategy must be coordinated with the monitoring strategy required in § 51.305 for reasonably attributable visibility impairment. Compliance with this requirement may be met through participation in the Interagency Monitoring of Protected Visual Environments network. The implementation plan must also provide for the following:

- (i) The establishment of any additional monitoring sites or equipment needed to assess whether reasonable progress goals to address regional haze for all mandatory Class I Federal areas within the State are being achieved.
- (ii) Procedures by which monitoring data and other information are used in determining the contribution of emissions from within the State to regional haze visibility impairment at mandatory Class I Federal areas both within and outside the State.
- (iii) For a State with no mandatory Class I Federal areas, procedures by which monitoring data and other information are used in determining the contribution of emissions from within the State to regional haze visibility impairment at mandatory Class I Federal areas in other States.
- (iv) The implementation plan must provide for the reporting of all visibility monitoring data to the Administrator at least annually for each mandatory Class I Federal area in the State. To the extent possible, the State should report visibility monitoring data electronically.
- (v) A statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any mandatory Class I Federal area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. The State must also include a commitment to update the inventory periodically.

- (vi) Other elements, including reporting, recordkeeping, and other measures, necessary to assess and report on visibility.
- (e) Best Available Retrofit Technology (BART) requirements for regional haze visibility impairment. The State must submit an implementation plan containing emission limitations representing BART and schedules for compliance with BART for each BART—eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area, unless the State demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions.
 - (1) To address the requirements for BART, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:
 - (i) A list of all BART—eligible sources within the State.
 - (ii) A determination of BART for each BART—eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area. All such sources are subject to BART.
 - (A) The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART—eligible source that is subject to

BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(B) The determination of BART for fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts must be made pursuant to the guidelines in appendix Y of this part (Guidelines for BART Determinations Under the Regional Haze Rule).

(C) Exception. A State is not required to make a determination of BART for SO₂ or for NO_x if a BART—eligible source has the potential to emit less than 40 tons per year of such pollutant(s), or for PM₁₀ if a BART—eligible source has the potential to emit less than 15 tons per year of such pollutant.

(iii) If the State determines in establishing BART that technological or economic limitations on the applicability of measurement methodology to a particular source would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice, or other operational standard, or combination thereof, to require the application of BART. Such standard, to the degree possible, is to set forth the emission reduction to be achieved by implementation of such

design, equipment, work practice or operation, and must provide for compliance by means which achieve equivalent results.

(iv) A requirement that each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision.

(v) A requirement that each source subject to BART maintain the control equipment required by this subpart and establish procedures to ensure such equipment is properly operated and maintained.

(2) A State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. Such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART. For all such emission trading programs or other alternative measures, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State

and covered by the alternative program. This demonstration must be based on the following:

(A) A list of all BART—eligible sources within the State.

(B) A list of all BART—eligible sources and all BART source categories covered by the alternative program. The State is not required to include every BART source category or every BART—eligible source within a BART source category in an alternative program, but each BART—eligible source in the State must be subject to the requirements of the alternative program, have a federally enforceable emission limitation determined by the State and approved by EPA as meeting BART in accordance with section 302(c) or paragraph (e)(1) of this section, or otherwise addressed under paragraphs (e)(1) or (e)(4) of this section.

(C) An analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each source within the State subject to BART and covered by the alternative program. This analysis must be conducted by making a determination of BART for each source subject to BART and covered by the alternative program as provided for in paragraph (e)(1) of this section, unless the emissions trading program or other alternative measure has been designed to meet a requirement other than BART (such as the core requirement to have a long-term strategy to achieve the reasonable progress goals established by States). In this case, the State

may determine the best system of continuous emission control technology and associated emission reductions for similar types of sources within a source category based on both source-specific and category-wide information, as appropriate.

(D) An analysis of the projected emissions reductions achievable through the trading program or other alternative measure.

(E) A determination under paragraph (e)(3) of this section or otherwise based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources.

(ii) [Reserved]

(iii) A requirement that all necessary emission reductions take place during the period of the first long-term strategy for regional haze. To meet this requirement, the State must provide a detailed description of the emissions trading program or other alternative measure, including schedules for implementation, the emission reductions required by the program, all necessary administrative and technical procedures for implementing the program, rules for accounting and monitoring emissions, and procedures for enforcement.

(iv) A demonstration that the emission reductions resulting from the emissions trading program or other alternative measure will be surplus to those reductions resulting from measures adopted to meet

requirements of the CAA as of the baseline date of the SIP.

(v) At the State's option, a provision that the emissions trading program or other alternative measure may include a geographic enhancement to the program to address the requirement under § 51.302(c) related to BART for reasonably attributable impairment from the pollutants covered under the emissions trading program or other alternative measure.

(vi) For plans that include an emissions trading program that establishes a cap on total annual emissions of SO₂ or NO_x from sources subject to the program, requires the owners and operators of sources to hold allowances or authorizations to emit equal to emissions, and allows the owners and operators of sources and other entities to purchase, sell, and transfer allowances, the following elements are required concerning the emissions covered by the cap:

(A) Applicability provisions defining the sources subject to the program. The State must demonstrate that the applicability provisions (including the size criteria for including sources in the program) are designed to prevent any significant potential shifting within the State of production and emissions from sources in the program to sources outside the program. In the case of a program covering sources in multiple States, the States must demonstrate that the applicability provisions in each State cover essentially the same size facilities and, if source categories are specified, cover the same source

categories and prevent any significant, potential shifting within such States of production and emissions to sources outside the program.

(B) Allowance provisions ensuring that the total value of allowances (in tons) issued each year under the program will not exceed the emissions cap (in tons) on total annual emissions from the sources in the program.

(C) Monitoring provisions providing for consistent and accurate measurements of emissions from sources in the program to ensure that each allowance actually represents the same specified tonnage of emissions and that emissions are measured with similar accuracy at all sources in the program. The monitoring provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the requirements of part 75 of this chapter. The monitoring provisions must require that other sources in the program allowed to sell or transfer allowances must provide emissions information with the same precision, reliability, accessibility, and timeliness as information provided under part 75 of this chapter.

(D) Recordkeeping provisions that ensure the enforceability of the emissions monitoring provisions and other program requirements. The recordkeeping provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the recordkeeping provisions of part 75 of this chapter. The

recordkeeping provisions must require that other sources in the program allowed to sell or transfer allowances must comply with recordkeeping requirements that, as compared with the recordkeeping provisions under part 75 of this chapter, are of comparable stringency and require recording of comparable types of information and retention of the records for comparable periods of time.

(E) Reporting provisions requiring timely reporting of monitoring data with sufficient frequency to ensure the enforceability of the emissions monitoring provisions and other program requirements and the ability to audit the program. The reporting provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the reporting provisions of part 75 of this chapter, except that, if the Administrator is not the tracking system administrator for the program, emissions may be reported to the tracking system administrator, rather than to the Administrator. The reporting provisions must require that other sources in the program allowed to sell or transfer allowances must comply with reporting requirements that, as compared with the reporting provisions under part 75 of this chapter, are of comparable stringency and require reporting of comparable types of information and require comparable timeliness and frequency of reporting.

(F) Tracking system provisions which provide for a tracking system that is publicly available in a secure, centralized database to track in a consistent manner all allowances and emissions in the program.

(G) Authorized account representative provisions ensuring that the owners and operators of a source designate one individual who is authorized to represent the owners and operators in all matters pertaining to the trading program.

(H) Allowance transfer provisions providing procedures that allow timely transfer and recording of allowances, minimize administrative barriers to the operation of the allowance market, and ensure that such procedures apply uniformly to all sources and other potential participants in the allowance market.

(I) Compliance provisions prohibiting a source from emitting a total tonnage of a pollutant that exceeds the tonnage value of its allowance holdings, including the methods and procedures for determining whether emissions exceed allowance holdings. Such method and procedures shall apply consistently from source to source.

(J) Penalty provisions providing for mandatory allowance deductions for excess emissions that apply consistently from source to source. The tonnage value of the allowances

deducted shall equal at least three times the tonnage of the excess emissions.

(K) For a trading program that allows banking of allowances, provisions clarifying any restrictions on the use of these banked allowances.

(L) Program assessment provisions providing for periodic program evaluation to assess whether the program is accomplishing its goals and whether modifications to the program are needed to enhance performance of the program.

(3) A State which opts under 40 CFR 51.308(e)(2) to implement an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART may satisfy the final step of the demonstration required by that section as follows: If the distribution of emissions is not substantially different than under BART, and the alternative measure results in greater emission reductions, then the alternative measure may be deemed to achieve greater reasonable progress. If the distribution of emissions is significantly different, the State must conduct dispersion modeling to determine differences in visibility between BART and the trading program for each impacted Class I area, for the worst and best 20 percent of days. The modeling would demonstrate “greater reasonable progress” if both of the following two criteria are met:

(i) Visibility does not decline in any Class I area, and

(ii) There is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas.

(4) A State subject to a trading program established in accordance with § 52.38 or § 52.39 under a Transport Rule Federal Implementation Plan need not require BART—eligible fossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State that chooses to meet the emission reduction requirements of the Transport Rule by submitting a SIP revision that establishes a trading program and is approved as meeting the requirements of § 52.38 or § 52.39 also need not require BART—eligible fossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State may adopt provisions, consistent with the requirements applicable to the State for a trading program established in accordance with § 52.38 or § 52.39 under the Transport Rule Federal Implementation Plan or established under a SIP revision that is approved as meeting the requirements of § 52.38 or § 52.39, for a geographic enhancement to the program to address the requirement under § 51.302(c) related to BART for reasonably attributable impairment from the pollutant covered by such trading program in that State.

(5) After a State has met the requirements for BART or implemented emissions trading program

or other alternative measure that achieves more reasonable progress than the installation and operation of BART, BART—eligible sources will be subject to the requirements of paragraph (d) of this section in the same manner as other sources.

(6) Any BART—eligible facility subject to the requirement under paragraph (e) of this section to install, operate, and maintain BART may apply to the Administrator for an exemption from that requirement. An application for an exemption will be subject to the requirements of § 51.303(a)(2)-(h).

(f) Requirements for comprehensive periodic revisions of implementation plans for regional haze. Each State identified in § 51.300(b)(3) must revise and submit its regional haze implementation plan revision to EPA by July 31, 2018 and every ten years thereafter. In each plan revision, the State must evaluate and reassess all of the elements required in paragraph (d) of this section, taking into account improvements in monitoring data collection and analysis techniques, control technologies, and other relevant factors. In evaluating and reassessing these elements, the State must address the following:

(1) Current visibility conditions for the most impaired and least impaired days, and actual progress made towards natural conditions during the previous implementation period. The period for calculating current visibility conditions is the most recent five year period preceding the required date of the implementation plan submittal for which data are available. Current visibility conditions must be calculated based on the annual average level of visibility impairment for the most and least

impaired days for each of these five years. Current visibility conditions are the average of these annual values.

(2) The effectiveness of the long-term strategy for achieving reasonable progress goals over the prior implementation period(s); and

(3) Affirmation of, or revision to, the reasonable progress goal in accordance with the procedures set forth in paragraph (d)(1) of this section. If the State established a reasonable progress goal for the prior period which provided a slower rate of progress than that needed to attain natural conditions by the year 2064, the State must evaluate and determine the reasonableness, based on the factors in paragraph (d)(1)(i)(A) of this section, of additional measures that could be adopted to achieve the degree of visibility improvement projected by the analysis contained in the first implementation plan described in paragraph (d)(1)(i)(B) of this section.

(g) Requirements for periodic reports describing progress towards the reasonable progress goals. Each State identified in § 51.300(b)(3) must submit a report to the Administrator every 5 years evaluating progress towards the reasonable progress goal for each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State which may be affected by emissions from within the State. The first progress report is due 5 years from submittal of the initial implementation plan addressing paragraphs (d) and (e) of this section. The progress reports must be in the form of implementation plan revisions that comply with the procedural requirements of § 51.102 and

§ 51.103. Periodic progress reports must contain at a minimum the following elements:

- (1) A description of the status of implementation of all measures included in the implementation plan for achieving reasonable progress goals for mandatory Class I Federal areas both within and outside the State.
- (2) A summary of the emissions reductions achieved throughout the State through implementation of the measures described in paragraph (g)(1) of this section.
- (3) For each mandatory Class I Federal area within the State, the State must assess the following visibility conditions and changes, with values for most impaired and least impaired days expressed in terms of 5—year averages of these annual values.
 - (i) The current visibility conditions for the most impaired and least impaired days;
 - (ii) The difference between current visibility conditions for the most impaired and least impaired days and baseline visibility conditions;
 - (iii) The change in visibility impairment for the most impaired and least impaired days over the past 5 years;
- (4) An analysis tracking the change over the past 5 years in emissions of pollutants contributing to visibility impairment from all sources and activities within the State. Emissions changes should be identified by type of source or activity. The analysis

must be based on the most recent updated emissions inventory, with estimates projected forward as necessary and appropriate, to account for emissions changes during the applicable 5—year period.

(5) An assessment of any significant changes in anthropogenic emissions within or outside the State that have occurred over the past 5 years that have limited or impeded progress in reducing pollutant emissions and improving visibility.

(6) An assessment of whether the current implementation plan elements and strategies are sufficient to enable the State, or other States with mandatory Federal Class I areas affected by emissions from the State, to meet all established reasonable progress goals.

(7) A review of the State's visibility monitoring strategy and any modifications to the strategy as necessary.

(h) Determination of the adequacy of existing implementation plan. At the same time the State is required to submit any 5—year progress report to EPA in accordance with paragraph (g) of this section, the State must also take one of the following actions based upon the information presented in the progress report:

(1) If the State determines that the existing implementation plan requires no further substantive revision at this time in order to achieve established goals for visibility improvement and emissions reductions, the State must provide to the Administrator a negative declaration that further

revision of the existing implementation plan is not needed at this time.

(2) If the State determines that the implementation plan is or may be inadequate to ensure reasonable progress due to emissions from sources in another State(s) which participated in a regional planning process, the State must provide notification to the Administrator and to the other State(s) which participated in the regional planning process with the States. The State must also collaborate with the other State(s) through the regional planning process for the purpose of developing additional strategies to address the plan's deficiencies.

(3) Where the State determines that the implementation plan is or may be inadequate to ensure reasonable progress due to emissions from sources in another country, the State shall provide notification, along with available information, to the Administrator.

(4) Where the State determines that the implementation plan is or may be inadequate to ensure reasonable progress due to emissions from sources within the State, the State shall revise its implementation plan to address the plan's deficiencies within one year.

(i) What are the requirements for State and Federal Land Manager coordination?

(1) By November 29, 1999, the State must identify in writing to the Federal Land Managers the title of the official to which the Federal Land Manager of any mandatory Class I Federal area can

App. 243

submit any recommendations on the implementation of this subpart including, but not limited to:

- (i) Identification of impairment of visibility in any mandatory Class I Federal area(s); and
- (ii) Identification of elements for inclusion in the visibility monitoring strategy required by § 51.305 and this section.

APPENDIX E

Regional Haze Implementation Plan Revision

State of Oklahoma

Department of Environmental Quality

February 2, 2010

* * *

[p.81]

* * *

As outlined in the previous section and described in detail in Appendix 6-4, DEQ conducted a thorough case-by-case five-factor BART analysis for each of the BART-subject units. DEQ determined that Dry-Flue Gas Desulfurization with Spray Dryer Absorber (“Dry FGD with SDA”) is not cost-effective for SO₂ control for any of the six coal-fired steam electric units reviewed, i.e., OG&E Sooner Units 1 and 2, OG&E Muskogee Units 4 and 5, and PSO Northeastern Units 3 and 4. This determination is based on the capital cost of add-on controls, the cost effectiveness both in dollars per ton and dollars per deciview of add-on controls, and the long term viability of coal with respect to other environmental programs, and national commitments. In addition to information provided prior to the public hearing, DEQ considered public comments, and additional information provided by the affected facilities in response to questions raised by the commentors and DEQ staff. Revised cost estimates

were provided by the affected facilities that are based on vendor quotes and go well beyond the default methodology recommended by EPA guidance. The cost estimates are credible, detailed, and specific for the individual facilities. The final estimate for Dry FGD with SDA for the six coal-fired units was on average 153% greater than the high end costs assumed by DEQ in the Draft SIP. These costs put the projects well above costs reported for other BART determinations, and above the levels DEQ considered reasonable for cost effectiveness both in terms of dollars per ton of pollutant removed and dollars per deciview (e.g., \$10,000,000/dv) of improved visibility. Tables VI-14 and VI-15 give data on these measures of cost-effectiveness.

[p.82]

* * *

DEQ has determined that the cost for DFGD is too high and the benefit too low. These costs would further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. Consequently, DEQ has determined BART for the six coal-fired steam electric units to be the use (or continued use) of low sulfur coal. Additional explanation of DEQ's rationale and conclusions is included in the BART Determinations in Appendix 6-4.

* * *

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

[Filed June 22, 2012]

Nos. 12-9526 & 12-9527

(No. EPA-R06-OAR-2010-0190)

STATE OF OKLAHOMA; OKLAHOMA)
INDUSTRIAL ENERGY CONSUMERS,)
an unincorporated association;)
OKLAHOMA GAS & ELECTRIC)
COMPANY,)
Petitioners,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)
-----)
SIERRA CLUB,)
Intervenor-Respondent.)

ORDER

Before **KELLY** and **HOLMES**, Circuit Judges.

Petitioners, the State of Oklahoma, Oklahoma Industrial Energy Consumers, and the Oklahoma Gas & Electric Company, seek a stay pending review of that

portion of the Environmental Protection Agency's final rule requiring the reduction of sulfur dioxide emissions at four electric generating units. We conclude that the stay factors have been met in this case, and we therefore GRANT the motion for stay pending hearing by the merits panel.

Entered for the Court

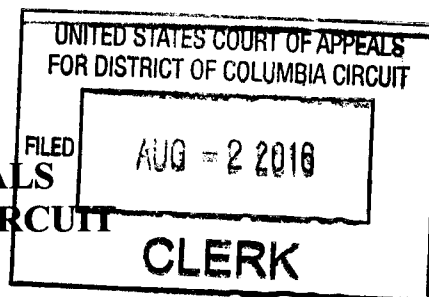
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

AUG - 2 2016

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



STATE OF WEST VIRGINIA;
STATE OF ALABAMA;
STATE OF ARIZONA;
STATE OF KANSAS;
COMMONWEALTH OF KENTUCKY;
STATE OF LOUISIANA;
ATTORNEY GENERAL BILL SCHUETTE,
For the People of Michigan;
STATE OF MONTANA;
STATE OF OHIO;
STATE OF OKLAHOMA;
STATE OF SOUTH CAROLINA;
STATE OF WISCONSIN;
COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET;
and, STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL
QUALITY;

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY;
and, REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency;

Respondents.

PETITION FOR REVIEW


Case No. 16-1264

The States of West Virginia, Alabama, Arizona, Kansas, Louisiana, Montana, Ohio, Oklahoma, South Carolina, Wisconsin, and the Commonwealth of Kentucky, and Attorney General Bill Schuette for the People of Michigan, the Commonwealth of Kentucky Energy and Environment Cabinet, and the State of North Carolina Department of Environmental Quality hereby petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and 5 U.S.C. § 702, for review of the final rule of the U.S. Environmental Protection Agency published in the Federal Register at 81 Fed. Reg. 35,824 (June 3, 2016), titled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources.” This Court has jurisdiction, and is a proper venue for this action, under 42 U.S.C. § 7607(b)(1).

Petitioners will show that the final rule is in excess of the agency’s statutory authority and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law. Accordingly, Petitioners ask the Court to hold unlawful and set aside the rule, and to order other such relief as may be appropriate. *See* 42 U.S.C. § 7607(d).

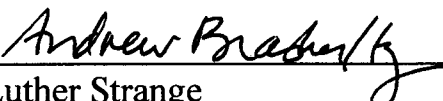
Dated: August 2, 2016

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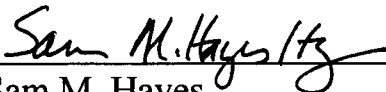
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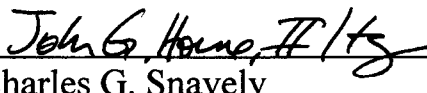
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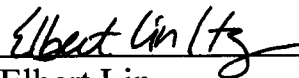
CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served a true copy of the Petition for Review via U.S. mail on August 2, 2016, upon the following:

Hon. Gina McCarthy, Administrator
Office of the Administrator (1101A)
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
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Elbert Lin
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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 28 and 29, 2012 Decided June 26, 2012

No. 09-1322

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

STATE OF MICHIGAN, ET AL.,
INTERVENORS

Consolidated with 10-1024, 10-1025, 10-1026, 10-1030,
10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040,
10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234,
10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318,
10-1319, 10-1320, 10-1321

On Petitions for Review of Final Actions
of the Environmental Protection Agency

Patrick R. Day, Harry W. MacDougald, and Jeffrey Bossert Clark argued the causes for Non-State Petitioners and Supporting Intervenors. With them on the briefs were *John J. Burns*, Attorney General, Office of the Attorney General of the State of Alaska, *Steven E. Mulder*, Chief Assistant Attorney

General, *Peter Glaser, Mark E. Nagle, Matthew Dukes, Paul D. Phillips, John A. Bryson, Ellen Steen, Eric Groten, John P. Elwood, James A. Holtkamp, Chet M. Thompson, Robin S. Conrad, Rachel L. Brand, Sheldon Gilbert, Quentin Riegel, Jeffrey A. Rosen, Robert R. Gasaway, William H. Burgess, Sam Kazman, Hans Bader, Matthew G. Paulson, Harry Moy Ng, Michele Marie Schoeppe, Michael R. Barr, Alexandra M. Walsh, Adam J. White, Jeffrey A. Lamken, Timothy K. Webster, Roger R. Martella, Neal J. Cabral, Theodore Hadzi-Antich, Ashley C. Parrish, Cynthia A. M. Stroman, Scott C. Oostdyk, Gordon R. Alphonso, Shannon L. Goessling, Edward A. Kazmarek, F. William Brownell, Norman W. Fichthorn, Henry V. Nickel, and Allison D. Wood. Paul D. Clement, Mark W. DeLaquil, Andrew M. Grossman, and David B. Rivin, Jr. entered appearances.*

E. Duncan Getchell, Jr., Solicitor General, Office of the Attorney General for the Commonwealth of Virginia, argued the cause for State Petitioners Texas and Virginia on Denial of Reconsideration of the Endangerment Finding and State Petitioners and Supporting Intervenors on Endangerment Finding Delegation Issues. With him on the briefs were Kenneth T. Cuccinelli, II, Attorney General, Stephen R. McCullough, Senior Appellate Counsel, Charles E. James Jr., Chief Deputy Attorney General, and Wesley G. Russell, Jr., Deputy Attorney General.

Greg Abbott, Attorney General, Office of the Attorney General for the State of Texas, Bill Cobb, Deputy Attorney General for Civil Litigation, J. Reed Clay, Jr., Special Assistant and Senior Counsel to the Attorney General, Jonathan F. Mitchell, Solicitor General, Michael P. Murphy, Assistant Solicitor General, Luther Strange III, Attorney General, Office of the Attorney General for the State of Alabama, Pamela Jo Bondi, Attorney General, Office of the Attorney General for the

State of Florida, *Gregory F. Zoeller*, Attorney General, Office of the Attorney General for the State of Indiana, *Jack Conway*, Attorney General, Office of the Attorney General for the Commonwealth of Kentucky, *James D. “Buddy” Caldwell*, Attorney General, Office of the Attorney General for the State of Louisiana, *Bill Schuette*, Attorney General, Office of the Attorney General for the State of Michigan, *John J. Bursch*, Solicitor General, *Neil D. Gordon*, Assistant Attorney General, *Gary C. Rikard*, *Jon Bruning*, Attorney General, Office of the Attorney General for the State of Nebraska, *Katherine J. Spohn*, Special Counsel to the Attorney General, *Wayne Stenehjem*, Attorney General, Office of the Attorney General for the State of North Dakota, *Margaret Olson*, Assistant Attorney General, *Scott Pruitt*, Attorney General, Office of the Attorney General for the State of Oklahoma, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *Marty Jackley*, Attorney General, Office of the Attorney General for the States of South Dakota, *Roxanne Giedd*, Chief, Civil Litigation Division, *Mark L. Shurtleff*, Attorney General, Office of the Attorney General for the State of Utah, and *Kenneth T. Cuccinelli, II*, Attorney General, Office of the Attorney General for the Commonwealth of Virginia were on the briefs for State Petitioners and Supporting Intervenors. *Robert D. Tambling*, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered an appearance.

Christian J. Ward, *Scott A. Keller*, and *April L. Farris* were on the brief for *amici curiae* Scientists in support of Petitioners.

Derek Schmidt, Attorney General, Office of the Attorney General for the State of Kansas, and *John Campbell*, Chief Deputy Attorney General, were on the brief for *amicus curiae* State of Kansas in support of Petitioners.

Martin R. Levin, *Michael J. O’Neill*, *Donald M. Falk*, *Mark*

S. Kaufman, Steven J. Lechner, and Richard P. Hutchison were on the brief for *amici curiae* Landmark Legal Foundation, et al. in support of Petitioners.

Jon M. Lipshultz and *Angeline Purdy*, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the brief were *John Hannon, Carol Holmes, and Steven Silverman*, U.S. Environmental Protection Agency, Attorneys. *Thomas A. Lorenzen*, Attorney, U.S. Department of Justice, entered an appearance.

Carol Iancu, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, argued the cause for State and Environmental Intervenors in support of respondents. With her on the briefs were *Martha Coakley*, Attorney General, *William L. Pardee*, Attorney Assistant General, *Sean H. Donahue, Howard I. Fox, David S. Baron, Megan Ceronsky, Vickie L. Patton, Peter Zalzal, Kamala D. Harris*, Attorney General, Office of the Attorney General for the State of California, *Kathleen A. Kenealy*, Senior Assistant Attorney General, *Marc N. Melnick* and *Nicholas Stern*, Deputy Attorneys General, *Joseph R. Biden, III*, Attorney General, Office of the Attorney General for the State of Delaware, *Valerie M. Satterfield*, Deputy Attorney General, *George Jepsen*, Attorney General, Office of the Attorney General for the State of Connecticut, *Kimberly P. Massicotte, Matthew I. Levine, Scott N. Koschwitz*, Assistant Attorneys General, *Lisa Madigan*, Attorney General, Office of the Attorney General for the State of Illinois, *Gerald T. Karr*, Assistant Attorney General, *Thomas J. Miller*, Attorney General, Office of the Attorney General for the State of Iowa, *David R. Sheridan*, Assistant Attorney General, *Douglas F. Gansler*, Attorney General, Office of the Attorney General for the State of Maryland, *Mary E. Raivel*, Assistant Attorney General, *Michael A. Delaney*, Attorney General, Office of the Attorney General for the State

of New Hampshire, *K. Allen Brooks*, Senior Assistant Attorney General, *William J. Schneider*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Reid*, Assistant Attorney General, *Lori Swanson*, Attorney General, Office of the Attorney General for the State of Minnesota, *Jocelyn F. Olson*, Assistant Attorney General, *Gary K. King*, Attorney General, Office of the Attorney General for the State of New Mexico, *Stephen R. Farris*, Assistant Attorney General, *Eric T. Schneiderman*, Attorney General, Office of the Attorney General for the State of New York, *Michael J. Myers* and *Yueh-Ru Chu*, Assistant Attorneys General, *John Kroger*, Attorney General, Office of the Attorney General for the State of Oregon, Paul Logan, Assistant Attorney-in-Charge, *Robert M. McKenna*, Attorney General, Office of the Attorney General for the State of Washington, *Leslie R. Seffern*, Assistant Attorney General, *Peter F. Kilmartin*, Attorney General, Office of the Attorney General for the State of Rhode Island, *Gregory S. Schultz*, Special Assistant Attorney General, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, *Thea J. Schwartz*, Assistant Attorney General, *Christopher King*, Assistant Corporation Counsel, Corporation Counsel for the City Of New York, *Ann B. Weeks*, *Helen D. Silver*, *David Doniger*, *Meleah Geertsma*, *Morgan Butler*, *Frank W. Rambo*, *Joseph Mendelson III*, *Craig Holt Segall*, and *Joanne Spalding*.

Deborah Sivas, *Douglas A. Ruley*, *Edward Lloyd*, and *Susan J. Kraham* were on the brief for *amici curiae* America's Great Waters Coalition, et al. in support of respondent. *James K. Thornton* entered an appearance.

No. 10-1073

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN FROZEN FOOD INSTITUTE, ET AL.,
INTERVENORS

Consolidated with 10-1083, 10-1099, 10-1109, 10-1110,
10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123,
10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129,
10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199,
10-1200, 10-1201, 10-1202, 10-1203, 10-1206, 10-1207,
10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216,
10-1218, 10-1219, 10-1220, 10-1221, 10-1222

On Petitions for Review of Final Agency Action
of the Environmental Protection Agency

Jonathan F. Mitchell, Solicitor General, Office of the Attorney General for the State of Texas, argued the cause for State Petitioners and Supporting Intervenor. With him on the briefs were *Gregg Abbott*, Attorney General, *Bill Cobb*, Deputy Attorney General, *J. Reed Clay, Jr.*, Special Assistant and Senior Counsel to the Attorney General, *Michael P. Murphy* and

James P. Sullivan, Assistant Solicitors General, *Luther Strange*, Attorney General, Office of the Attorney General for the State of Alabama, *Herman Robinson*, *Donald Trahan*, *Kathy M. Wright*, *Gary C. Rikard*, *John Bruning*, Attorney General, Office of the Attorney General for the State of Nebraska, *Katherine J. Spohn*, Special Counsel, *Wayne Stenehjem*, Attorney General, Office of the Attorney General for the State of North Dakota, *Margaret Olson*, Assistant Attorney General, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *J. Emory Smith, Jr.*, Assistant Deputy Attorney General, *Marty Jackley*, Attorney General, Office of the Attorney General for the State of South Dakota, *Roxanne Giedd*, Chief, and *Kenneth T. Cuccinelli, II*, Attorney General, Office of the Attorney General for the Commonwealth of Virginia. *Mark W. DeLaquil*, *Earle D. Getchell, Jr.*, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Virginia, *Andrew M. Grossman*, *David B. Rivkin, Jr.*, and *Robert D. Tambling*, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered appearances.

F. William Brownell and *Peter Keisler* argued the causes for Non-State Petitioners and Supporting Intervenors. With them on the briefs were *Norman W. Fichthorn*, *Henry V. Nickel*, *Allison D. Wood*, *Charles H. Knauss*, *Shannon S. Broome*, *Timothy K. Webster*, *Roger R. Martella*, *Eric Groten*, *Patrick R. Day*, *John A. Bryson*, *Matthew G. Paulson*, *John P. Elwood*, *Paul D. Phillips*, *James A. Holtkamp*, *Shannon L. Goessling*, *Harry W. MacDougald*, *William H. Lewis, Jr.*, *Ronald J. Tenpas*, *Gordon R. Alphonso*, *Edward A. Kazmarek*, *Chet M. Thompson*, *Neal J. Cabral*, *Scott C. Oostdyk*, *Richard P. Hutchison*, *John J. McMackin, Jr.*, *Robin S. Conrad*, *Sheldon Gilbert*, *Michael W. Steinberg*, *Levi McAllister*, *Jeffrey A. Rosen*, *Robert R. Gasaway*, *Jeffrey Bossert Clark*, *William H. Burgess*, *Ashley C. Parrish*, *Cynthia A.M. Stroman*, *Ellen Steen*,

Leslie Sue Ritts, Peter Glaser, Mark E. Nagle, Terry J. Satterlee, Thomas J. Grever, Margaret Claiborne Campbell, Bryon W. Kirkpatrick, Quentin Riegel, Elizabeth Gaudio, Elizabeth Henry Warner, Harry Moy Ng, Michele Marie Schoeppe, Thomas J. Ward, and Peter H. Wyckoff. Mark A. Behrens, Paul D. Clement, Matthew Dukes, Virginia L. Hudson, and David B. Salmons entered appearances.

Jonathan S. Massey was on the brief for amicus curiae Municipal Gas Commission of Missouri.

John G. Horne, II, Samuel B. Boxerman and Leslie A. Hulse were on the brief for amici curiae the Commonwealth of Kentucky and the American Chemistry Council in support of petitioners. Angus Macbeth entered an appearance.

Amanda Shafer Berman and Perry M. Rosen, Attorneys, U.S. Department of Justice, argued the causes for respondents. With them on the briefs were Howard Hoffman, Elliott Zenick, Brian Doster, and David Orlin, Counsel, U.S. Environmental Protection Agency. Thomas A. Lorenzen and Kim N. Smaczniak, Attorneys, U.S. Department of Justice, and John D. Gunter, II and Michele L. Walter, Counsel, U.S. Environmental Protection Agency, entered appearances.

Sean H. Donahue and Michael J. Myers argued the causes for State and Environmental Intervenors in support of respondents. With them on the briefs were Vickie L. Patton, Pamela A. Campos, Megan Ceronky, Petere Zalzal, Eric T. Schneiderman, Attorney General, Office of the Attorney General for the State of New York, Barbara D. Underwood, Solicitor General, Morgan A. Costello, Assistant Attorney General, Monica Wagner, Howard I. Fox, David S. Baron, Lisa Madigan, Attorney General, Office of the Attorney General for the State of Illinois, Gerald T. Karr, Assistant Attorney General, Joanne

Spalding, Nathan Matthews, Craig Holt Segall, Kamala D. Harris, Attorney General, Office of the Attorney General for the State of California, *Kathleen A. Kenealy*, Senior Assistant Attorney General, *Susan Durbin, Raissa Lerner, Marc N. Melnick*, and *Nicholas Stern*, Deputy Attorneys General, *Martha Coakley*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *William L. Pardee* and *Carol Iancu*, Assistant Attorneys General, *David Doniger, Meleah Geertsma, William J. Schneider*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Ried*, Assistant Attorney General, *Ann B. Weeks, Helen D. Silver, Thomas J. Miller*, Attorney General, Office of the Attorney General for the State of Iowa, *David R. Sheridan*, Assistant Attorney General, *Douglas F. Gansler*, Attorney General, Office of the Attorney General for the State of Maryland, *Mary Raivel*, Deputy Attorney General, *Michael A. Delaney*, Attorney General, Office of the Attorney General for the State of New Hampshire, *K. Allen Brooks*, Senior Assistant Attorney General, *Barbara Baird, William B. Wong, Peter F. Kilmartin*, Attorney General, Office of the Attorney General for the State of Rhode Island, *Gregory S. Schultz*, Special Assistant Attorney General, *Frank Rambo, Morgan Butler, Gary K. King*, Attorney General, Office of the Attorney General for the State of New Mexico, *Stephen Farris*, Assistant Attorney General, *John Kroger*, Attorney General, Office of the Attorney General for the State of Oregon, *Paul Logan*, Assistant Attorney-in-Charge, *Roy Cooper*, Attorney General, Office of the Attorney General for the State of North Carolina, and *J. Allen Jernigan* and *Marc Bernstein*, Special Deputy Attorneys General. *Kenneth P. Alex* and *Gavin G. McCabe*, Deputy Assistant Attorneys General, Office of the Attorney General for the State of California, entered appearances.

No. 10-1092

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

LANGBOARD, INC. - MDF, ET AL.,
INTERVENORS

Consolidated with 10-1094, 10-1134, 10-1143, 10-1144,
10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161,
10-1162, 10-1163, 10-1164, 10-1166, 10-1182

On Petitions for Review of Final Actions
of the Environmental Protection Agency

Peter Glaser argued the cause for petitioners. With him on the briefs were John P. Elwood, Eric Groten, Patrick R. Day, John A. Bryson, Shannon L. Goessling, Harry W. MacDougald, Paul D. Phillips, James A. Holtkamp, Edward A. Kazmarek, Chet M. Thompson, Sam Kazman, Hans Bader, Gordon R. Alphonso, Richard P. Hutchison, Neal J. Cabral, Scott C. Oostdyk, Ronald J. Tenpas, Michael W. Steinberg, Levi McAllister, John J. McMackin Jr., Robin S. Conrad, Rachel L. Brand, Sheldon Gilbert, F. William Brownell, Norman W. Fichthorn, Henry V. Nickel, Allison D. Wood, Ashley C. Parrish, Cynthia A.M. Stroman, Mark E. Nagle, Michael Higgins, Ellen

Steen, Timothy K. Webster, Roger R. Martella, Matthew G. Paulson, Charles H. Knauss, Shannon S. Broome, Quentin Riegel, Elizabeth Gaudio, Thomas J. Ward, Harry Moy Ng, and Michele Marie Schoeppe.

Greg Abbott, Attorney General, Office of the Attorney General for the State of Texas, Bill Cobb, Deputy Attorney General for Civil Litigation, Jonathan F. Mitchell, Solicitor General, J. Reed Clay Jr., Special Assistant and Senior Counsel to the Attorney General, Michael P. Murphy, Assistant Solicitor General, Luther Strange, Attorney General, Office of the Attorney General for the State of Alabama, Samuel S. Olenz, Attorney General, Office of the Attorney General for the State of Georgia, John E. Hennelly, Senior Assistant Attorney General, Gary C. Rikard, Jon C. Bruning, Attorney General, Office of the Attorney General for the State of Nebraska, Katherine J. Spohn, Special Counsel to the Attorney General, Wayne K. Stenehjem, Attorney General, Office of the Attorney General for the State of North Dakota, Margaret Olson, Assistant Attorney General, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, J. Emory Smith, Jr., Assistant Deputy Attorney General, Marty Jackley, Attorney General, Office of the Attorney General for the State of North Dakota, Roxanne Giedd, Chief, Civil Litigation Division, and Kenneth T. Cuccinelli, II, Attorney General, Office of the Attorney General for the Commonwealth of Virginia, were on the briefs for State Petitioners and Supporting Intervenor. Paul D. Clement, James W. Coleman, Wayne J. D'Angelo, Mark W. DeLaquil, E. Duncan Getchell Jr., Solicitor General, Office of the Attorney General for the Commonwealth of Virginia, Andrew M. Grossman, Virginia L. Hudson, David B. Rivkin Jr., and Robert D. Tambling, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered appearances.

Samuel B. Boxerman and *Leslie A. Hulse* were on the brief for *amicus curiae* American Chemistry Council in support of petitioners. *Angus Macbeth* entered an appearance.

Eric G. Hostetler, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were *John Hannon* and *Steven Silverman*, Attorneys, U.S. Environmental Protection Agency.

Raymond B. Ludwyszewski argued the cause for intervenors Association of Global Automakers, et al. With him on the brief were *Kathleen M. Sullivan*, *Sanford I. Weisburst*, and *William B. Adams*.

Gavin G. McCabe, Deputy Attorney General, Office of the Attorney General for the State of California, argued the cause for intervenor State of California. On the brief were *Kamala D. Harris*, Attorney General, *Kathleen A. Kenealy*, Senior Assistant Attorney General, *Marc N. Melnick* and *Nicholas Stern*, Deputy Attorneys General, *Sean H. Donahue*, *Howard I. Fox*, *David S. Baron*, *Pamela Campos*, *Megan Ceronsky*, *Vickie L. Patton*, *Peter Zalzal*, *Joseph R. Biden, III*, Attorney General, Office of the Attorney General for the State of Delaware, *Valerie M. Satterfield*, Deputy Attorney General, *Thomas J. Miller*, Attorney General, Office of the Attorney General for the State of Iowa, *David R. Sheridan*, Assistant Attorney General, *Douglas F. Gansler*, Attorney General, Office of the Attorney General for the State of Maryland, *Roberta R. James*, Assistant Attorney General, *Lisa Madigan*, Attorney General, Office of the Attorney General for the State of Illinois, *Gerald T. Karr*, Assistant Attorney General, *William T. Schneider*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Reid*, Assistant Attorney General, *Martha Coakley*, Attorney General, Office of the Attorney General for the

Commonwealth of Massachusetts, *Carol Iancu*, *Tracy Triplett*, and *William L. Pardee*, Assistant Attorneys General, *Gary K. King*, Attorney General, Office of the Attorney General for the State of New Mexico, *Stephen R. Farris*, Assistant Attorney General, *John Kroger*, Attorney General, Office of the Attorney General for the State of Oregon, *Paul Logan*, Assistant Attorney-in-Charge, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, *Thea J. Schwartz*, Assistant Attorney General, *Eric T. Schneiderman*, Attorney General, Office of the Attorney General for the State of New York, *Michael J. Myers* and *Yueh-Ru Chu*, Assistant Attorneys General, *Peter F. Kilmartin*, Attorney General, Office of the Attorney General for the State of Rhode Island, *Gregory S. Schultz*, Special Assistant Attorney General, *Robert M. McKenna*, Attorney General, Office of the Attorney General for the State of Washington, *Leslie R. Seffern*, Assistant Attorney General, *Christopher King*, Assistant Corporation Counsel, Corporation Counsel for the City of New York, *Joanne Spalding*, *Craig Holt Segall*, *David Doniger* and *Meleah Geertsma*. *Judith A. Stahl Moore*, Assistant Attorney General, Office of the Attorney General for the State of New Mexico, and *John D. Walke* entered appearances.

Richard E. Ayres, *Jessica L. Olson*, and *Kristin L. Hines* were on the brief for *amicus curiae* Honeywell International, Inc. in support of respondents.

Richard L. Revesz, *Michael A. Livermore*, and *Jennifer S. Rosenberg* were on the brief for *amicus curiae* Institute for Policy Integrity at New York University School of Law in support of respondents.

No. 10-1167

AMERICAN CHEMISTRY COUNCIL,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ
JACKSON, ADMINISTRATOR, U.S. ENVIRONMENTAL
PROTECTION AGENCY,
RESPONDENTS

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, ET AL.,
INTERVENORS

Consolidated with 10-1168, 10-1169, 10-1170, 10-1173,
10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179,
10-1180

On Petitions for Review of a Final Action
of the Environmental Protection Agency

Timothy K. Webster, Roger R. Martella, Jr., James W. Coleman, William H. Lewis, Jr., Ronald J. Tenpas, Charles H. Knauss, Shannon S. Broome, Bryan M. Killian, and Matthew G. Paulson were on the briefs for petitioners. Peter D. Keisler, Leslie A. Hulse, and Quentin Riegel entered appearances.

Amanda Shafer Berman and *Perry M. Rosen*, Attorneys, U.S. Department of Justice, and *Elliott Zenick* and *Howard J. Hoffman*, Counsel, U.S. Environmental Protection Agency, were on the brief for respondents. *Jon M. Lipshultz*, Senior Counsel, U.S. Department of Justice, entered and appearance.

Ann Brewster Weeks, *Sean H. Donahue*, *Vickie Patton*, *Peter Zalzal*, *Joanne Spalding*, *Craig Segall*, *David Doniger*, and *Meleah Geertsma* were on the brief of intervenors in support of respondents. *David S. Baron*, *Pamela A. Campos*, *Colin C. O'Brien*, and *John D. Walke* entered appearances.

Vera P. Pardee, *Brendan R. Cummings*, and *Kevin P. Bundy* were on the brief for *amicus curiae* Center for Biological Diversity in support of respondents.

Before: SENTELLE, *Chief Judge*; ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)—which clarified that greenhouse gases are an “air pollutant” subject to regulation under the Clean Air Act (CAA)—the Environmental Protection Agency promulgated a series of greenhouse gas-related rules. First, EPA issued an Endangerment Finding, in which it determined that greenhouse gases may “reasonably be anticipated to endanger public health or welfare.” *See* 42 U.S.C. § 7521(a)(1). Next, it issued the Tailpipe Rule, which set emission standards for cars and light trucks. Finally, EPA determined that the CAA requires major stationary sources of greenhouse gases to obtain construction and operating permits. But because immediate regulation of all such sources would result in overwhelming permitting burdens on permitting

authorities and sources, EPA issued the Timing and Tailoring Rules, in which it determined that only the largest stationary sources would initially be subject to permitting requirements.

Petitioners, various states and industry groups, challenge all these rules, arguing that they are based on improper constructions of the CAA and are otherwise arbitrary and capricious. But for the reasons set forth below, we conclude: 1) the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; 2) EPA's interpretation of the governing CAA provisions is unambiguously correct; and 3) no petitioner has standing to challenge the Timing and Tailoring Rules. We thus dismiss for lack of jurisdiction all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions.

I.

We begin with a brief primer on greenhouse gases. As their name suggests, when released into the atmosphere, these gases act "like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat." *Massachusetts v. EPA*, 549 U.S. at 505. A wide variety of modern human activities result in greenhouse gas emissions; cars, power plants, and industrial sites all release significant amounts of these heat-trapping gases. In recent decades "[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of [greenhouse gases] in the atmosphere." *Id.* at 504-05. Many scientists believe that mankind's greenhouse gas emissions are driving this climate change. These scientists predict that global climate change will cause a host of deleterious consequences, including drought, increasingly severe weather events, and rising sea levels.

The genesis of this litigation came in 2007, when the

Supreme Court held in *Massachusetts v. EPA* that greenhouse gases “unambiguous[ly]” may be regulated as an “air pollutant” under the Clean Air Act (“CAA”). *Id.* at 529. Squarely rejecting the contention—then advanced by EPA—that “greenhouse gases cannot be ‘air pollutants’ within the meaning of the Act,” *id.* at 513, the Court held that the CAA’s definition of “air pollutant” “embraces *all* airborne compounds of whatever stripe.” *Id.* at 529 (emphasis added). Moreover, because the CAA requires EPA to establish motor-vehicle emission standards for “*any* air pollutant . . . which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. § 7521(a)(1) (emphasis added), the Court held that EPA had a “statutory obligation” to regulate harmful greenhouse gases. *Id.* at 534. “Under the clear terms of the Clean Air Act,” the Court concluded, “EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* at 533. The Court thus directed EPA to determine “whether sufficient information exists to make an endangerment finding” for greenhouse gases. *Id.* at 534.

Massachusetts v. EPA spurred a cascading series of greenhouse gas-related rules and regulations. First, in direct response to the Supreme Court’s directive, EPA issued an Endangerment Finding for greenhouse gases. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. 66,496 (Dec. 15, 2009). The Endangerment Finding defined as a single “air pollutant” an “aggregate group of six long-lived and directly-emitted greenhouse gases” that are “well mixed” together in the atmosphere and cause global climate change: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.* at 66,536-37. Following “common practice,” EPA measured

the impact of these gases on a “carbon dioxide equivalent basis,” (CO₂e) which is based on the gases’ “warming effect relative to carbon dioxide . . . over a specified timeframe.” *Id.* at 66,519. (Using the carbon dioxide equivalent equation, for example, a mixture of X amount of nitrous oxide and Y amount of sulfur hexafluoride is expressed as Z amount of CO₂e). After compiling and considering a considerable body of scientific evidence, EPA concluded that motor-vehicle emissions of these six well-mixed gases “contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.” *Id.* at 66,499.

Next, and pursuant to the CAA’s requirement that EPA establish motor-vehicle emission standards for “any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. § 7521(a)(1), the agency promulgated its Tailpipe Rule for greenhouse gases. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule* (“Tailpipe Rule”), 75 Fed. Reg. 25,324 (May 7, 2010). Effective January 2, 2011, the Tailpipe Rule set greenhouse gas emission standards for cars and light trucks as part of a joint rulemaking with fuel economy standards issued by the National Highway Traffic Safety Administration (NHTSA). *Id.* at 25,326.

Under EPA’s longstanding interpretation of the CAA, the Tailpipe Rule automatically triggered regulation of stationary greenhouse gas emitters under two separate sections of the Act. The first, the Prevention of Significant Deterioration of Air Quality (PSD) program, requires state-issued construction permits for certain types of stationary sources—for example, iron and steel mill plants—if they have the potential to emit over 100 tons per year (tpy) of “any air pollutant.” *See* 42 U.S.C. § 7475; 7479(1). All other stationary sources are subject to PSD

permitting if they have the potential to emit over 250 tpy of “any air pollutant.” *Id.* § 7479(1). The second provision, Title V, requires state-issued operating permits for stationary sources that have the potential to emit at least 100 tpy of “any air pollutant.” *Id.* § 7602(j). EPA has long interpreted the phrase “any air pollutant” in both these provisions to mean any air pollutant that is regulated under the CAA. *See Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans* (“1980 Implementation Plan Requirements”), 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980) (PSD program); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (“Tailoring Rule”), 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010) (discussing history of Title V regulation and applicability). And once the Tailpipe Rule set motor-vehicle emission standards for greenhouse gases, they became a regulated pollutant under the Act, requiring PSD and Title V greenhouse permitting.

Acting pursuant to this longstanding interpretation of the PSD and Title V programs, EPA issued two rules phasing in stationary source greenhouse gas regulation. First, in the Timing Rule, EPA concluded that an air pollutant becomes “subject to regulation” under the Clean Air Act—and thus subject to PSD and Title V permitting—only once a regulation requiring control of that pollutant takes effect. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs* (“Timing Rule”), 75 Fed. Reg. 17,004 (Apr. 2, 2010). Therefore, EPA concluded, major stationary emitters of greenhouse gases would be subject to PSD and Title V permitting regulations on January 2, 2011—the date on which the Tailpipe Rule became effective, and thus, the date when greenhouse gases first became regulated under the CAA. *Id.* at 17,019.

Next, EPA promulgated the Tailoring Rule. In the Tailoring Rule, EPA noted that greenhouse gases are emitted in far greater volumes than other pollutants. Indeed, millions of industrial, residential, and commercial sources exceed the 100/250 tpy statutory emissions threshold for CO₂e. Tailoring Rule, 75 Fed. Reg. at 31,534-36. Immediately adding these sources to the PSD and Title V programs would, EPA predicted, result in tremendous costs to industry and state permitting authorities. *See id.* As a result, EPA announced that it was “relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources.” *Id.* at 31,516. Departing from the CAA’s 100/250 tpy emissions threshold, the Tailoring Rule provided that only the largest sources—those exceeding 75,000 or 100,000 tpy CO₂e, depending on the program and project—would initially be subject to greenhouse gas permitting. *Id.* at 31,523. (The Tailoring Rule further provided that regulated sources must also emit greenhouse gases at levels that exceed the 100/250 tpy emissions threshold on a *mass* basis. That is, they must emit over 100/250 tpy of actual pollutants, in addition to exceeding the 75,000/100,000 tpy carbon dioxide equivalent. *Id.* at 31,523.)

A number of groups—including states and regulated industries—filed petitions for review of EPA’s greenhouse gas regulations, contending that the agency misconstrued the CAA and otherwise acted arbitrarily and capriciously. This appeal consolidates the petitions for review of the four aforementioned rules: the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule.

“The Clean Air Act empowers us to reverse the Administrator’s action in rulemaking if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” *Med. Waste Inst. & Energy Recovery*

Council v. EPA, 645 F.3d 420, 424 (D.C. Cir. 2011) (quoting 42 U.S.C. § 7607(d)(9)(A)). Questions of statutory interpretation are governed by the familiar *Chevron* two-step: “First . . . if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

This opinion proceeds in several steps. Part II explains why the Endangerment Finding was neither arbitrary nor capricious, while Part III does the same for the Tailpipe Rule. Turning to stationary source regulation, Part IV examines whether any petitioners may timely challenge EPA’s longstanding interpretation of the PSD statute. Because we conclude that they may, Part V addresses the merits of their statutory arguments, and explains why EPA’s interpretation of the CAA was compelled by the statute. Next, Part VI explains why petitioners lack standing to challenge the Timing and Tailoring Rules themselves. Finally, Part VII disposes of several arguments that have nothing to do with the rules under review, and thus are not properly before us.

II.

We turn first to State and Industry Petitioners’ challenges to the Endangerment Finding, the first of the series of rules EPA issued after the Supreme Court remanded *Massachusetts v. EPA*. In the decision ordering the remand, the Supreme Court held that EPA had failed in its statutory obligations when it “offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”

Massachusetts v. EPA, 549 U.S. at 534. On remand, EPA compiled a substantial scientific record, which is before us in the present review, and determined that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” Endangerment Finding, 74 Fed. Reg. at 66,497. EPA went on to find that motor-vehicle emissions of greenhouse gases “contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.” *Id.* at 66,499.

State and Industry Petitioners challenge several aspects of EPA’s decision, including (1) EPA’s interpretation of CAA § 202(a)(1), which sets out the endangerment-finding standard; (2) the adequacy of the scientific record supporting the Endangerment Finding; (3) EPA’s decision not to “quantify” the risk of endangerment to public health or welfare created by climate change; (4) EPA’s choice to define the “air pollutant” at issue as an aggregate of six greenhouse gases; (5) EPA’s failure to consult its Science Advisory Board before issuing the Endangerment Finding; and (6) EPA’s denial of all petitions for reconsideration of the Endangerment Finding. We ultimately conclude that the Endangerment Finding is consistent with *Massachusetts v. EPA* and the text and structure of the CAA, and is adequately supported by the administrative record.

A.

Industry Petitioners contend that EPA improperly interpreted CAA § 202(a)(1) as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns and regulatory consequences. They assert that CAA § 202(a)(1) requires EPA to consider, *e.g.*, the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the

Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious.

These contentions are foreclosed by the language of the statute and the Supreme Court’s decision in *Massachusetts v. EPA*. Section 202(a) of the CAA states in relevant part that EPA’s Administrator

shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). This language requires that the endangerment evaluation “relate to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.’” *Massachusetts v. EPA*, 549 U.S. at 532–33. At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular “air pollution”—here, greenhouse gases—“may reasonably be anticipated to endanger public health or welfare,” and whether motor-vehicle emissions “cause, or contribute to” that endangerment.

These questions require a “scientific judgment” about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions. *Massachusetts v. EPA*, 549 U.S. at 534. In *Massachusetts v. EPA*, the Supreme Court rebuffed an attempt by EPA itself to inject considerations of

policy into its decision. At the time, EPA had “offered a laundry list of reasons not to regulate” greenhouse gases, including

that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President’s ability to negotiate with “key developing nations” to reduce emissions, and that curtailing motor-vehicle emissions would reflect “an inefficient, piecemeal approach to address the climate change issue.”

Id. at 533 (citations omitted). The Court noted that “these policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.” *Id.* at 533–34. In the Court’s view, EPA’s policy-based explanations contained “no reasoned explanation for [EPA’s] refusal to decide” the key part of the endangerment inquiry: “whether greenhouse gases cause or contribute to climate change.” *Id.* at 534.

As in *Massachusetts v. EPA*, a “laundry list of reasons not to regulate” simply has “nothing to do with whether greenhouse gas emissions contribute to climate change.” *Id.* at 533–34. The additional exercises State and Industry Petitioners would have EPA undertake—*e.g.*, performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society’s adaptive response to the dangers or harms caused by climate change—do not inform the “scientific judgment” that § 202(a)(1) requires of EPA. Instead of focusing on the question whether greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare, the factors State and Industry Petitioners put forth only address

what might happen were EPA to answer that question in the affirmative. As EPA stated in the Endangerment Finding, such inquiries “muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question.” 74 Fed. Reg. at 66,515. To be sure, the subsection following § 202(a)(1), § 202(a)(2), requires that EPA address limited questions about the cost of compliance with new emission standards and the availability of technology for meeting those standards, *see infra* Part III, but these judgments are not part of the § 202(a)(1) endangerment inquiry. The Supreme Court made clear in *Massachusetts v. EPA* that it was not addressing the question “whether policy concerns can inform EPA’s actions in the event that it makes such a finding,” 549 U.S. at 534–35, but that policy concerns were not part of the calculus for the determination of the endangerment finding in the first instance. The Supreme Court emphasized that it was holding “that EPA must ground its reasons for action or inaction in the statute.” *Id.* at 535. The statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute.

State and Industry Petitioners insist that because statutes should be interpreted to avoid absurd results, EPA should have considered at least the “absurd” consequences that would follow from an endangerment finding for greenhouse gases. Specifically: having made an endangerment finding, EPA will proceed to promulgate emission standards under § 202(a)(1). Issuing those standards triggers regulation—under EPA’s PSD and Title V programs—of stationary sources that emit greenhouse gases at levels above longstanding statutory thresholds. Because greenhouse gases are emitted in much higher volumes than other air pollutants, hundreds of thousands of small stationary sources would exceed those thresholds. This would subject those sources to PSD and Title V permitting

requirements despite what Petitioners claim was Congress's clear intent that the requirements apply only to large industrial sources. Petitioners assert that even EPA believed such overbroad regulation to be an absurd result, which it attempted to rectify by adopting the Tailoring Rule to raise the statutory thresholds, *see infra* Part VI.

However “absurd” Petitioners consider this consequence, though, it is still irrelevant to the endangerment inquiry. That EPA adjusted the statutory thresholds to accommodate regulation of greenhouse gases emitted by stationary sources may indicate that the CAA is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases. But the Supreme Court has already held that EPA indeed wields the authority to regulate greenhouse gases under the CAA. *See Massachusetts v. EPA*. The plain language of § 202(a)(1) of that Act does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding, even if the degree of regulation triggered might at a later stage be characterized as “absurd.”

B.

State and Industry Petitioners next challenge the adequacy of the scientific record underlying the Endangerment Finding, objecting to both the type of evidence upon which EPA relied and EPA's decision to make an Endangerment Finding in light of what Industry Petitioners view as significant scientific uncertainty. Neither objection has merit.

1.

As an initial matter, State and Industry Petitioners question EPA's reliance on “major assessments” addressing greenhouse gases and climate change issued by the Intergovernmental Panel

on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the National Research Council (NRC). Endangerment Finding, 74 Fed. Reg. at 66,510–11. These peer-reviewed assessments synthesized thousands of individual studies on various aspects of greenhouse gases and climate change and drew “overarching conclusions” about the state of the science in this field. *Id.* at 66,511. The assessments provide data and information on, *inter alia*, “the amount of greenhouse gases being emitted by human activities”; their continued accumulation in the atmosphere; the resulting observed changes to Earth’s energy balance, temperature and climate at global and regional levels, and other “climate-sensitive sectors and systems of the human and natural environment”; the extent to which these changes “can be attributed to human-induced buildup of atmospheric greenhouse gases”; “future projected climate change”; and “projected risks and impacts to human health, society and the environment.” *Id.* at 66,510–11.

State and Industry Petitioners assert that EPA improperly “delegated” its judgment to the IPCC, USGCRP, and NRC by relying on these assessments of climate-change science. *See U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). This argument is little more than a semantic trick. EPA did not delegate, explicitly or otherwise, any decision-making to any of those entities. EPA simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted. It makes no difference that much of the scientific evidence in large part consisted of “syntheses” of individual studies and research. Even individual studies and research papers often synthesize past work in an area and then build upon it. This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.

Moreover, it appears from the record that EPA used the assessment reports not as substitutes for its own judgment but as evidence upon which it relied to make that judgment. EPA evaluated the processes used to develop the various assessment reports, reviewed their contents, and considered the depth of the scientific consensus the reports represented. Based on these evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public health or welfare. Endangerment Finding, 74 Fed. Reg. at 66,510–11. It then reviewed those reports along with comments relevant to the scientific considerations involved to determine whether the evidence warranted an endangerment finding for greenhouse gases as it was required to do under the Supreme Court’s mandate in *Massachusetts v. EPA*.

2.

Industry Petitioners also assert that the scientific evidence does not adequately support the Endangerment Finding. As we have stated before in reviewing the science-based decisions of agencies such as EPA, “[a]lthough we perform a searching and careful inquiry into the facts underlying the agency’s decisions, we will presume the validity of agency action as long as a rational basis for it is presented.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (internal quotation marks omitted). In so doing, “we give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.” *Id.* (internal quotation marks omitted).

The body of scientific evidence marshaled by EPA in support of the Endangerment Finding is substantial. EPA’s scientific evidence of record included support for the proposition

that greenhouse gases trap heat on earth that would otherwise dissipate into space; that this “greenhouse effect” warms the climate; that human activity is contributing to increased atmospheric levels of greenhouse gases; and that the climate system is warming.

Based on this scientific record, EPA made the linchpin finding: in its judgment, the “root cause” of the recently observed climate change is “very likely” the observed increase in anthropogenic greenhouse gas emissions. Endangerment Finding, 74 Fed. Reg. at 66,518. EPA found support for this finding in three lines of evidence. First, it drew upon our “basic physical understanding” of the impacts of various natural and manmade changes on the climate system. For instance, EPA relied on evidence that the past half-century of warming has occurred at a time when natural forces such as solar and volcanic activity likely would have produced cooling. Endangerment Finding, Response to Comments (RTC) Vol. 3, at 20. Other evidence supports EPA’s conclusion that the observed warming pattern—warming of the bottommost layer of the atmosphere and cooling immediately above it—is consistent with greenhouse-gas causation. *Id.*

EPA further relied upon evidence of historical estimates of past climate change, supporting EPA’s conclusion that global temperatures over the last half-century are unusual. Endangerment Finding, 74 Fed. Reg. at 66,518. Scientific studies upon which EPA relied place high confidence in the assertion that global mean surface temperatures over the last few decades are higher than at any time in the last four centuries. Technical Support Document for the Endangerment Finding (TSD), at 31. These studies also show, albeit with significant uncertainty, that temperatures at many individual locations were higher over the last twenty-five years than during any period of comparable length since 900 A.D. *Id.*

For its third line of evidence that anthropogenic emissions of greenhouse gases spurred the perceived warming trend, EPA turned to computer-based climate-model simulations. Scientists have used global climate models built on basic principles of physics and scientific knowledge about the climate to try to simulate the recent climate change. These models have only been able to replicate the observed warming by including anthropogenic emissions of greenhouse gases in the simulations. Endangerment Finding, 74 Fed. Reg. at 66,523.

To recap, EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases “very likely” caused warming of the climate over the last several decades. EPA further had evidence of current and future effects of this warming on public health and welfare. Relying again upon substantial scientific evidence, EPA determined that anthropogenically induced climate change threatens both public health and public welfare. It found that extreme weather events, changes in air quality, increases in food- and water-borne pathogens, and increases in temperatures are likely to have adverse health effects. *Id.* at 66,497–98. The record also supports EPA’s conclusion that climate change endangers human welfare by creating risk to food production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife. Substantial evidence further supported EPA’s conclusion that the warming resulting from the greenhouse gas emissions could be expected to create risks to water resources and in general to coastal areas as a result of expected increase in sea level. *Id.* at 66,498. Finally, EPA determined from substantial evidence that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare.

Industry Petitioners do not find fault with much of the substantial record EPA amassed in support of the Endangerment

Finding. Rather, they contend that the record evidences too much uncertainty to support that judgment. But the existence of some uncertainty does not, without more, warrant invalidation of an endangerment finding. If a statute is “precautionary in nature” and “designed to protect the public health,” and the relevant evidence is “difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge,” EPA need not provide “rigorous step-by-step proof of cause and effect” to support an endangerment finding. *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). As we have stated before, “Awaiting certainty will often allow for only reactive, not preventive, regulation.” *Id.* at 25.

Congress did not restrict EPA to remedial regulation when it enacted CAA § 202(a). That section mandates that EPA promulgate new emission standards if it determines that the air pollution at issue “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). This language requires a precautionary, forward-looking scientific judgment about the risks of a particular air pollutant, consistent with the CAA’s “precautionary and preventive orientation.” *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980). Requiring that EPA find “certain” endangerment of public health or welfare before regulating greenhouse gases would effectively prevent EPA from doing the job Congress gave it in § 202(a)—utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm. *Cf. id.* (“[R]equiring EPA to wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts is inconsistent with both the [CAA]’s precautionary and preventive orientation and the nature of the Administrator’s statutory responsibilities. Congress provided that the Administrator is to use his judgment in setting air quality standards precisely to permit him to act in the face of uncertainty.”).

In *Massachusetts v. EPA* the Supreme Court confirmed that EPA may make an endangerment finding despite lingering scientific uncertainty. Indeed, the Court held that the existence of “some residual uncertainty” did not excuse EPA’s decision to decline to regulate greenhouse gases. *Massachusetts v. EPA*, 549 U.S. at 534. To avoid regulating emissions of greenhouse gases, EPA would need to show “scientific uncertainty . . . so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.” *Id.* Clearly, then, EPA may issue an endangerment finding even while the scientific record still contains at least “some residual uncertainty.” Industry Petitioners have shown no more than that.

In the end, Petitioners are asking us to re-weigh the scientific evidence before EPA and reach our own conclusion. This is not our role. As with other reviews of administrative proceedings, we do not determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence when considered on the record as a whole. *See, e.g., New York v. EPA*, 413 F.3d 3, 30 (D.C. Cir. 2005). When EPA evaluates scientific evidence in its bailiwick, we ask only that it take the scientific record into account “in a rational manner.” *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981). Industry Petitioners have not shown that EPA failed to do so here.

C.

State Petitioners, here led by Texas, contend that the Endangerment Finding is arbitrary and capricious because EPA did not “define,” “measure,” or “quantify” either the atmospheric concentration at which greenhouse gases endanger public health or welfare, the rate or type of climate change that it anticipates will endanger public health or welfare, or the risks

or impacts of climate change. According to Texas, without defining these thresholds and distinguishing “safe” climate change from climate change that endangers, EPA’s Endangerment Finding is just a “subjective conviction.”

It is true that EPA did not provide a quantitative threshold at which greenhouse gases or climate change will endanger or cause certain impacts to public health or welfare. The text of CAA § 202(a)(1) does not require that EPA set a precise numerical value as part of an endangerment finding. Quite the opposite; the § 202(a)(1) inquiry necessarily entails a case-by-case, sliding-scale approach to endangerment because “[d]anger . . . is not set by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability and severity.” *Ethyl*, 541 F.2d at 18. EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers. It may base an endangerment finding on “a lesser risk of greater harm . . . or a greater risk of lesser harm” or any combination in between. *Id.*

Ethyl is instructive. There, EPA made an endangerment finding for airborne lead. During its endangerment inquiry, EPA initially tried to do what Texas asks of it here: find a specific concentration of the air pollutant below which it would be considered “safe” and above which it would endanger public health. *Id.* at 56. However, EPA abandoned that approach because it failed to account for “the wide variability of dietary lead intake” and lacked predictive value. EPA substituted a “more qualitative” approach, which relied on “predictions based on uncertain data” along with clinical studies. *Id.* at 56–57. This court upheld the endangerment finding that used that qualitative approach despite the lack of a specific endangerment “threshold.”

In its essence, Texas’s call for quantification of the

endangerment is no more than a specialized version of Industry Petitioners' claim that the scientific record contains too much uncertainty to find endangerment. EPA relied on a substantial record of empirical data and scientific evidence, making many specific and often quantitative findings regarding the impacts of greenhouse gases on climate change and the effects of climate change on public health and welfare. Its failure to distill this ocean of evidence into a specific number at which greenhouse gases cause "dangerous" climate change is a function of the precautionary thrust of the CAA and the multivariate and sometimes uncertain nature of climate science, not a sign of arbitrary or capricious decision-making.

D.

EPA defined both the "air pollution" and the "air pollutant" that are the subject of the Endangerment Finding as an aggregate of six greenhouse gases, which EPA called "well mixed greenhouse gases": carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). Industry Petitioners argue that EPA's decision to include PFCs and SF₆ in this group of greenhouse gases was arbitrary and capricious primarily because motor vehicles generally do not emit these two gases.

No petitioner for review of the Endangerment Finding has established standing to make this argument. Industry Petitioners concede that EPA's decision to regulate PFCs and SF₆ along with the other four greenhouse gases does not injure any motor-vehicle-related petitioner. Nor has any non-motor-vehicle-related petitioner shown an injury-in-fact resulting from EPA's inclusion of these two gases in the six-gas amalgam of "well-mixed greenhouse gases." At oral argument, Industry Petitioners asserted for the first time that certain utility

companies—members of associations that petitioned for review of the Endangerment Finding—own utility transformers that emit SF₆. However, they never demonstrated or even definitively asserted that any of these companies would not be subject to regulation or permitting requirements but for EPA’s decision to include SF₆ as part of the “well-mixed greenhouse gases” that are the subject of the Endangerment Finding. *See Sierra Club v. EPA*, 292 F.3d 895, 898–900 (D.C. Cir. 2002) (requiring that a petitioner seeking review of agency action demonstrate standing by affidavit or other evidence if standing is not “self-evident” from the administrative record). Absent a petitioner with standing to challenge EPA’s inclusion of PFCs and SF₆ in the “air pollution” at issue, this court lacks jurisdiction to address the merits of Industry Petitioners’ contention.

E.

EPA did not submit the Endangerment Finding for review by its Science Advisory Board (SAB). Industry Petitioners claim that EPA’s failure to do so violates its mandate to “make available” to the SAB “any proposed criteria document, standard, limitation, or regulation under the Clean Air Act” at the time it provides the same “to any other Federal agency for formal review and comment.” 42 U.S.C. § 4365(c)(1); *see Am. Petroleum Inst.*, 665 F.2d at 1188.

To begin with, it is not clear that EPA provided the Endangerment Finding “to any other Federal agency for formal review and comment,” which triggers this duty to submit a regulation to the SAB. EPA only submitted a draft of the Endangerment Finding to the Office of Information and Regulatory Affairs pursuant to Executive Order 12,866. EPA contends that this was merely an *informal* review process, not “formal review and comment”—at least when compared with a

statutory review-and-comment requirement in which other agencies are given the opportunity to provide written comments about the impacts of a proposed regulation on the reviewing agency's universe of responsibility. *See, e.g.*, 49 U.S.C. § 32902(j). Industry Petitioners failed to respond to this contention.

In any event, even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was “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.” 42 U.S.C. § 7607(d)(8); *see Am. Petroleum Inst.*, 665 F.2d at 1188–89 (applying this standard to EPA's failure to submit an ozone standard to the SAB).

F.

Lastly, State Petitioners maintain that EPA erred by denying all ten petitions for reconsideration of the Endangerment Finding. Those petitions asserted that internal e-mails and documents released from the University of East Anglia's Climate Research Unit (CRU)—a contributor to one of the global temperature records and to the IPCC's assessment report—undermined the scientific evidence supporting the Endangerment Finding by calling into question whether the IPCC scientists adhered to “best science practices.” *EPA's Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Reconsideration Denial”), 75 Fed. Reg. 49,556, 49,556–57 (Aug. 13, 2010). The petitions pointed to factual mistakes in the IPCC's assessment report

resulting from the use of non-peer-reviewed studies and several scientific studies postdating the Endangerment Finding as evidence that the Endangerment Finding was flawed. *Id.*

On August 13, 2010, EPA issued a denial of the petitions for reconsideration accompanied by a 360-page response to petitions (RTP). *Id.* at 49,556. It determined that the petitions did not provide substantial support for the argument that the Endangerment Finding should be revised. According to EPA, the petitioners' claims based on the CRU documents were exaggerated, contradicted by other evidence, and not a material or reliable basis for questioning the credibility of the body of science at issue; two of the factual inaccuracies alleged in the petitions were in fact mistakes, but both were "tangential and minor" and did not change the key IPCC conclusions; and the new scientific studies raised by some petitions were either already considered by EPA, misinterpreted or misrepresented by petitioners, or put forth without acknowledging other new studies. *Id.* at 49,557–58.

1.

EPA is required to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule

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.

42 U.S.C. § 7607(d)(7)(B). For the purpose of determining whether to commence reconsideration of a rule, EPA considers

an objection to be of “central relevance to the outcome” of that rule “if it provides substantial support for the argument that the regulation should be revised.” Reconsideration Denial, 75 Fed. Reg. at 49,561.

State Petitioners have not provided substantial support for their argument that the Endangerment Finding should be revised. State Petitioners point out that some studies the IPCC referenced in its assessment were not peer-reviewed, but they ignore the fact that (1) the IPCC assessment relied on around 18,000 studies that were peer-reviewed, and (2) the IPCC’s report development procedures expressly permitted the inclusion in the assessment of some non-peer-reviewed studies (“gray” literature).

Moreover, as EPA determined, the limited inaccurate information developed from the gray literature does not appear sufficient to undermine the substantial overall evidentiary support for the Endangerment Finding. State Petitioners have not, as they assert, uncovered a “pattern” of flawed science. Only two of the errors they point out seem to be errors at all, and EPA relied on neither in making the Endangerment Finding. First, as State Petitioners assert, the IPCC misstated the percentage of the Netherlands that is below sea level, a statistic that was used for background information. However, the IPCC corrected the error, and EPA concluded that the error was “minor and had no impact,” and the Endangerment Finding did not refer to the statistic in any way. *Id.* at 49,576–77. Second, the IPCC acknowledged misstating the rate at which Himalayan glaciers are receding. EPA also did not rely on that projection in the Endangerment Finding. *Id.* at 49,577.

State Petitioners also contend that a new study contradicts EPA’s reliance on a projection of more violent storms in the future as a result of climate change, but the study they cite only

concerns past trends, not projected future storms. The record shows that EPA considered the new studies on storm trends and concluded that the studies were consistent with the Endangerment Finding. In sum, State Petitioners have failed to show that these isolated “errors” provide substantial support for their argument to overturn the Endangerment Finding.

2.

State Petitioners’ further argument that EPA erred in denying reconsideration fails as well. These Petitioners claim EPA erred by failing to provide notice and comment before denying the petitions for reconsideration because EPA’s inclusion of a 360-page RTP amounted to a revision of the Endangerment Finding, and revision of a rule requires notice and comment. The RTP, however, appears to be exactly what EPA called it—a response to the petitions for reconsideration, not a revision of the Endangerment Finding itself. EPA certainly may deny petitions for reconsideration of a rule and provide an explanation for that denial, including by providing support for that decision, without triggering a new round of notice and comment for the rule.

III.

State and Industry Petitioners contend that in promulgating the Tailpipe Rule, EPA relied on an improper interpretation of CAA § 202(a)(1), and was arbitrary and capricious in failing to justify and consider the cost impacts of its conclusion that the Rule triggers stationary-source regulation under the PSD and Title V provisions. They do not challenge the substantive standards of the Rule and focus principally on EPA’s failure to consider the cost of stationary-source permitting requirements triggered by the Rule. Positing an absurd-consequences scenario, Petitioners maintain that if EPA had considered these

costs it “would have been forced” to exclude carbon dioxide from the scope of the emission standards, to decline to issue greenhouse gas emission standards at all, or “to interpret the statute so as not to automatically trigger stationary source regulation.” Industry Tailpipe Br. 17; *see also* Industry Tailpipe Reply Br. 8–9. Both the plain text of Section 202(a) and precedent refute Petitioners’ contentions.

A.

Section 202(a)(1) provides:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). By employing the verb “shall,” Congress vested a non-discretionary duty in EPA. *See Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011). The plain text of Section 202(a)(1) thus refutes Industry Petitioners’ contention that EPA had discretion to defer issuance of motor-vehicle emission standards on the basis of stationary-source costs. Neither the adjacent text nor the statutory context otherwise condition this clear “language of command,” *id.* (citation omitted). Having made the Endangerment Finding pursuant to CAA § 202(a), 42 U.S.C. § 7521(a), EPA lacked discretion to defer promulgation of the Tailpipe Rule on the basis of its trigger of stationary-source permitting requirements under the PSD program and Title V.

The Supreme Court’s decision in *Massachusetts v. EPA*

compels this interpretation of Section 202(a)(1). “If EPA makes a finding of endangerment, the Clean Air Act requires the [a]gency to regulate emissions of the deleterious pollutant from new motor vehicles.” 549 U.S. at 533. “Under the clear terms of the Clean Air Act, EPA can avoid taking further action *only if* it determines that greenhouse gases do not contribute to climate change *or if* it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* (emphasis added). In the Endangerment Finding, EPA determined that motor-vehicle emissions contribute to greenhouse gas emissions that, in turn, endanger the public health and welfare; the agency therefore was in no position to “avoid taking further action,” *id.*, by deferring promulgation of the Tailpipe Rule. Given the non-discretionary duty in Section 202(a)(1) and the limited flexibility available under Section 202(a)(2), which this court has held relates only to the motor-vehicle industry, *see infra* Part III.C, EPA had no statutory basis on which it could “ground [any] reasons for” further inaction, *Massachusetts v. EPA*, 549 U.S. at 535.

The plain text of Section 202(a)(1) also negates Industry Petitioners’ contention that EPA had discretion to defer the Tailpipe Rule on the basis of NHTSA’s authority to regulate fuel economy. The Supreme Court dismissed a near-identical argument in *Massachusetts v. EPA*, rejecting the suggestion that EPA could decline to regulate carbon-dioxide emissions because the Department of Transportation (DOT) had independent authority to set fuel-efficiency standards. *Id.* at 531–32. “[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities,” because EPA’s duty to promulgate emission standards derives from “a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.” *Id.* at 532. Just as EPA lacks authority to refuse to regulate on the grounds of NHTSA’s regulatory authority, EPA cannot defer regulation on that basis. A

comparison of the relevant statutes bolsters this conclusion. Compare 49 U.S.C. § 32902(f) (“When deciding maximum feasible average fuel economy . . . , the Secretary of Transportation shall consider . . . the effect of other motor vehicle standards of the Government on fuel economy . . .”), with 42 U.S.C. § 7521(a) (including no such direction). Nor, applying the same reasoning, was EPA required to treat NHTSA’s proposed regulations as establishing the baseline for the Tailpipe Rule. Furthermore, the Tailpipe Rule provides benefits above and beyond those resulting from NHTSA’s fuel-economy standards. See, e.g., Tailpipe Rule, 75 Fed. Reg. at 25,490 (Table III.F.1-2), 25,636 (Table IV.G.1-4). Petitioners’ related contentions regarding the PSD permitting triggers are addressed in Part V.

B.

Turning to the APA, Industry Petitioners contend, relying on *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 525 (D.C. Cir. 1983), and *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), that EPA failed both to justify the Tailpipe Rule in terms of the risk identified in the Endangerment Finding and to show that the proposed standards “would meaningfully mitigate the alleged endangerment,” Industry Tailpipe Br. 35. Instead, they maintain that EPA “separated these two integral steps,” *id.* at 11, and “concluded that it had no obligation to show . . . ‘the resulting emissions control strategy or strategies will have some significant degree of harm reduction or effectiveness in addressing the endangerment,’” *id.* at 11–12 (quoting Endangerment Finding, 74 Fed. Reg. at 66,508). These contentions fail.

Petitioners’ reliance on *Small Refiner*, 705 F.2d at 525, is misplaced; the court there laid out guidelines for assessing

EPA's discretion to set numerical standards and Petitioners do not challenge the substance of the emission standards. In *Ethyl*, 541 F.2d at 7, the court assessed the scope of EPA's authority, under CAA § 211(c)(1), 42 U.S.C. § 1857f-6c(c)(1) (1970) (*currently codified as amended at* 42 U.S.C. § 7545(c)(1)), to regulate lead particulate in motor-vehicle emissions. The court rejected the argument that the regulations had to "be premised upon factual proof of actual harm," *Ethyl*, 541 F.2d at 12, and instead deferred to EPA's reasonable interpretation that regulations could be based on a "significant risk of harm," *id.* at 13. Nothing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required. EPA made such a determination in the Endangerment Finding, concluding that vehicle emissions are a significant contributor to domestic greenhouse gas emissions. *See, e.g.*, Endangerment Finding, 74 Fed. Reg. at 66,499. Further, in the preamble to the Tailpipe Rule itself, EPA found that the emission standards would result in meaningful mitigation of greenhouse gas emissions. For example, EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO₂e emissions over the lifetime of the model year 2012–2016 vehicles affected by the new standards. *See* Tailpipe Rule, 75 Fed. Reg. at 25,488–90. Other precedent is likewise unhelpful to Petitioners: in *Chemical Manufacturers Association v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000), "nothing in the record" indicated that the challenged regulatory program would "directly or indirectly, further the Clean Air Act's environmental goals," whereas here the record is fulsome, *see supra* Part II.

C.

Petitioners also invoke Section 202(a)(2) as support for their contention that EPA must consider stationary-source costs in the Tailpipe Rule. Section 202(a)(2) provides:

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

42 U.S.C. § 7521(a)(2). State Petitioners maintain the reference to compliance costs encompasses those experienced by stationary sources under the PSD program, while Industry Petitioners maintain stationary-source costs are a relevant factor in EPA's Section 202(a)(1) rulemaking. This court, however, has held that the Section 202(a)(2) reference to compliance costs encompasses only the cost to the motor-vehicle industry to come into compliance with the new emission standards, and does not mandate consideration of costs to other entities not directly subject to the proposed standards. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979).

D.

Petitioners' remaining challenges to the Tailpipe Rule fail as well. In Part II, the court rejects the contention that the Tailpipe Rule fails due to flaws in the underlying Endangerment Finding. The record also refutes Industry Petitioners' suggestion that EPA "employed a shell game to avoid," Industry Tailpipe Reply Br. 9 (capitalization removed), responding to comments regarding stationary-source costs. Industry Tailpipe Br. 19–20; *see also* Industry Tailpipe Reply Br. 14–15. EPA adequately responded to "significant comments," 42 U.S.C. § 7607(d)(6)(B). *See, e.g.*, Tailpipe Rule, 75 Fed. Reg. at 25,401–02; Tailpipe Rule, Response to Comments at 7-65 to 7-69. And, assuming other statutory mandates provide a basis for judicial review, *see* Industry Tailpipe Br. 21–22 (listing mandates); *see, e.g.*, *Small Refiner*, 705 F.2d at 537–39, the

record shows EPA's compliance, *see* Tailpipe Rule, 75 Fed. Reg. at 25,539–42, and that EPA was not arbitrary and capricious by not considering stationary-source costs in its analyses. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 341–42 (D.C. Cir. 1985). EPA's economic impact assessment conducted pursuant to CAA § 317, 42 U.S.C. § 7617, does not provide grounds for granting the petitions because Petitioners' contentions that EPA, "[i]n defiance of these requirements, . . . refused to estimate or even consider the costs of the [Tailpipe Rule] for stationary sources," Industry Tailpipe Br. 22, are no more than another attempt to avoid the plain text of Section 202(a). *See also* 42 U.S.C. § 7617(e).

IV.

We turn next to the stationary source regulations. As noted *supra* in Part I, EPA's interpretation of the CAA requires PSD and Title V permits for stationary sources whose potential emissions exceed statutory thresholds for *any* regulated pollutant—including greenhouse gases. Industry Petitioners now challenge EPA's longstanding interpretation of the scope of the permitting requirements for construction and modification of major emitting facilities under CAA Sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a) & 7479(1) ("the PSD permitting triggers"). EPA maintains that this challenge is untimely because its interpretation of the PSD permitting triggers was set forth in its 1978, 1980, and 2002 Rules.

In 1978, EPA defined "major stationary source" as a source that emits major amounts of "any air pollutant regulated under the [CAA]." *Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration* ("1978 Implementation Plan Requirements"), 43 Fed. Reg. 26,380, 26,382 (June 19,

1978). Industry petitioners' challenge to the 1978 Rule in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) reflected their understanding that EPA would apply the PSD permitting program to both pollutants regulated pursuant to National Ambient Air Quality Standards (NAAQS) and other regulated pollutants. *See* Br. for Industry Pet'rs on Regulation of Pollutants other than Sulfur Dioxide and Particulates, No. 78-1006 (and consolidated cases) (Dec. 19, 1978) at 10, 12. In the 1980 Rule, EPA highlighted that to be subject to PSD review, a "source need only emit *any* pollutant in major amounts (i.e., the amounts specified in [CAA § 169(1)]) and be located in an area designated attainment or unclassifiable for that or any other pollutant." 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,711 (emphasis in original). EPA explained that "*any* pollutant" meant "both criteria pollutants, for which national ambient air quality standards have been promulgated, and non-criteria pollutants subject to regulation under the Act." *Id.* The same explanation of EPA's interpretation appeared in the 2002 Rule. *Prevention of Significant Deterioration and Nonattainment New Source Review*, 67 Fed. Reg. 80,186, 80,239-40, 80,264 (Dec. 31, 2002).

CAA Section 307(b)(1) provides that a petition for review of any promulgated nationally applicable regulations:

"shall be filed within sixty days from the date notice of such promulgation . . . 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 . . . shall be filed within sixty days after such grounds arise."

42 U.S.C. § 7607(b)(1). The exception encompasses the occurrence of an event that ripens a claim. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 208 n.14 (D.C. Cir. 2011);

Am. Rd. & Transp. Builders Ass'n v. EPA, 588 F.3d 1109, 1113 (D.C. Cir. 2009). EPA acknowledges this precedent, but maintains that the “new grounds” exception is narrow and inapplicable because Industry Petitioners’ challenge to EPA’s interpretation of the PSD permitting triggers is based on legal arguments that were available during the normal judicial review periods for the 1978, 1980, and 2002 Rules, and the “new ground” on which they now rely is a factual development, namely the regulation of greenhouse gases by the Tailpipe Rule. This is correct so far as it goes, but fails to demonstrate that Industry Petitioners’ challenge is untimely.

Industry Petitioners point out that two petitioners—the National Association of Home Builders (NAHB) and National Oilseed Processors Association (NOPA) – have newly ripened claims as a result of the Tailpipe Rule, which had the effect of expanding the PSD program to never-regulated sources:

- NAHB’s members construct single family homes, apartment buildings, and commercial buildings. According to the Vice President of Legal Affairs, prior to the Tailpipe Rule, no member of NAHB was a major source of any regulated pollutant, and thus no member was ever required to obtain a PSD permit. Decl. of Thomas J. Ward, Vice President of Legal Affairs for NAHB, ¶ 6 (May 10, 2011). Since the Tailpipe Rule rendered greenhouse gases a regulated pollutant, it is now certain that NAHB members that engage in construction projects that emit greenhouse gases in major amounts will have to obtain PSD permits sometime in the future. *Id.* at ¶¶ 7, 8. Indeed, EPA estimated that 6,397 multifamily buildings and 515 single family homes would trigger PSD review annually absent the Tailoring Rule. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule* (“Proposed Tailoring Rule”), 74 Fed. Reg.

55,292, 55,338 (Oct. 27, 2009).

- NOPA's members are large companies that monthly produce millions of tons of vegetable meals and over a billion pounds of oils from oilseeds, such as soybeans. *See, e.g.*, NOPA, January 2012 Statistical Report (Feb. 14, 2012) *available at* www.nopa.org; NOPA, February 2012 Statistical Report (Mar. 14, 2012), *available at* www.nopa.org. According to the Executive Vice President of Regulatory Affairs, NOPA members operate facilities that are major sources of criteria pollutants and, for this reason, are subject to PSD review. Decl. of David C. Ailor, Executive Vice President of Regulatory Affairs of NOPA, ¶ 8 (May 10, 2011). Prior to promulgation of the Tailpipe Rule, no member's facility had triggered PSD review by virtue of emissions of a non-criteria pollutant. *Id.* Now that greenhouse gases are a regulated non-criteria pollutant, many NOPA members will have to obtain PSD permits as result of their facilities' emissions of a non-criteria pollutant. *Id.* at ¶¶ 9,10. For some NOPA members this time is not far off because renovations to their facilities will result in greenhouse gas emissions above the significance thresholds set by the Tailoring Rule, 75 Fed. Reg. at 31,567. *Id.* at ¶ 9.

Industry Petitioners thus maintain that because NAHB and NOPA filed their petitions on July 6, 2010, within 60 days of the promulgation of the Tailpipe Rule in the Federal Register on May 7, 2010, their challenges are timely.

“Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.” *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). During an initial review

period, although purely legal claims may be justiciable and, thus, prudentially ripe, a party without an immediate or threatened injury lacks a constitutionally ripe claim. *See Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 149 (D.C. Cir. 1982). EPA's position would conflate the constitutional and prudential considerations. Constitutional ripeness exists where a challenge "involve[s], at least in part, the existence of a live 'Case or Controversy.'" *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81 (1978). Prudential considerations embodied in the ripeness doctrine relate to "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see Duke Power*, 438 U.S. at 81. Standing to challenge agency action exists where a petitioner can demonstrate an "injury in fact" that is fairly traceable to the challenged action and is likely to be redressed by a favorable judicial decision. *Reytblatt v. NRC*, 105 F.3d 715, 721 (D.C. Cir. 1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Had NAHB and NOPA challenged EPA's interpretation of the PSD permitting triggers in 1978, 1980, or 2002, as EPA suggests, the court would have lacked jurisdiction under Article III of the Constitution because their alleged injuries were only speculative. *See, e.g., Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012); *Baltimore Gas & Elec. Co.*, 672 F.2d at 149. At that time, NAHB and NOPA could have shown only the possibility that their members would be injured if EPA were someday to determine that greenhouse gases were a pollutant that endangers human health and welfare and to adopt a rule regulating the greenhouse gas emissions of stationary sources. EPA does not challenge the assertions in the NAHB and NOPA declarations, which establish no such rule was promulgated prior to the Tailpipe Rule.

The NAHB and NOPA challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of the “substantial probability” of injury to them. *See Baltimore Gas & Elec. Co.*, 672 F.2d at 149. Although, as EPA notes, other Industry Petitioners’ challenges to EPA’s interpretation of the PSD permitting triggers ripened decades earlier, this court has assured petitioners with unripe claims that “they will not be foreclosed from judicial review when the appropriate time comes,” *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 473 (D.C. Cir. 1998), and that they “need not fear preclusion by reason of the 60-day stipulation [barring judicial review],” *Baltimore Gas & Elec. Co.*, 672 F.2d at 149–50. EPA expresses concern that allowing NAHB and NOPA to litigate their newly ripened claims will have far-reaching implications for finality of agency actions, but “the ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – . . . litigation.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998). Some limitations inhere in doctrines such as *stare decisis* or the law-of-the-circuit doctrine, *see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

Because petitioners NAHB and NOPA’s challenges to EPA’s PSD permitting triggers are newly ripened upon promulgation of the Tailpipe Rule and they filed petitions for review within sixty days thereof, their challenge to EPA’s interpretation of the PSD permitting triggers is timely.

V.

Having established that Industry Petitioners’ challenges to the PSD permitting triggers are both timely and ripe, we turn to the merits of their claims.

A.

CAA Title I, Part C—entitled “Prevention of Significant Deterioration of Air Quality” (PSD)—largely focuses on the maintenance of national ambient air quality standards (NAAQS). Under the PSD program, EPA designates specific pollutants as “NAAQS pollutants” and sets national ambient air quality standards for those pollutants—requiring, for example, that the concentration of a given NAAQS pollutant may not exceed more than a certain number of parts per billion in the ambient air. *See generally* 42 U.S.C. § 7407. Thus far, EPA has designated six NAAQS pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. None of these NAAQS pollutants is one of the six well-mixed greenhouse gases defined as an “air pollutant” in the Endangerment Finding. *See* Environmental Protection Agency, National Ambient Air Quality Standards, *available at* <http://www.epa.gov/air/criteria.html> (last visited May 3, 2012); Endangerment Finding, 74 Fed. Reg. 66,536-37.

Acting upon information submitted by states, EPA then determines whether each region of the country is in “attainment” or “nonattainment” with the promulgated air quality standard for each NAAQS pollutant, or, alternatively, whether a region is “unclassifiable” for that pollutant. 42 U.S.C. § 7407(d)(1)(A). An area in attainment for a NAAQS pollutant is “any area . . . that meets the . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(ii). By contrast, an area in nonattainment for a NAAQS pollutant is “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(i). Finally, an unclassifiable area is any area that “cannot be classified on the basis of available information as meeting or not meeting the . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(iii).

The PSD program applies to those areas of the United States designated as in “attainment” or “unclassifiable” for any NAAQS pollutant, *see id.* § 7471, and requires permits for major emitting facilities embarking on construction or modification projects in those regions. *Id.* § 7475(a). A separate part of Title I of the CAA, Part D, governs the construction and modification of sources in nonattainment regions. *See id.* §§ 7501, 7502. It bears emphasis that attainment classifications are pollutant-specific: depending on the levels of each NAAQS pollutant in an area, a region can be designated as in attainment for NAAQS pollutant A, but in nonattainment for NAAQS pollutant B. If a major emitting facility in such a region wishes to undertake a construction or modification project, both Part C and Part D’s substantive requirements apply—that is, the source must obtain a general PSD permit and must also abide by Part D’s more stringent, pollutant-specific requirements for any NAAQS pollutants for which the area is in nonattainment. *See* 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,711-12 (“where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment, Part D NSR rather than Part C PSD review should apply *to those pollutants.*”) (emphasis added).

The key substantive provision in the PSD program is CAA Section 165(a), which establishes permitting requirements for “major emitting facilities” located in attainment or unclassifiable regions. In relevant part, section 165(a) provides that “[n]o major emitting facility . . . may be constructed in any area to which this part applies unless” the facility obtains a PSD permit. 42 U.S.C. § 7475(a). To obtain a PSD permit, a covered source must, among other things, install the “best available control technology [BACT] for each pollutant subject to regulation under [the CAA]”—regardless of whether that pollutant is a NAAQS pollutant. *Id.* § 7475(a)(4). Since the Tailpipe Rule became effective, EPA has regulated automotive greenhouse gas

emissions under Title II of the Act. Thus, greenhouse gases are now a “pollutant subject to regulation under” the Act, and, as required by the statute itself, any “major emitting facility” covered by the PSD program must install BACT for greenhouse gases. *See id.*

The dispute in this case centers largely on the scope of the PSD program—specifically, which stationary sources count as “major emitting facilities” subject to regulation. CAA Section 169(1) defines “major emitting facility,” for the purposes of the PSD program, as a stationary source “which emit[s], or [has] the potential to emit” either 100 tons per year (tpy) or 250 tpy of “*any air pollutant*.” 42 U.S.C. § 7479(1) (emphasis added). As discussed *supra* in Part I, whether the 100 or 250 tpy threshold applies depends on the type of source. Certain listed categories of sources—for example, iron and steel mill plants—qualify as “major emitting facilities” if they have the potential to emit over 100 tons per year of “any air pollutant.” *Id.* All other stationary sources are “major emitting facilities” if they have the potential to emit over 250 tons per year of “any air pollutant.” *Id.*

As mentioned above, since 1978 EPA has interpreted the phrase “any air pollutant” in the definition of “major emitting facility” as “any air pollutant regulated under the CAA.” *See* 1978 Implementation Plan Requirements, 43 Fed. Reg. at 26,388, 26,403; *supra* Part IV. Thus, because the PSD program covers “major emitting facilities” in “any area to which this part applies,” 42 U.S.C. § 7475, EPA requires PSD permits for stationary sources that 1) are located in an area designated as attainment or unclassifiable for any NAAQS pollutant, and 2) emit 100/250 tpy of any regulated air pollutant, regardless of whether that pollutant is itself a NAAQS pollutant. *See* 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,710-11. Consequently, once the Tailpipe Rule took effect and made

greenhouse gases a regulated pollutant under Title II of the Act, the PSD program automatically applied to facilities emitting over 100/250 tpy of greenhouse gases. But because immediate regulation of greenhouse gas-emitting sources exceeding the 100/250 tpy benchmark would result in “overwhelming permitting burdens that would . . . fall on permitting authorities and sources,” Tailoring Rule, 75 Fed. Reg. at 31,516, EPA’s Tailoring Rule provided that, for now, sources are subject to PSD permitting requirements only if they have the potential to emit over 100,000 tpy of greenhouse gases (for a construction project) or 75,000 tpy (for a modification project). *Id.* at 31,523; *see also infra*, Part VI.

According to EPA, its longstanding interpretation of the phrase “any air pollutant”—“any air pollutant regulated under the CAA”—is compelled by the statute. *See id.* at 31,517. Disputing this point, Industry Petitioners argue that the phrase is capable of a far more circumscribed meaning and that EPA could have—and should have—avoided extending the PSD permitting program to major greenhouse gas emitters. For the reasons discussed below, we agree with EPA that its longstanding interpretation of the PSD permitting trigger is statutorily compelled. Thus, as EPA argues, it “must give effect to the unambiguously expressed intent of Congress,” *Chevron*, 467 U.S. at 843, which here requires PSD coverage for major emitters of any regulated air pollutant.

We begin our analysis, as we must, with the statute’s plain language. *See Chevron*, 467 U.S. at 842 (“First, always, is the question whether Congress has directly spoken to the precise question at issue.”). CAA Section 169(1) requires PSD permits for stationary sources emitting major amounts of “any air pollutant.” 42 U.S.C. § 7479(1) (emphasis added). On its face, “the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind,’ ” *United States v. Gonzales*,

520 U.S. 1, 5 (1997) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). Greenhouse gases are indisputably an “air pollutant.” See *Massachusetts v. EPA*, 549 U.S. at 528–29. Congress’s use of the broad, indiscriminate modifier “any” thus strongly suggests that the phrase “any air pollutant” encompasses greenhouse gases.

This plain-language reading of the statute is buttressed by the Supreme Court’s decision in *Massachusetts v. EPA*. There the Court determined that CAA’s overarching definition of “air pollutant” in Section 302(g)—which applies to all provisions of the Act, including the PSD program—unambiguously includes greenhouse gases. Noting that “[t]he Clean Air Act’s sweeping definition of ‘air pollutant’ includes ‘any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air,’” the Court held that “the definition embraces *all* airborne compounds of whatever stripe, *and underscores that intent through repeated use of the word ‘any.’*” *Id.* at 529 (quoting 42 U.S.C. § 7602(g)) (second and third emphases added). Crucially for purposes of the issue before us, the Court concluded that “[t]he statute is unambiguous.” *Id.*

Thus, we are faced with a statutory term—“air pollutant”—that the Supreme Court has determined unambiguously encompasses greenhouse gases. This phrase is preceded by the expansive term “any,” a word the Court held “underscores” Congress’s intent to include “all” air pollutants “of whatever stripe.” See *id.* Absent some compelling reason to think otherwise, “‘any’ . . . means any,” *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010), and Petitioners have given us no reason to construe that word narrowly here. To the contrary: given both the statute’s plain language and the Supreme Court’s decision in *Massachusetts v. EPA*, we have little trouble concluding that the phrase “any air pollutant” includes *all*

regulated air pollutants, including greenhouse gases.

In reaching this conclusion, we recognize that EPA's definition of "any air pollutant" slightly narrows the literal statutory definition, which nowhere requires that "any air pollutant" be a *regulated* pollutant. *See* 42 U.S.C. § 7479(1). But this does not make the statutory language ambiguous. Indeed, "any regulated air pollutant" is the only logical reading of the statute. The CAA's universal definition of "air pollutant"—the one at issue in *Massachusetts v. EPA*—provides that the term includes "any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." *Id.* § 7602(g). Of course, nothing in the CAA requires regulation of a substance simply because it qualifies as an "air pollutant" under this broad definition. As discussed *supra* in Parts II and III, for example, the Act requires EPA to prescribe motor vehicle "standards applicable to the emission of any air pollutant" only if that pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). But if "any air pollutant" in the definition of "major emitting facility" was read to encompass both regulated and nonregulated air pollutants, sources could qualify as major emitting facilities—and thus be subjected to PSD permitting requirements—if they emitted 100/250 tpy of a "physical, chemical, [or] biological" substance EPA had determined was harmless. It is absurd to think that Congress intended to subject stationary sources to the PSD permitting requirements due to emissions of substances that do not "endanger public health or welfare." *Id.* § 7521(a)(1). Thus, "any regulated air pollutant" is, in this context, the only plausible reading of "any air pollutant."

We find further support for this definition throughout the CAA. First, as previously mentioned, the PSD program provides that all major emitting facilities must install BACT for

“each pollutant subject to regulation under [the CAA].” *Id.* § 7475(a)(4). “Each pollutant subject to regulation under” the Act is, of course, synonymous with “any air pollutant regulated under the Act.” Thus, EPA’s interpretation of “any air pollutant” in the definition of “major emitting facilities” harmonizes the PSD program’s scope (i.e., which pollutants trigger PSD coverage) with its substantive requirements (i.e., which pollutants must be controlled to obtain a permit). In other words, because a covered source must control greenhouse gas emissions, it makes sense that major emissions of greenhouse gases would subject that source to the PSD program.

Second, a PSD permittee is required to establish that it

will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under [the CAA].

Id. § 7475(a)(3). Subsections (A) and (B) prohibit a permitted source from contributing to a concentration of NAAQS pollutants that exceeds EPA’s standards. By contrast, subsection (C) has an entirely different focus: it prohibits a permitted source from causing or contributing to air pollution in excess of *any* CAA emission standard. Thus, as EPA notes, “what this provision establishes is that while the PSD program was certainly directed towards NAAQS-criteria pollutants, it also was directed at maintaining air quality for other pollutants regulated under other provisions.” EPA Timing & Tailoring Br. 101. EPA’s determination that “any air pollutant” means “any air pollutant regulated under the Act”—encompassing the greenhouse gases regulated under Title II—is entirely consistent

with this focus.

Finally, Congress made perfectly clear that the PSD program was meant to protect against precisely the types of harms caused by greenhouse gases. The PSD provision contains a section entitled “Congressional declaration of purpose,” which provides, in relevant part, that “[t]he purposes of this part are . . . to protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution.” 42 U.S.C. § 7470(1). The CAA further provides that “[a]ll language referring to effects on welfare includes, but is not limited to, effects on . . . weather . . . and climate.” *Id.* § 7602(h). As previously noted, EPA in the Endangerment Finding “marshaled . . . substantial . . . scientific evidence . . . for the proposition that greenhouse gases trap heat on earth that would otherwise dissipate into space [and] that this ‘greenhouse effect’ warms the climate.” Part II, *supra* at 28–29. It further concluded that this “anthropogenically induced climate change” was likely to threaten the public welfare through, among other things, “extreme weather events.” *Id.* at 15–16. Thus, one express purpose of the program is to protect against the harms caused by greenhouse gases.

In sum, we are faced with a statutory term—“any air pollutant”—that the Supreme Court has determined is “expansive,” and “unambiguous[ly]” includes greenhouse gases. *Massachusetts v. EPA*, 549 U.S. at 529. Moreover, the PSD program requires covered sources to install control technology for “each pollutant” regulated under the CAA, 42 U.S.C. § 7475(a)(4), and to establish that they “will not cause, or contribute to, air pollution in excess of *any* . . . emission standard . . . under [the CAA].” *Id.* § 7475(a)(3) (emphasis added). These provisions demonstrate that the PSD program was intended to control pollutants regulated under every section of

the Act. Finally, Congress’s “Declaration of Purpose” expressly states that the PSD program was meant, in part, to protect against adverse effects on “weather” and “climate”—precisely the types of harm caused by greenhouse gases. *See id.* § 7470(1). Given all this, we have little trouble concluding that “any air pollutant” in the definition of “major emitting facility” unambiguously means “any air pollutant regulated under the CAA.”

B.

Industry Petitioners offer three alternative interpretations of the PSD permitting triggers, none of which cast doubt on the unambiguous nature of the statute.

As a preliminary matter, we note that none of Petitioners’ alternative interpretations applies to Title V. To the contrary, all of the proposed alternative interpretations are based on the structure of—and purported Congressional intent behind—the PSD program. Indeed, Industry Petitioners never argue that their proposed alternative interpretations are relevant to Title V. Petitioners have thus forfeited any challenges to EPA’s greenhouse gas-inclusive interpretation of Title V. *See, e.g., Nat’l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998) (petitioners forfeit an argument by failing to raise it in their opening brief).

Industry Petitioners’ first alternative is simple enough. Because the PSD program focuses on “the air people breathe in certain geographically defined . . . areas,” Coalition for Responsible Reg. Timing & Tailoring Br. 38, Industry Petitioners contend that the term “pollutant” in the PSD statute encompasses only air pollutants that, unlike greenhouse gases,

“pollute locally.” *Id.* at 35. Industry Petitioners would thus apply a greenhouse gas-exclusive interpretation of “pollutant” throughout the statute’s PSD provision. Under this reading, a source would qualify as a “major emitting facility” only if it emits 100/250 tpy of “any air pollutant” except greenhouse gases. *See* 42 U.S.C. § 7479(1). Moreover, sources that *are* subject to PSD permitting requirements would be required to install BACT for “each pollutant subject to regulation under [the CAA]”—except greenhouse gases. *Id.* § 7475(a)(4).

We can easily dispose of Industry Petitioners’ argument that the PSD program’s “concerns with local emissions,” Coalition for Responsible Reg. Timing & Tailoring Br. 36, somehow limit the BACT provision. The statutory text provides, without qualification, that covered sources must install the “best available control technology for *each pollutant subject to regulation* under [the CAA].” 42 U.S.C. § 7475(a)(4) (emphasis added). Because greenhouse gases are indisputably a pollutant subject to regulation under the Act, it is crystal clear that PSD permittees must install BACT for greenhouse gases. “When the words of a statute are unambiguous . . . judicial inquiry is complete.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotation marks omitted).

Equally without merit is Industry Petitioners’ argument that the PSD program’s regional focus requires a greenhouse gas-exclusive interpretation of “any air pollutant” in the definition of “major emitting facility.” In support of this contention, Industry Petitioners note that CAA Section 161 provides that states’ implementation plans for the PSD program “shall contain emission limitations and such other measures as may be necessary . . . to prevent *significant deterioration of air quality in each region*.” 42 U.S.C. § 7471 (emphasis added). The term “air quality,” Industry Petitioners contend, implies a focus on “the air people breathe,” and the term “in each region” suggests

that Congress was concerned about local, not global, effects. *See* Coalition for Responsible Reg. Timing & Tailoring Br. 36. Moreover, Industry Petitioners note that when Congress enacted the PSD program in 1977, it did so “against the backdrop of a known universe of CAA-regulated pollutants.” *Id.* All these pollutants, Industry Petitioners argue, “were regulated because they could cause elevated ground-level concentrations in ambient air people breathe.” *Id.* And as Industry Petitioners point out, EPA itself has concluded that greenhouse gases are problematic for reasons other than local health and environmental concerns. In EPA’s Advance Notice of Proposed Rulemaking for the regulations at issue here, for example, the agency noted that “[a] significant difference between the major [greenhouse gases] and most air pollutants regulated under the CAA is that [greenhouse gases] have much longer atmospheric lifetimes [and] . . . can remain in the atmosphere for decades to centuries.” *Regulating Greenhouse Gas Emissions Under the Clean Air Act* (“Greenhouse Gas Advance Notice”), 73 Fed. Reg. 44,354, 44,400–01 (July 30, 2008). Moreover, “unlike traditional air pollutants,” greenhouse gases “become well mixed throughout the global atmosphere so that the long-term distribution of [greenhouse gas] concentrations is not dependant on local emission sources.” *Id.* Thus, Industry Petitioners conclude, greenhouse gases are problematic for reasons entirely distinct from the local concerns that provided the basis for the PSD program. Given this, the phrase “any air pollutant” cannot be applied to greenhouse gases in the context of the regionally-focused PSD program.

As an initial matter, we note that the Supreme Court rejected a very similar argument in *Massachusetts v. EPA*. There, EPA attempted to distinguish between greenhouse gases and other air pollution agents “because greenhouse gases permeate the world’s atmosphere rather than a limited area near the earth’s surface.” *Massachusetts v. EPA*, 549 U.S. at 529

n.26. The Court held that this was “a plainly unreasonable reading of a sweeping statutory provision designed to capture ‘any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air,’” *id.* (quoting 42 U.S.C. § 7602(g)), thus rejecting the dissent’s view that “EPA’s exclusion of greenhouse gases . . . is entitled to deference.” *Id.* As the Court noted, the purported distinction between greenhouse gases and “traditional” air pollutants “finds no support in the text of the statute, which uses the phrase ‘the ambient air’ without distinguishing between atmospheric layers.” *Id.* *Massachusetts v. EPA* thus forecloses Industry Petitioners’ argument that because greenhouse gases do not “cause elevated ground-level concentrations in ambient air people breathe,” Coalition for Responsible Reg. Timing & Tailoring Br. 36, EPA should have adopted a greenhouse gas-exclusive interpretation of “any air pollutant.”

We also have little trouble disposing of Industry Petitioners’ argument that the PSD program is specifically focused solely on localized air pollution. True, as Industry Petitioners note, one part of the PSD program requires states to “prevent significant deterioration of air quality in each region.” 42 U.S.C. § 7471 (emphasis added). But while localized air quality is obviously one concern of the PSD program, a comprehensive reading of the statute shows it was also meant to address a much broader range of harms. As an initial matter, the PSD provision’s “Congressional declaration of purpose” section expansively provides that the program is intended “to protect public health and welfare from *any* actual or potential adverse effect . . . *from air pollution.*” *Id.* § 7470(1) (emphasis added). Nothing in this section limits the PSD program to adverse effects on local air quality; to the contrary, the word “any” here gives this clause an “expansive meaning” which we see “no reason to contravene.” *New York*, 443 F.3d at 885 (internal quotation marks omitted). Indeed, the CAA expressly provides that effects on “welfare”

means “effects on . . . weather . . . and climate.” 42 U.S.C. § 7602(h). It seems quite clear to us, then, that the PSD program was intended to protect against precisely the types of harms caused by greenhouse gases. This broad understanding of the PSD program’s scope is buttressed by the fact that the program requires covered sources to control “each pollutant subject to regulation under [the CAA],” and further requires sources to comply with “*any* . . . emission standard” under the CAA. *Id.* §§ 7475(a)(3); (a)(4) (emphasis added). These substantive requirements amount to further evidence that Congress wanted the PSD program to cover all regulated pollutants, regardless of the type of harm those pollutants cause.

In light of the PSD program’s broad scope of regulation and the express purposes of the program, we conclude—consistent with the Supreme Court in *Massachusetts v. EPA*—that Industry Petitioners’ greenhouse gas-exclusive interpretation of “pollutant” is “a plainly unreasonable reading” of the statute. *Massachusetts v. EPA*, 549 U.S. at 529 n.26.

2.

For their second alternative interpretation, Industry Petitioners argue that the PSD program’s definition of “major emitting facility” establishes a “pollutant-specific situs requirement.” Am. Chemistry Council Br. 33. Under this reading of the statute, a stationary source is subject to PSD permitting requirements only if “(1) a source has major emissions of a NAAQS criteria pollutant and (2) the source is located in an area attaining *that pollutant’s*” air quality standard. Coalition for Responsible Reg. Timing & Tailoring Br. 23. Thus, for example, a source would be subject to the PSD permitting requirements if it 1) emits over 100/250 tpy of sulfur dioxide (a NAAQS criteria pollutant), and 2) is located in an area that is in “attainment,” or is “unclassifiable,” for sulfur

dioxide. But under this approach, a stationary source could never be subject to the PSD program solely because of its greenhouse gas emissions. After all, Industry Petitioners observe, EPA declined to make greenhouse gases a NAAQS criteria pollutant. Instead, EPA regulated greenhouse gases only under Title II of the Act, dealing with motor vehicle emissions. Because “no major source of [greenhouse gases] can be located in an area attaining the nonexistent [air quality standard] for [greenhouse gases],” *id.* at 24, Industry Petitioners point out that their reading of the statute would bring no new stationary sources under the PSD program’s ambit—alleviating any “absurd results” caused by excessive permitting requirements, *id.* at 25.

Industry Petitioners emphasize that, unlike their first proposed alternative, nothing in this approach would “wholly exempt [greenhouse gases] from PSD.” Coalition for Responsible Reg. Timing & Tailoring Reply Br. 20. Although a pollutant-specific situs requirement would limit the *number* of sources subject to the PSD program, nothing in this proposed reading of the statute would alter the substantive requirements for PSD permits, including the requirement that all regulated sources install BACT “for each pollutant subject to regulation under [the CAA].” 42 U.S.C. § 7475(a)(4). So, for example, under this interpretation, a hypothetical stationary source emitting more than 100/250 tpy of sulfur dioxide and located in an area designated as “in attainment” for sulfur dioxide, must still install BACT for “each pollutant subject to regulation” under the Act, including greenhouse gases. Their key point, though, is that sources emitting only major amounts of greenhouse gases—but not major amounts of a NAAQS criteria pollutant—would escape PSD permitting requirements.

Industry Petitioners’ argument in support of this interpretation proceeds in several steps. First, they argue that the

term “any air pollutant,” though “capacious and flexible by itself,” “is a chameleon term” when placed in certain contexts. Am. Chemistry Council Br. 38. Indeed, Industry Petitioners note that EPA has already narrowed the literal meaning of the term “any air pollutant” here. After all, and as discussed *supra*, although the statutory term “air pollutant” includes “any physical [or] chemical . . . substance or matter,” 42 U.S.C. § 7602(g), EPA has long maintained that the term “any air pollutant” in the definition of “major emitting facility” encompasses only air pollutants regulated under the Act. Moreover, Industry Petitioners point out that when interpreting CAA Part C, Subpart 2, entitled “Visibility Protection,” EPA determined that the term “any pollutant” in the definition of “major stationary source” meant “any visibility-impairing pollutant.” *See* Coalition for Responsible Reg. Timing & Tailoring Br. 34 (emphasis added). The statute’s definition of “major stationary source” in the visibility-protection subpart is quite similar to the definition of “major emitting facility” in the PSD subpart: for the purposes of the visibility program, a “major stationary source” is defined as a “stationary source[] with the potential to emit 250 tons or more of any pollutant.” 42 U.S.C. § 7491(g)(7)); *compare* 42 U.S.C. § 7479(1) (“major emitting facility” for the purposes of the PSD program is a source which “emit[s], or [has] the potential to emit,” either 100 or 250 tons per year “of any air pollutant”). These narrowed interpretations, Industry Petitioners argue, prove that the seemingly capacious term “any air pollutant” is, notwithstanding that the Supreme Court called this term “expansive” and “sweeping,” *Massachusetts v. EPA*, 549 U.S. at 529 nn.25–26, capable of a far more circumscribed meaning.

According to Industry Petitioners, EPA should have adopted that more circumscribed meaning by interpreting “any air pollutant” as establishing a pollutant-specific situs requirement. As Industry Petitioners point out, the PSD program requires

permits for “major emitting facilit[ies] . . . in any area to which this part applies,” 42 U.S.C. § 7479(1), and defines “major emitting facilities” as stationary sources emitting 100/250 tpy of “any air pollutant.” *Id.* § 7475(a). In this context, Industry Petitioners contend, the phrases “any air pollutant” and “in any area to which this part applies” must be read in concert. And, Industry Petitioners argue, these phrases “*together* mean” that a source is subject to PSD permitting requirements only if it emits major amounts of “any [NAAQS] air pollutant whose NAAQS an area is attaining.” Am. Chemistry Council Br. 33.

In support of this supposedly holistic interpretation of the statute, Industry Petitioners cite CAA § 163(b), a different section of the PSD provision in which the phrase “any air pollutant” and “any area to which this part applies” are used in conjunction with one another. Unlike § 165(a), which sets permitting requirements for sources covered by the PSD program, § 163 provides guidelines for *areas* designated as “in attainment” under the program. Specifically, § 163(b) limits the “maximum allowable increase in concentrations of” airborne NAAQS pollutants that may occur in an attainment area before that area’s “attainment” status is jeopardized. *See* 42 U.S.C. § 7473(b)(1). Subsections (1) through (3) of § 163(b)—not directly relevant here—set limits on the maximum allowable increases for two specific NAAQS pollutants, sulfur dioxide and particulate matter. Subsection (4) is a catchall provision, which limits the maximum allowable increases for all other NAAQS pollutants. It is in subsection (4) that Industry Petitioners find what they believe is their payoff: the terms “any air pollutant” and “any area to which this part applies” in conjunction with one another. Section 163(b)(4) provides:

The maximum allowable concentration of *any air pollutant in any area to which this part applies* shall not exceed a concentration for such pollutant for each period of exposure

equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

42 U.S.C. § 7473(b)(4) (emphasis added). As Industry Petitioners correctly point out, in this context the phrase “any air pollutant” must mean “any NAAQS pollutant,” and “in any area to which this part applies” must mean “any area that is in attainment for that NAAQS pollutant.” After all, the statute states that the “maximum allowable concentration of any air pollutant . . . shall not exceed” either the primary or secondary national ambient air quality standards. But, as Industry Petitioners observe, national ambient air standards exist only for NAAQS pollutants, so even if “any air pollutant” in CAA § 163(b)(4) was read to include non-NAAQS pollutants, the phrase, in context, would have no practical effect for those pollutants. Moreover, “any area to which this part applies” must mean “any area that is in attainment for that NAAQS pollutant,” because if an area was in nonattainment for a particular pollutant, Part D—rather than the PSD program—would govern emissions limits for that specific pollutant. *See id.* § 7501(2) (“[t]he term ‘nonattainment area’ means, for any air pollutant, an area which is designated ‘nonattainment’ with respect to that pollutant”); § 7502(c) (setting out required “Nonattainment plan provisions”). Finally, Industry Petitioners correctly note that a pollutant-specific reading of the phrase “air pollutant” must also apply to CAA § 165(a)(3)(A), which prohibits PSD permittees from “caus[ing], or contribut[ing] to, air pollution in excess of any . . . maximum allowable concentration for *any air pollutant in any area to which this part applies* more than one time per year.” *Id.* § 7475(a)(3)(A) (emphasis added). This clause, as

Industry Petitioners point out, piggybacks off the NAAQS pollutant-specific definition of “maximum allowable concentration” in § 163(b)(4), prophylactically restricting PSD permittees from endangering an area’s attainment status. *See* Am. Chemistry Council Br. 32 (describing the interplay between the two provisions as “Section 163(b)(4) (and Section 165(a)(3)(A), which implements it) . . .”).

Based on all of this, Industry Petitioners conclude that because the phrase “any air pollutant in any area to which this part applies” in § 163(b)(4) means “any NAAQS pollutant in any area in attainment for that NAAQS pollutant,” an identical reading must apply to the definition of “major emitting facility.” As a result, a stationary source may be subject to the PSD program only if it emits 100/250 tpy of any NAAQS pollutant and is located in an area designated as in attainment for that NAAQS pollutant. We are unpersuaded.

Although we agree that the term “any air pollutant” is, in some contexts, capable of narrower interpretations, we see nothing in the definition of “major emitting facility” that would allow EPA to adopt a NAAQS pollutant-specific reading of that phrase. The contrast with the visibility program is instructive. There, EPA determined that “any pollutant” in the definition of “major stationary source” meant “any visibility-impairing pollutant.” *See* 40 C.F.R. pt. 51, App. Y, § II.A. But as EPA notes, the entire visibility program, codified in CAA Part C, Subpart 2, deals with visibility-impairing pollutants, as reflected in that subpart’s title: “Visibility Protection.” *See* 42 U.S.C. prec. § 7491. From this, “it naturally follows that EPA’s regulations under that section should address ‘visibility-impairing pollutants.’ ” EPA Timing & Tailoring Br. 99 n.19. No similar guidance can be garnered from Part C, Subpart 1, which contains the phrase “any air pollutant” at issue here. Dealing with far more than NAAQS pollutants, Part C, Subpart

1 requires, for example, covered sources to install BACT for “each pollutant subject to regulation under [the CAA].” 42 U.S.C. § 7475(a)(4). Indeed, Subpart 1 is simply—and expansively—entitled “Clean Air.” *Id.* prec. § 7470. Moreover, Congress designed the PSD program broadly to protect against “adverse effect[s]” on “public health and welfare,” *Id.* § 7470(1), including effects on global problems like weather and climate. *Id.* § 7602(h).

Furthermore, the phrases “any air pollutant” and “in any area to which this part applies” are used differently in Section 163(b)(4) and in the PSD program’s definition of “major emitting facility.” The presumption that “[a] term appearing in several places in a statutory text is generally read the same way each time it appears,” *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994), “readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent,” *Atl. Cleans & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1933). Here, the focus and structure of § 163(b)(4) is entirely distinct from the PSD permitting trigger. Section 163(b)(4) provides that “[t]he maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a [particular] concentration.” 42 U.S.C. § 7473(b)(4). By contrast, § 165(a) provides that “[n]o major emitting facility . . . may be constructed in any area to which this part applies” unless certain conditions are met, *id.* § 7475(a), and § 169(1) defines “major emitting facility” as any stationary source that emits or has the potential to emit threshold amounts of “any air pollutant,” *id.* § 7479(1). The differences between these two provisions are manifest. In § 163(b)(4), the phrases “any air pollutant” and “in any area to which this part applies” appear next to one another, and it is the concentration of the pollutant in an area that matters. In the PSD permitting trigger, the phrases appear in

different subsections and it is the location of the facility that matters. Section 163(b)(4) thus does nothing to undermine the unambiguous meaning of “any air pollutant” in the definition of “major emitting facility.”

Industry Petitioners’ pollutant-specific reading of “any air pollutant” is further undermined by contrasting Part C of the Act (the PSD program) with Part D (which regulates areas in nonattainment). Unlike Part C, Part D is expressly pollutant-specific, providing that “[t]he term ‘nonattainment area’ means, for any air pollutant, an area which is designated ‘nonattainment’ *with respect to that pollutant.*” *Id.* § 7501(2) (emphasis added). Congress thus clearly knew how to promulgate a narrow, pollutant-specific definition of “any air pollutant.” That it did so in Part D but not in Part C strongly suggests that the phrase “any air pollutant” in Part C was meant to be construed broadly. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

A final point: Industry Petitioners observe that every area in the country has always been in attainment for at least one NAAQS criteria pollutant. *See Tailoring Rule*, 75 Fed. Reg. at 31,561. Thus, pursuant to EPA’s pollutant-indifferent reading of § 165(a), under which a major emitting facility must abide by PSD requirements so long as it is located in an attainment area for *any* NAAQS pollutant, every facility in the United States has always been in an “area to which this part applies.” Consequently, Industry Petitioners argue, “[i]f EPA’s interpretation were right, Congress simply could have left out the phrase ‘in any area to which this part applies’” in the PSD permitting trigger. Am. Chemistry Council Br. 36. But

“Congress does not enact ‘stillborn’ laws,” *id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004)), and interpretations that render statutory language superfluous are disfavored. Am. Chemistry Council Reply Br. 19. The fact that the PSD program has applied nationwide since its inception, Industry Petitioners conclude, thus militates against EPA’s pollutant-indifferent approach.

This argument fails at its premise, for Industry Petitioners confuse a lack of practical import with a lack of meaning. To say that the phrase “in any area to which this part applies” is currently without practical import is quite different than showing that the phrase means nothing. Indeed, under different circumstances, the phrase would have a significant effect. If, hypothetically, one area of the country was designated as “nonattainment” for every NAAQS pollutant, the phrase “in any area to which this part applies” would limit PSD coverage, as covered sources in that area would be subject only to Part D requirements. In fact, Environmental Intervenors point out that when Congress drafted the PSD permitting triggers “the prospect that some areas could be in nonattainment for all NAAQS was not far-fetched.” *Sierra Club Historic Reg. Br.* 23. “In the years leading up to 1977, EPA air quality data identified a number of areas that failed to meet all five of the then-current [air quality standards] for which EPA had gathered data.” *Id.* Accordingly, “in any area to which this part applies” is a meaningful phrase under EPA’s pollutant-indifferent interpretation of the PSD permitting triggers: it provides that sources need not obtain PSD permits if they are located in areas designated “nonattainment” for all six NAAQS pollutants.

In short, although we agree with Industry Petitioners that phrases like “any air pollutant” are, in certain contexts, capable of a more limited meaning, they have failed to identify any reasons that the phrase should be read narrowly here. Nor do we

know of one. We thus conclude that EPA's 34-year-old interpretation of the PSD permitting triggers is statutorily compelled: a source must obtain a permit if it emits major amounts of any regulated pollutant and is located in an area that is in attainment or unclassifiable for any NAAQS pollutant.

3.

We can quickly dispose of Industry Petitioners' third alternative interpretation, namely, that in order to regulate new pollutants through the PSD program, EPA was required to go through the process prescribed by CAA § 166. Section 166 provides specific steps that EPA must take when designating new "pollutants for which national ambient air quality standards" apply. 42 U.S.C. § 7476(a). Here, Industry Petitioners argue, EPA unlawfully failed to follow the steps laid out in Section 166, including a required study of the pollutant and a one-year delay before the effective date of regulations, before adding greenhouse gases "to the PSD [c]onstellation." Coalition for Responsible Reg. Timing & Tailoring Br. 41.

This argument fails on its face. By its terms, § 166 applies only to new "pollutants *for which national ambient air quality standards*" apply, 42 U.S.C. § 7476(a) (emphasis added), i.e., NAAQS criteria pollutants for which regions may be classified as in "attainment," "non-attainment," or "unclassifiable." And EPA never classified greenhouse gases as a NAAQS criteria pollutant. Instead, it simply determined that under § 165, major emitters of greenhouse gases are subject to the PSD program and all covered sources must install BACT for greenhouse gases. Contrary to Industry Petitioners' arguments, then, § 166 has no bearing on this addition of greenhouse gases into "the PSD [c]onstellation." Coalition for Responsible Reg. Timing & Tailoring Br. 41. Indeed, we rejected a nearly identical argument in *Alabama Power*, holding that there is "no implied or apparent

conflict between sections 165 and 166; nor . . . must the requirements of section 165 be ‘subsumed’ with those of section 166.” *Alabama Power*, 636 F.2d at 406. Stating what should have been obvious from the text of the statute, we concluded: “[S]ection 166 has a different focus from section 165.” *Id.*

Thus, because EPA has never classified greenhouse gases as a NAAQS criteria pollutant, the § 166 requirements are entirely inapplicable here. This section of the CAA has absolutely no bearing on our conclusion that EPA’s interpretation of the PSD permitting trigger is compelled by the statute itself.

VI.

Having concluded that the CAA requires PSD and Title V permits for major emitters of greenhouse gases, we turn to Petitioners’ challenges to the Tailoring and Timing Rules themselves.

As an initial matter, we note that Petitioners fail to make any real arguments against the Timing Rule. To be sure, at one point State Petitioners contend that the Timing Rule constitutes an attempt “to extend the PSD and Title V permitting requirements to greenhouse-gas emissions,” State Pet’rs’ Timing & Tailoring Br. 67. This is plainly incorrect. As discussed in the previous section, greenhouse gases are regulated under PSD and Title V pursuant to automatic operation of the CAA. All the Timing Rule did was delay the applicability of these programs, providing that major emitters of greenhouse gases would be subject to PSD and Title V permitting requirements only once the Tailpipe Rule actually took effect on January 2, 2011. *See* Timing Rule, 75 Fed. Reg. at 17,017-19. Despite this, Petitioners confusingly urge us to vacate “[t]he Tailoring *and* Timing Rules,” *e.g.* State Pet’rs’ Timing & Tailoring Br. 24

(emphasis added), although it is unclear what practical effect vacature of the Timing Rule would have. Nonetheless, given this phrasing of their argument, and given our conclusion that Petitioners lack Article III standing to challenge *both* rules, we shall, where appropriate, discuss the Timing Rule in conjunction with the Tailoring Rule.

In the Tailoring Rule, EPA announced that it was “relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources.” Tailoring Rule, 75 Fed. Reg. at 31,516. Although the PSD statute requires permits for sources with the potential to emit 100/250 tpy of “any air pollutant,” 42 U.S.C. § 7479(1), EPA noted that immediate application of that threshold to greenhouse gas-emitting sources would cause permit applications to jump from 280 per year to over 81,000 per year. Tailoring Rule, 75 Fed. Reg. at 31,554. Many of these applications would come from commercial and residential sources, which would “each incur, on average, almost \$60,000 in PSD permitting expenses.” *Id.* at 31,556. Similarly, if the Title V 100 tpy threshold applied immediately to greenhouse gases, sources needing operating permits would jump from 14,700 per year to 6.1 million per year. *Id.* at 31,562. “The great majority of these sources would be small commercial and residential sources” which “would incur, on average, expenses of \$23,175.” *Id.* And were permitting authorities required to hire the 230,000 full-time employees necessary to address these permit applications, “authorities would face over \$21 billion in additional permitting costs each year due to [greenhouse gases], compared to the current program cost of \$62 million each year.” *Id.* at 31,563.

Thus, instead of immediately requiring permits for all sources exceeding the 100/250 tpy emissions threshold, EPA decided to “phas[e] in the applicability of these programs to [greenhouse gas] sources, starting with the largest [greenhouse

gas] emitters.” *Id.* at 31,514. The Tailoring Rule established the first two steps in this phased-in process. During Step One, only sources that were “subject to PSD requirements for their conventional pollutants anyway” (i.e., those sources that exceeded the statutory emissions threshold for non-greenhouse gas pollutants) were required to install BACT for their greenhouse gas emissions. *Id.* at 31,567. Step Two, which took effect on July 1, 2011, also requires PSD permits for sources with the potential to emit over 100,000 tpy CO₂e after a proposed construction project, or 75,000 tpy CO₂e after a proposed modification project. *Id.* at 31,523. Step Two further requires Title V permits for sources which have the potential to emit over 100,000 tpy CO₂e. *Id.* at 31,516. EPA has since proposed—but has yet to finalize—a “Step Three,” which would maintain the current thresholds while the agency evaluates the possibility of regulating smaller sources. *See* EPA’s 28(j) Letter 1-2, February 27, 2012.

In the Tailoring Rule, EPA justified its phased-in approach on three interrelated grounds, each of which rests on a distinct doctrine of administrative law. First, EPA concluded “the costs to sources and administrative burdens . . . that would result from [immediate] application of the PSD and title V programs . . . at the statutory levels . . . should be considered ‘absurd results,’” which Congress never intended. *Id.* at 31,517; *see Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (“[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts.”). Thus, under the “absurd results” doctrine, EPA concluded that the PSD and Title V programs “should not [immediately] be read to apply to all [greenhouse gas] sources at or above the 100/250 tpy threshold.” Tailoring Rule, 75 Fed. Reg. at 31,554. Second, emphasizing that immediate regulation at the 100/250 tpy threshold would cause tremendous administrative burden, EPA

justified its deviation from this threshold on the basis of the “administrative necessity” doctrine. *Id.* at 31,576; *see Env’tl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (“[A]n agency may depart from the requirements of a regulatory statute . . . to cope with the administrative impossibility of applying the commands of the substantive statute.”). Finally, asserting that there exists a judicial doctrine that allows agencies to implement regulatory programs in a piecemeal fashion, EPA stated that the Tailoring Rule was justified pursuant to this “one-step-at-a-time” doctrine. Tailoring Rule, 75 Fed. Reg. at 31,578; *see Massachusetts v. EPA*, 549 U.S. at 524 (“Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”).

Petitioners—particularly State Petitioners—argue that none of these doctrines permit EPA to “depart unilaterally from the [CAA’s] permitting thresholds and replace them with numbers of its own choosing.” State Pet’rs’ Timing & Tailoring Br. 29. Admitting the “lamentable policy consequences of adhering to the unambiguous numerical thresholds in the Clean Air Act,” State Petitioners rather colorfully argue that EPA’s attempts to alleviate those burdens “establish only that EPA is acting as a benevolent dictator rather than a tyrant.” *Id.* at 26. And because EPA exceeded the boundaries of its lawful authority, Petitioners urge us to vacate the Tailoring Rule.

Before we may address the merits of these claims, however, we must determine whether we have jurisdiction. “No principle,” the Supreme Court has repeatedly explained, “is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted). The doctrine of standing “is an essential and unchanging part of the case-or-controversy requirement.” *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992). To establish standing, a petitioner must have suffered an “injury in fact” that is 1) “concrete and particularized . . . [and] actual or imminent, not conjectural or hypothetical,” 2) was caused by the conduct complained of, and 3) is “likely, as opposed to merely speculative [to] be redressed by a favorable decision.” *Id.* at 560–61 (internal quotation marks and citations omitted).

Petitioners fall far short of these “irreducible constitutional . . . elements” of standing, *id.* at 560. Simply put, Petitioners have failed to establish that the Timing and Tailoring Rules caused them “injury in fact,” much less injury that could be redressed by the Rules’ vacatur. Industry Petitioners contend that they are injured because they are subject to regulation of greenhouse gases, Coalition for Responsible Reg. Timing & Tailoring Br. 14. State Petitioners claim injury because they own some regulated sources and because they now carry a heavier administrative burden. State Pet’rs’ Timing & Tailoring Br. 22–23. But as discussed above, *see supra* Part V, the CAA mandates PSD and Title V coverage for major emitters of greenhouse gases. Thus, Industry Petitioners were regulated and State Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, but by automatic operation of the statute. Given this, neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases.

Indeed, the Timing and Tailoring Rules actually mitigate Petitioners’ purported injuries. Without the Timing Rule, Petitioners may well have been subject to PSD and Title V for greenhouse gases before January 2, 2011. Without the Tailoring Rule, an even greater number of industry and state-owned sources would be subject to PSD and Title V, and state authorities would be overwhelmed with millions of additional permit applications. Thus, Petitioners have failed to “show that,

absent the government's allegedly unlawful actions, there is a substantial probability that they would not be injured and that, if the court affords the relief requested, the injury will be removed." *Chamber of Commerce v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011) (quotations and alterations omitted). Far from it. If anything, vacature of the Tailoring Rule would significantly exacerbate Petitioners' injuries.

Attempting to remedy this obvious jurisdictional defect, State Petitioners present two alternative theories, neither of which comes close to meeting the "irreducible constitutional . . . elements" of standing. *Lujan*, 504 U.S. at 560. First, State Petitioners counterintuitively suggest that they actually want EPA to immediately "appl[y] the 100/250 tpy permitting thresholds to greenhouse-gas emissions." State Pet'rs' Timing & Tailoring Reply Br. 15. Admitting that vacature of the Tailoring Rule would result in astronomical costs and unleash chaos on permitting authorities, State Petitioners predict that Congress will be forced to enact "corrective legislation" to relieve the overwhelming permitting burdens on permitting authorities and sources, thus mitigating their purported injuries. *Id.*

This theory fails. To establish standing, plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision," *Lujan*, 504 U.S. at 561 (internal quotation marks omitted), but here, State Petitioners simply hypothesize that Congress will enact "corrective legislation." State Pet'rs' Timing & Tailoring Reply Br. 15. We have serious doubts as to whether, for standing purposes, it is ever "likely" that Congress will enact legislation at all. After all, a proposed bill must make it through committees in both the House of Representatives and the Senate and garner a majority of votes in both chambers—overcoming, perhaps, a filibuster in the Senate. If passed, the bill must then be signed

into law by the President, or go back to Congress so that it may attempt to override his veto. As a generation of schoolchildren knows, “by that time, it’s very unlikely that [a bill will] become a law. It’s not easy to become a law.” Schoolhouse Rock, *I’m Just a Bill*, at 2:41, available at <http://video.google.com/videoplay?docid=7266360872513258185#> (last visited June 1, 2012).

And even if the astronomical costs associated with a 100/250 tpy permitting threshold make *some* Congressional action likely, State Petitioners are still unable to show that it is “likely, as opposed to merely speculative,” *Lujan*, 504 U.S. at 561, that Congress will redress their injury. State Petitioners apparently assume that if the 100/250 tpy permitting threshold was immediately applied to greenhouse gases, Congress would exempt those pollutants from the PSD and Title V programs entirely. But this is just one of many forms “corrective legislation” could take. For example, were we to vacate the Tailoring Rule, Congress could decide to readopt its key provisions in the PSD and Title V statutes. Or it could set PSD and Title V permitting thresholds at 25,000 tpy for greenhouse gases—higher than the 100/250 tpy threshold, but lower (and thus more costly to Petitioners) than the thresholds promulgated in the Tailoring Rule. Or it could do something else entirely. All of this is guesswork, which is precisely the point: State Petitioners’ faith that Congress will alleviate their injury is inherently speculative.

State Petitioners’ second alternative theory of standing fares no better. In their reply brief, they contend that even if vacating the Timing or Tailoring Rules would indeed exacerbate their costs and administrative burdens (the purported injuries they claimed in their opening brief), “then State Petitioners can establish Article III standing under *Massachusetts* by asserting injuries caused by EPA’s failure to regulate sooner.” State

Pet'rs' Timing & Tailoring Reply Br. 5. Essentially, State Petitioners' reply brief contends that, contrary to the position taken in the opening brief, they want more regulation, not less, and that they wanted regulation sooner rather than later. And because the Commonwealth of Massachusetts had standing to seek regulation of greenhouse gases in *Massachusetts v. EPA*, State Petitioners argue that they now have standing to seek more regulation of greenhouse gases as well.

This argument is completely without merit. As an initial matter, we are aware of no authority which permits a party to assert an entirely new injury (and thus, an entirely new theory of standing) in its reply brief. Quite to the contrary, we have held that, where standing is not self-evident, “[i]n its *opening* brief, the petitioner should . . . include . . . a concise recitation of the basis upon which it claims standing.” *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002) (emphasis added); *see also* D.C. Cir. R. 28(a)(7) (“[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing.”); *American Library Ass’n v. FCC*, 401 F.3d 489, 493–94 (D.C. Cir. 2005) (discussing limitations on this principle). After all, “it is often the case . . . that some of the relevant facts are known only to the petitioner, to the exclusion of both the respondent and the court.” *Sierra Club*, 292 F.3d at 901. If “the petitioner does not submit evidence of those facts with its opening brief,” the respondent is “left to flail at the unknown in an attempt to prove the negative.” *Id.* This principle is particularly important here, for State Petitioners’ asserted fear of global warming stands in stark contrast to the position they took throughout this litigation. In an earlier brief, for example, they characterized the Endangerment Finding as “a subjective conviction” State Pet’rs’ Endangerment Br. 19, “supported by highly uncertain climate forecasts,” *id.* at 18, and “offer[ing] no criteria for determining a harmful, as opposed to a safe, climate,” *id.* at 17. Given this,

EPA could not possibly have anticipated that State Petitioners, abruptly donning what they themselves call “an environmentalist hat,” State Pet’rs’ Timing & Tailoring Reply Br. 4, would assert that global warming causes them concrete and particularized harm.

In any event, State Petitioners fail to cite any record evidence to suggest that they are adversely affected by global climate change. This is in stark contrast to the evidence put forward in *Massachusetts v. EPA*, where the Commonwealth submitted unchallenged affidavits and declarations showing that 1) rising sea tides due to global warming had “already begun to swallow Massachusetts’ coastal land,” and 2) “[t]he severity of that injury will only increase over the course of the next century.” *Massachusetts v. EPA*, 549 U.S. at 522–23. These specific, factual submissions were key to the standing analysis in *Massachusetts v. EPA*: the Court held that “petitioners’ submissions as they pertain to *Massachusetts* have satisfied the most demanding standards of the adversarial process.” *Id.* at 521 (emphasis added). It is true, as State Petitioners emphasize, that the Supreme Court held that states are “entitled to special solicitude in our standing analysis.” *Id.* at 522. But nothing in the Court’s opinion remotely suggests that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact. State Petitioners, like Industry Petitioners, failed to do so here. We shall thus dismiss all challenges to the Timing and Tailoring Rules for lack of jurisdiction.

VII.

Following promulgation of the Timing and Tailoring Rules, EPA issued a series of rules ordering states to revise their PSD State Implementation Plans (SIPs) to accommodate greenhouse gas regulation. *See Action to Ensure Authority to Issue Permits*

Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 53,892 (Sept. 2, 2010), 75 Fed. Reg. 77,698 (Dec. 13, 2010); *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81,874 (Dec. 29, 2010). Industry Petitioners present several challenges to these SIP-related rules. But our review in this case is limited to four EPA decisions: the Endangerment Finding, the Tailpipe Rule, and the Timing and Tailoring Rules. We thus lack jurisdiction over the SIP-related rules. Moreover, challenges to these rules are currently pending in at least two separate cases before this court. See *Utility Air Regulatory Group v. EPA*, No. 11-1037 (consolidating various challenges); *Texas v. EPA*, No. 10-1425 (challenge brought by Texas). We decline Industry Petitioners' invitation to rule on the merits of cases which are properly before different panels.

VIII.

For the foregoing reasons, we dismiss all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions.

So ordered.

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1112 & No. 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

No. 14-1112: IN RE MURRAY ENERGY CORPORATION
Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A.
McCARTHY, Administrator, United States Environmental Protection Agency
Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

OPENING BRIEF OF PETITIONER

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December 15, 2014

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PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner states as follows:

I. PARTIES, INTERVENORS, AND AMICI

Case No. 14-1112

Petitioner:

Murray Energy Corporation

Intervenor for Petitioner:

National Federation of Independent Business

Movant-Intervenors for Petitioner:

Utility Air Regulatory Group, State of West Virginia, State of Alabama, State of Alaska, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, and State of Wyoming

Amici Curiae for Petitioner:

State of West Virginia, State of Alabama, State of Alaska, Commonwealth of Kentucky, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, and State of Wyoming

Respondents:

United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency

Movant-Intervenors for Respondent:

Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club

Amici Curiae for Respondent:

State of New York, State of California, State of Connecticut, State of Delaware, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, and District of Columbia

Movant-Amici Curiae for Respondent:

City of New York, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Clean Wisconsin, Michigan Environmental Council, and Ohio Environmental Council

Case No. 14-1151*Petitioner:*

Murray Energy Corporation

Movant-Intervenors for Petitioner:

State of West Virginia, State of Alabama, State of Alaska, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, and State of Wyoming

Respondents:

United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency

Movant-Intervenors for Respondent:

Environmental Defense Fund, Natural Resources Defense Council, and
Sierra Club

RULINGS UNDER REVIEW

The petition for an extraordinary writ, No. 14-1112, seeks a writ prohibiting EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014).

The petition for review, No. 14-1151, seeks judicial review of an EPA legal conclusion embodied and announced in the initiation of EPA's *ultra vires* rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014).

RELATED CASES

West Virginia v. EPA, No. 14-1146 (petition to review EPA settlement).

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner provides the following disclosure:

Murray Energy Corporation is a corporation organized and existing under the laws of the State of Ohio. No publicly-held corporation holds an ownership interest of 10 percent or more of Murray Energy Corporation. Murray Energy Holdings Co. is Murray Energy Corporation's parent corporation.

Murray Energy Corporation is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, employing approximately 7,500 workers in the mining, processing, transportation, distribution, and sale of coal. In 2014, Murray Energy Corporation expects to produce 65 million tons of coal from twelve active coal mining complexes in six States. Murray Energy Corporation also owns two billion tons of proven or probable coal reserves in the United States.

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GLOSSARY

CAA	Clean Air Act
CO₂	Carbon Dioxide
EGUs	Electric Utility Steam Generating Units
EPA	United States Environmental Protection Agency
Power Plants	Electric Utility Steam Generating Units
The Office	The House Office of Law Revision Counsel
The Code	The Code of Laws of the United States

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the accompanying
PETITIONER STATUTORY AND REGULATORY ADDENDUM.

INTRODUCTION

This is an extraordinary case. It presents the only time that EPA has ever proposed a regulation that would, *inter alia*, dramatically reorder the country's electrical power system, adversely affect the reliability and cost of electricity, impose immediate obligations on States to design compliance programs, and disrupt markets for coal — based entirely on a provision of the Clean Air Act that expressly prohibits the very action that EPA proposes to take. Petitioner asks this Court to rule that EPA's legal conclusion supporting the proposed rule is illegal, and that EPA may not proceed with the proposal. Under the unique circumstances of this case, this Court has authority to address the issues presented, and should halt a plainly unlawful proceeding that is already damaging Petitioner and Intervenors.

ISSUES

1. Given the express language in Section 111(d) of the Clean Air Act that EPA may only mandate state-by-state standards for emissions that are not “from a source category which is regulated under section 112,” does EPA have the legal authority to mandate state-by-state emission standards for existing coal-fired power plants when it has already promulgated a national emission standard for those same sources under Section 112 of the Clean Air Act?
2. Should an extraordinary writ issue to stop EPA from engaging in conduct that is expressly prohibited by the Clean Air Act and is forcing an unprecedented and potentially irreversible shift in the nation’s power sector without legal justification?
3. Is EPA’s final conclusion that it has legal authority to doubly regulate existing coal-fired power plants under both Section 111(d) and Section 112 of the Clean Air Act arbitrary, capricious, or unlawful when it is expressly prohibited by the Clean Air Act and rests on reasoning that is inconsistent with the purpose and structure of the Act and EPA’s own past representations?

STATEMENT OF THE CASE

Three years ago, EPA promulgated a national emission standard under Section 112 of the Clean Air Act for electric utility steam generating units (“power plants”). Under the express terms of the Clean Air Act, this action barred EPA from using Section 111(d) of the Act to mandate state-by-state standards for these same sources. Nonetheless, EPA has now announced its conclusion that the agency can force States to promulgate standards for existing power plants under Section 111(d) and has initiated a rulemaking to issue such a mandate. Because this attempt at double regulation is expressly prohibited by the Clean Air Act, Murray Energy Corporation petitions this Court to set aside EPA’s legal conclusion as contrary to law and to issue a writ prohibiting EPA from continuing with its unlawful rulemaking.

I. IN 2012, EPA PROMULGATED A NATIONAL EMISSION STANDARD FOR POWER PLANTS UNDER SECTION 112 OF THE CLEAN AIR ACT.

On February 16, 2012, EPA promulgated one of the most expensive regulations in the history of the United States, a national emission standard for power plants, using EPA’s authority under Section 112 of the Clean Air Act. *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9,304 (Feb. 16, 2012); 40 C.F.R. Part 63 Subpart UUUUU. This Court recently upheld the standard in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)

(cert. granted). This Court also upheld EPA's decision to regulate power plants under Section 112. *Id.* at 16–36. Unlike standards for other sources, EPA had a choice whether to issue this standard for power plants under Section 112 rather than rely on other programs to achieve reductions of power plant emissions.¹ 42 U.S.C. § 7412(n)(1)(A). Despite strenuous objections from stakeholders and a previous Administration's conclusion that it would neither be appropriate nor necessary, EPA decided to regulate power plants under Section 112 and issued the standard.

Every covered power plant in the nation must meet the emission limits in this standard that, as Section 112 of the Act requires, EPA designed to maximize emission reductions while taking costs into account. 77 Fed. Reg. at 9,307. EPA estimated the costs of this regulation will exceed 9.4 billion dollars *per year*. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* at 3-13 (2011) [“2011 *Regulatory Impact Analysis*”].

1. In contrast, the Act directly requires, rather than give EPA a choice, that existing incinerators may not be regulated under the Section 112 program and instead must be regulated by mandating state-by-state emission standards under Section 111(d). 42 U.S.C. § 7429(b). With the exception of incinerators and, due to the election granted in Section 112(n)(1)(A), the potential exception of power plants, Congress directed EPA to issue national standards for sources that emit in excess of specified thresholds and all other sources that “present[] a threat of adverse effects to human health or the environment . . . warranting regulation under” the Section 112 program. 42 U.S.C. § 7412(c).

EPA recognizes that its national emission standard will force many coal-fired power plants to shut down. EPA projects that the national standard will, by itself, result in the retirement of 4,700 megawatts of coal-fired generating capacity. *2011 Regulatory Impact Analysis* at 6A-8. That is nearly fourteen percent of the nation's total coal-fired generating capacity. *See id.* at 6A-8, 2-1. The new rule will also have dramatically greater impacts on certain regions, as, for example, Ohio relies on coal for more than two thirds of its electricity production. EPA projects that the rest of the coal-fired fleet will decide to invest billions of dollars to comply rather than shut down, but there is no guarantee that they will do so. With so many different decision makers deciding whether to shut down at once, any error in the projection or unforeseen shifts in prices could mean that EPA has woefully underestimated the risks of retirements. The final deadline to comply with the national emission standard is April 16, 2016. 40 C.F.R. § 63.9984(b).

II. EPA NOW SEEKS TO MANDATE STATE-BY-STATE STANDARDS FOR EXISTING POWER PLANTS UNDER SECTION 111(D) OF THE ACT.

As utilities across the country decide whether to shut down or invest many millions at coal-fired power plants, EPA has launched a second rulemaking, now under Section 111(d) of the Clean Air Act, requiring that States design and issue state-by-state emission standards for greenhouse gas emissions. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014). Just as must any national emission standard under Section 112, any state-by-state emission standard mandated under Section 111(d) must maximize emission reductions in light of costs. 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

EPA's mandate under Section 111(d) of the Clean Air Act calling for the development of state-by-state emission standards for existing power plants is unlawful. The Clean Air Act expressly prohibits EPA from mandating state-by-state standards for existing sources that are already subject to a national standard: EPA's authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. 42 U.S.C. § 7411(d). Here, existing coal- and oil-fired power plants are already subject to the national emission standard recently upheld by this Court. EPA proceeded with the Section 111(d) rulemaking anyway, and further announced its unequivocal legal conclusion that the agency not only can but *must* regulate categories of existing sources under both Section 111(d) and Section 112 of the Clean Air Act.

**III. MURRAY ENERGY CORPORATION PETITIONS FOR JUDICIAL REVIEW
AND AN EXTRAORDINARY WRIT TO STOP EPA'S UNLAWFUL ACTIONS.**

Faced with EPA's erroneous pronouncement and *ultra vires* rulemaking, Murray Energy Corporation filed the two consolidated petitions requesting that this Court: (1) issue a writ prohibiting EPA from promulgating an *ultra vires* Section 111(d) mandate ordering States to design and impose state-by-state standards for power plants; and (2) hold unlawful and set aside EPA's erroneous legal conclusion that the agency may regulate power plants under Section 111(d) despite the express prohibition in that very section.

EPA opposed the petition for extraordinary writ and moved to dismiss the petition for judicial review, contending that this Court can offer no relief until the agency has completed its rulemaking. This Court, on its own motion, consolidated the petitions and ordered full briefing and argument. Per Curiam Order (Nov. 13, 2014).

JURISDICTION

This Court has jurisdiction over the petition for an extraordinary writ, No. 14-1112, and the petition for judicial review, No. 14-1151, because Congress provided this Court original and exclusive jurisdiction to review EPA's actions under the Clean Air Act that are "nationally applicable." 42 U.S.C. § 7607(b)(1); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980).

EPA's legal conclusion, announced in EPA's June 18, 2014 publication in the Federal Register, applies nationwide to all existing sources regulated under Clean Air Act Section 112. This Court, therefore, has original and exclusive jurisdiction to review that action.

EPA's rulemaking similarly has national applicability. The Clean Air Act therefore also grants this Court original and exclusive jurisdiction to review challenges to EPA's rulemaking. 42 U.S.C. § 7607(b)(1). Under the law of this Circuit, the Clean Air Act's grant of original jurisdiction includes within its scope All Writs Act challenges seeking relief before EPA has taken final action such as the instant petition seeking a writ prohibiting EPA from proceeding with its *ultra vires* rulemaking. *See* 28 U.S.C. § 1651(a); *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 42–43 (D.C. Cir. 2004) (holding an express grant of original jurisdiction to review an agency's final actions extends also to consideration of petitions for relief from nonfinal agency action authorized by the All Writs Act).

In its prior briefings in the consolidated cases, EPA contended that this Court's jurisdiction does not extend to petitions seeking to prohibit EPA from

taking an action beyond its authority. Response to Petition at 1–2, 7–18. EPA’s contention is unsupportable in light of the undisputed law of this Circuit that this Court has jurisdiction under the Clean Air Act to provide relief authorized by the All Writs Act even in the absence of final agency action. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). EPA’s position would also create an unworkable split of jurisdiction between this Court and the district courts that Congress never intended. As this Court reasoned in *Sierra Club*, Congress provided for direct review by this Court to speed and centralize judicial supervision of EPA’s administration of the Clean Air Act. Congress has not, simply by expressly providing for direct review in the Courts of Appeals, either limited or split the availability of relief from EPA’s *ultra vires* agency action that could have otherwise been sought under the Administrative Procedure Act and the All Writs Act in the district courts had Congress not provided for direct review in this Court. *Cf. Leedom v. Kyne*, 358 U.S. 184, 188, 190–91 (1958).

SUMMARY

In 2012, EPA chose to regulate power plants under Section 112 of the Clean Air Act rather than mandate state-by-state standards under Section 111(d). It then promulgated one of the most expensive rules in the history of the United States. By the plain terms of the Clean Air Act, as interpreted by the Supreme Court and by EPA itself, this action foreclosed EPA from mandating state-by-state emission standards for these same sources. But in 2013 the President directed EPA to develop just such a mandate for greenhouse gas emissions from power plants. This directive was unlawful, but in response EPA initiated a rulemaking to mandate state-by-state greenhouse gas standards for existing power plants.

To justify its rulemaking in contravention of the clear statutory text, EPA rests its authority entirely on two fundamental errors. First, EPA argues that the text of Clean Air Act is not accurately reflected in the United States Code because of the existence of a superfluous conforming amendment. Second, EPA claims that it has authority to resolve the purported ambiguity raised by that conforming amendment and EPA demands that this Court defer to EPA's efforts in resolving it. But EPA, not the United States Code, is wrong, and EPA has no authority to second-guess the determinations made by the House Office of Law Revision Counsel in executing amendments whenever EPA finds that Acts of Congress have stymied its regulatory initiatives.

Finally, EPA argues that, even if its conduct is unlawful and in direct contravention of the Clean Air Act, it should be allowed to finish its unlawful conduct before this Court provides relief. There is nothing in the law to support this argument and no reason why EPA should be permitted to continue to pressure coal-fired power plants to shut down and continue to subject the States, the coal-fired power plants they regulate, and the hundreds of thousands of people who depend on coal-fired utilities for their businesses, jobs, and livelihoods, to suffer current injury and bear the burdens of preparing for compliance.

Because EPA's actions are in direct contravention of the Clean Air Act, because this Court has clear authority to stop the ongoing harm caused by EPA's unlawful conduct, and because there is no reason to delay relief until EPA promulgates a final rule it does not even have the authority to propose, Petitioner Murray Energy Corporation respectfully requests that this Court grant its petition for an extraordinary writ and petition for judicial review, declare EPA's legal conclusion not in accordance with law, and prohibit EPA from proceeding to mandate state-by-state emission standards for source categories already subject to Section 112.

STANDING

As the largest privately-held coal producer and the fifth largest overall in the United States, Murray Energy Corporation has standing to seek review of EPA's legal conclusion and to seek a writ of prohibition against EPA's rulemaking that jeopardizes the existence of many of the nation's coal-fired power plants, thereby directly harming the coal industry, including Murray Energy Corporation.² That the rulemaking is directed at coal is apparent from EPA's own statements.

In order to have standing, petitioner "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Whatever the detail of EPA's mandate, and whatever the detail of the States' plans in response, one thing is clear: Reliance on coal as the source of electricity generating capacity is to be reduced. Each loss of a customer means less revenue. Even if a non-customer shuts a coal-fired unit, the reduced demand for coal impacts pricing, which means less revenue. Thus, each coal-fired unit that is closed, or scheduled for closing, presents a "concrete" and

2. Murray Energy Corporation's standing is supported by the Declaration of Robert E. Murray, December 11, 2014, provided in the attached PETITIONER STANDING ADDENDUM.

“actual or imminent” injury to Murray Energy Corporation. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 (1972)); see also *Nat’l Envtl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1005–06 (D.C. Cir. 2014) (injury-in-fact due to competitive disadvantage).

The harm is neither “conceptual” nor “hypothetical.” *Lujan*, 504 U.S. at 560. Some customers have recently closed units. Another recently announced it would seek to repower its last unit to natural gas, reportedly due to the impact of upcoming regulations and the inability to obtain further rate increases to support capital improvements necessitated by them. Many have expressed their concerns in comments filed in the rulemaking. The planning for the forced retirement of coal-fired units is underway, often driven by deadlines under other EPA programs. Utilities do not have the luxury of deferring their decisions until the conclusion of the Section 111(d) rulemaking process.

Not only is the injury “fairly traceable” to EPA’s actions, *id.*, it is contemplated by EPA. EPA’s own modeling predicts significant reductions in coal production:

The EPA projects coal production for use by the power sector, a large component of total coal production, will decline by roughly 25 to 27 percent in 2020 from base case levels. The use of coal by the power sector will decrease roughly 30 to 32 percent in 2030.

79 Fed. Reg. at 34,934. Even though EPA's modeling is predictive, EPA has designed the proposed rule to produce this result. There is more than a "substantial probability" of harm. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (internal quotations omitted). While EPA's rulemaking may not be technically directed at coal producers, the impacts are still traceable to EPA's action. See *Motor & Equip. Mfgs. Assn. v. Nichols*, 142 F.3d 449, 456–458 (D.C. Cir. 1998); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1147–48 (D.C. Cir. 2002); see also *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 914–15 (D.C. Cir. 2014).³

The intended consequence of EPA's rulemaking is to force the shutdown of more coal-fired units than would otherwise occur. The petitions seek to stop EPA, now. If this Court does that, these additional shutdowns will not occur. Far from being "merely speculative," not only will a favorable decision by this Court "likely" redress the injury to Murray Energy, it will do so with certainty. See *Lujan*, 504 U.S. at 560.

For the foregoing reasons, the injury to Murray Energy Corporation is actual, concrete, and traceable to EPA's actions, and this Court has the ability to stop EPA. Accordingly, Murray Energy Corporation has standing to bring these petitions.

3. Additionally, "[p]arties motivated by purely commercial interests routinely satisfy the zone of interests test." *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004); compare *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256–57 (D.C. Cir. 2014) ("prudential standing" not found for a plaintiff whose sole interest was in seeing its competitor more rigorously regulated); see generally *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1389.

ARGUMENT

I. SECTION 111(D) PROHIBITS EPA FROM MANDATING STATE-BY-STATE EMISSION STANDARDS FOR EXISTING SOURCES THAT ARE ALREADY SUBJECT TO A SECTION 112 NATIONAL EMISSION STANDARD.

Power plants are already subject to a national emission standard. The unambiguous text of the Clean Air Act expressly prohibits EPA from mandating state-by-state emission standards for existing sources that are subject to a national standard by excluding from EPA's authority the power to mandate state-by-state standards "for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d). This is an important protection against inconsistent and unaffordable double regulation of existing sources. Further, the Clean Air Act's evolution since 1970 confirms that ignoring this prohibition would disrupt Congress's careful balance between national and state control and jeopardize existing sources in a manner Congress consistently avoided.

A. The Clean Air Act Expressly Prohibits Regulating Sources under Both Section 111(d) and Section 112, as EPA Has Repeatedly Conceded.

Section 111(d) of the Clean Air Act authorizes EPA to mandate state-by-state emission standards for existing sources. 42 U.S.C. § 7411(d). However, this authority is limited to mandating standards for emissions that are not "from a source category which is regulated under section [112]" of the Act. *Id.* Section 112 of the Act authorizes EPA to issue national emission standards. 42 U.S.C. § 7412(a)–(q). Thus, once a source category is regulated under a

national emission standard, EPA may not thereafter mandate state-by-state emission standards for that source category.

As a result, existing sources can be subjected to national standards *or* mandated state-by-state standards, but they cannot be subjected to national standards *and* mandated state-by-state standards. With respect to power plants in particular, Congress specifically directed EPA to subject them to a national emission standard only if “appropriate and necessary,” giving EPA the choice of whether to proceed with a national standard or allow power plants to be regulated through state-by-state standards. 42 U.S.C. § 7412(n)(1)(A) (“The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary”).

EPA has repeatedly acknowledged that the text of Section 111(d), as reflected in the United States Code after the 1990 Amendments, unambiguously prohibits doubly regulating existing source categories. During the Clinton Administration, EPA found Congress’s instructions on this point crystal clear, explaining that Section 111(d) does not permit or require mandates for emissions that are “emitted from a source category that is actually being regulated under section 112,” so EPA’s authority to issue a Section 111(d) mandate depends upon whether there is “a section 112 emission standard” applicable to the source category in question. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS – BACKGROUND INFORMATION FOR FINAL

STANDARDS AND GUIDELINES 1-5 to 1-6 (1995). The Bush Administration's EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA section 111(d) for 'any pollutant' . . . that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." 70 Fed. Reg. 15,994, 16,031 (March 29, 2005). EPA reiterated its position to this Court as well, stating that "a literal reading of this provision could bar section 111 standards for any pollutant . . . emitted from a source category that is regulated under Section 112." Final Brief of Respondent at 104, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097). Even in the documents announcing EPA's conclusion and rulemaking, the current Administration's EPA has continued to acknowledge the clear and unambiguous "literal reading of th[e] language . . . mean[s] that the EPA c[an] not regulate any air pollutant from a source category regulated under section 112." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS at 26, EPA-HQ-OAR-2013-0602-0419.

The Supreme Court has also already confirmed that EPA is correct that the text of Section 111(d) as reflected in the United States Code prohibits EPA from mandating state-by-state standards for existing sources that are already subjected to a national emission standard. In *American Electric Power v. Connecticut*, the Court observed that Section 111(d) "requires regulation of

existing sources within [a source category regulated under Section 111(b)] but “[t]here is an exception: EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408-7410, or the ‘hazardous air pollutants’ program, § 7412.” 131 S.Ct. 2527, 2537 n.7 (2011).⁴ Similarly, the ABA’s *Clean Air Act Handbook*, which has been cited by the Supreme Court,⁵ observes, with no hint of uncertain meaning, that “[u]nder section 111(d), EPA may establish emissions guidelines for existing sources in a source category when . . . the category is not subject to regulation under section 112.” CLEAN AIR ACT HANDBOOK 331 (J. Domike & A. Zacaroli eds., 3d ed. 2011).

The unambiguous words of Section 111(d) exclude from EPA’s authority the power to issue “standards of performance for any existing source for *any* air pollutant . . . emitted from a source category which is regulated under section [112].” 42 U.S.C. § 7411(d) (emphasis added). Thus, Congress has directed that EPA may not regulate *any* air pollutant through the state-by-state mandate program of Section 111(d) if the existing source category is regulated under Section 112.

4. That EPA might foreclose itself from issuing a mandate under Section 111(d) by issuing a national emission standard under Section 112 is fully consistent with the Supreme Court’s holding in *American Electric Power v. Connecticut* that federal common law was displaced by the Act because the Court explicitly held that delegation of authority “displaces federal common law” even if that authority is never actually exercised. 131 S.Ct. at 2538–39.

5. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014).

B. Section 111(d) Sensibly Protects Existing Sources From Double Regulation Under Standards that Each Seek to Independently Maximize Emission Reductions.

Congress sensibly banned EPA from doubly regulating source categories under both Sections 111(d) and 112 because simultaneous, uncoordinated design of national and state-by-state standards maximizing emission reductions would unduly jeopardize their viability by imposing conflicting or unaffordable requirements.

An EPA mandate of state-by-state standards under Section 111(d) must require the States, or EPA if the States do not, to design and impose emission standards determined to “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) . . . has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1); 42 U.S.C. § 7411(d).

A national emission standard under Section 112 must be designed to “require the maximum degree of reduction in emissions” determined to be “achievable” by EPA “taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . through the application of measures, processes, methods, systems or techniques” and must meet statutory stringency floors. 42 U.S.C. § 7412(d).

Thus, both the state-by-state standard and the national standard programs require consideration of costs on the one hand and maximum

reductions on the other. Plainly, the Act orders the designers of these standards to go as far as possible in reducing emissions without threatening the economic viability of sources. Subjecting existing sources to both state-by-state standards and a national standard would set the designers at odds and result in standards requiring more expenditures than existing sources can reasonably afford.

The problem is exacerbated where, as here, the threat of state maximum emission reductions comes closely on the heels of an independent national requirement. Power plants are forced to make engineering, design, and economic choices now, based on the obligation to maximize the reduction of one set of pollutants selected by EPA today, knowing that the variables will change almost immediately after these commitments have been made.

Will the pollution controls installed to meet the national standard be enough to meet the States' as-yet unwritten standards? If not, will the technology and operational changes needed to meet a state's standard be compatible with those the source is committing to for the national standard? Moreover, do the financial projections that were made to justify continuing to operate at all in light of the millions that will be needed to meet the national standard still hold once a state standard is imposed? These are just some of the issues Congress avoided by prohibiting double regulation of the same existing sources under both programs.

C. The Act's Evolution Since 1970 Shows the Import and Purpose of the Section 111(d) Restriction.

The evolution of the Clean Air Act's state and national emission standards programs reflect a careful balance between federal and state control, and show Congress's keen interest in avoiding the double regulation of existing sources by overlapping emission standards programs.

1. The 1970 Clean Air Act Amendments Created a State-by-State Existing Source Standards Program and a Limited National Standards Program Only for Extremely Hazardous Emissions.

Today, EPA has authority to directly impose comprehensive national standards on existing sources, but this was not always so, and it was Congressional reluctance to give EPA this power in 1970 that led to the development of EPA's authority to mandate state-by-state emission standards for existing sources in the first place.

On February 9, 1970, President Nixon proposed amending the Clean Air Act to authorize national emission standards "for facilities that emit pollutants extremely hazardous to health" and "for selected classes of new facilities which could be major contributors to air pollution." A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1498, 1505 (Comm. Print 1974).⁶

6. Citations to the historical development of the Clean Air Act are to the pages of the comprehensive committee print compilations. None of the materials referenced in this section are statements by legislators or committees. A more detailed discussion of the historical development of these provisions is included in Murray Energy Corporation's comments. COMMENTS OF MURRAY ENERGY CORPORATION at 25–36, EPA-HQ-OAR-2013-0602-23523 (Dec. 1, 2014), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23523>.

Congress considered a number of different options in response to the President's proposal, ranging from mandating the regulation of all sources to just new sources, and from the regulation of all existing source emissions that endangered "public health or welfare" to only regulation of existing source emissions that are "extremely hazardous to health."⁷

The final result, the 1970 Clean Air Act, created an emission standards program for existing sources in Section 111(d) that covered most pollutants found to endanger "public health or welfare," but it assigned the authority to develop these standards to the States, not the federal government. 42 U.S.C. § 1857c-6(d) (1976). The only exception was the narrow Section 112 program authorizing EPA to establish national standards for certain extremely hazardous emissions that were to be listed under Section 112(b)(1)(A) if found to have the potential to "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C.

7. See A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 1,489–92 (S. 3466 § 8 and H.R. 15848 § 8 as introduced proposed a Section 112 program authorizing standards for new sources of emissions found to endanger "public health or welfare" and standards for existing source emissions only when found to be "extremely hazardous to health"); *id.* at 920–24 (H.R. 17255 § 5(a) as reported proposed a Section 112 program authorizing standards only for new sources); *id.* at 1,467–68 (S. 3546 § 4(c) as introduced proposed a Section 108(i) program authorizing standards only for new sources); *id.* 392, 553–69 (S. 4358 § 6(b) as introduced and passed in the Senate proposed a Section 113 program authorizing standards for new source emissions found to endanger "public health and welfare," a Section 114 program for all sources of emissions found "to have an adverse effect on public health," and a Section 115 program authorizing standards for emissions from any source found to be "hazardous to the health of persons").

§ 1857c-7(a)(1) (1976). Congress also made clear that these programs were not to overlap, providing that state-by-state standards developed by States could only be mandated by EPA for emissions of pollutants which, among other things, were “not included on a list published under section . . . 112(b)(1)(A).” 42 U.S.C. § 1857c-6(d) (1976).

Notably, while Congress elsewhere in the 1970 Clean Air Act prescribed maximum emission reductions in light of costs for new sources, for existing sources Congress chose a different path: National emission standards for extremely hazardous emissions from existing sources would be set by EPA so as to “provide[] an ample margin of safety to protect the public health,” 42 U.S.C. § 1857c-7(b)(1)(B) (1976), and standards for existing sources of other harmful emissions from existing sources would be determined by States on a state-by-state basis for each State’s own existing sources but not according to any particular design formula imposed by EPA. 42 U.S.C. § 1857c-6(d) (1976).

2. The 1977 Amendments Required States to Maximize Emission Reductions at Existing Sources in Light of Costs.

Whereas the 1970 Act left to the States the task of determining the appropriate method for setting emission standards for each State’s own existing sources of most air pollutants, the 1977 Act imposed for the first time the additional requirement that States design standards for existing sources to maximize emission reductions while considering costs and other factors. 42 U.S.C. § 7411(a)(1)(C) (1988). The standards for existing sources would still be set by the States in the first instance, but would now have to “reflect[] the

degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.” *Id.*

The Act’s Section 112 national emission standards program was not significantly altered. It remained limited to extremely hazardous emissions and continued to require an ample margin of safety rather than maximized emission reductions in light of costs. 42 U.S.C. § 7412 (1988). Meanwhile, the Act also continued after the 1977 Amendments to prohibit EPA from mandating state-by-state standards for any pollutant “included on a list published under section . . . 112(b)(1)(A).” 42 U.S.C. § 7411(d) (1988).

3. The 1990 Clean Air Act Amendments Significantly Expanded the National Standards Program and Retained the State-by-State Existing Source Standards Program Only for Source Categories Not Regulated Under the National Standards Program.

In 1990, Congress dramatically expanded Section 112 of the Act, altering the national emission standards program for existing sources from a limited program covering extremely hazardous emission to a broad national program covering all emissions “which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects.” 42 U.S.C. § 7412(b)(2).

The 1990 Amendments also established, for the first time, a requirement that EPA impose national standards for existing sources that maximize

emission reductions in light of costs, requiring that EPA design the standards to achieve “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.” 42 U.S.C. § 7412(d).

In addition, where Section 112(b)(1)(A) of the Act had previously contained a short requirement that the Administrator publish, and “from time-to-time thereafter revise” a list of the hazardous air pollutants covered by Section 112 (and therefore excluded from regulation under Section 111(d)), the 1990 Amendments replaced all of Section 112(b) with a list of nearly 200 pollutants and a detailed process for adding additional pollutants to the list, removing them, routinely updating the list, and allowing for private parties to petition for changes. 42 U.S.C. § 7412(b).

The 1990 Amendments also shifted the focus of Section 112’s national emission standards from pollutants to source categories. Where before the Administrator was to publish standards for each pollutant listed in Section 112(b)(1)(A) (now Section 112(b)), the 1990 Amendments required EPA to develop “a list of all categories and subcategories of major sources and area sources . . . of the air pollutants listed pursuant to subsection (b)” and to establish emission standards for those “categories and subcategories the Administrator lists” on a category-by-category basis. 42 U.S.C. § 7412(c).

In the course of this expansion and change in focus, Congress sought to again ensure that there would be no double regulation under both programs.

The bill passed in the Senate merely updated the citation to the list of specific pollutants covered by Section 112 from 112(b)(1)(A) to 112(b) without limiting the scope of the Section 112 exclusion. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 4,534 (Comm. Print 1993). This bill would have preserved the traditional approach that, as long as a pollutant is covered by a Section 112 national emission standard, it could not be the subject of an EPA mandated state-by-state emission standard. Of course, since the 1990 Amendments greatly expanded the set of pollutants that would be covered by Section 112, this would have essentially eliminated the Section 111(d) state-by-state standards program. The only exception the Senate bill provided was a special provision requiring Section 111(d) mandates for certain specified emissions from existing incinerators. *Id.* at 4,538–40, 4,556.

Meanwhile, the House passed a bill that preserved much more of the Section 111(d) mandate program by changing the focus of the Section 112 exclusion from the *pollutants* covered by Section 112 to the *source categories*, such that Section 111(d) standards could now be promulgated for almost any pollutant meeting the basic requirements of Section 111, as long as it did not cover emissions “from a source category which is regulated under Section 112.” *Id.* at 1,979. In addition, the House bill included a provision that would allow EPA to *choose* whether the nations existing power plants should be regulated under Section 111(d) or the new Section 112 program. *Id.* at 2,149.

In conference, the House and Senate agreed to include in the final bill the Senate bill incinerator provision, the House bill power plant provision, and the House bill amendment to the mandate program.⁸ *Id.* at 593, 572, 481; *see* 42 U.S.C. § 7429(b); 42 U.S.C. § 7412(n)(1)(A); 42 U.S.C. § 7411(d).

Importantly, the Clean Air Act as amended in 1990 again continued to avoid authorizing EPA to subject any existing source simultaneously to multiple standards designed to maximize emission reductions in light of costs. Having provided for far more comprehensive national emission standards for existing sources, Congress decided to maintain the state-by-state standard mandate program for those sources not subject to the national standards. And having preserved this role for the state-by-state mandate program, Congress further decided incinerators would be subject only to the state-by-state mandate program but gave EPA discretion to decide which program power plants would be subject to, national or state-by-state.

Congress's special treatment of incinerators and power plants recognizes that these categories of existing sources are often older facilities that offer essential public or quasi-public services to their communities, frequently operating at little or no profit. Thus, regulation of existing incinerators and

8. As discussed further below, the 1990 Act also inadvertently included the conforming amendment that would have updated the pre-1990 Section 112 exclusion's reference from Section 112(b)(1)(A) to Section 112(b), but the House Office of Law Revision Counsel properly found that this conforming amendment failed to execute in light of the execution priority of the provision substantively amending the Section 112 exclusion.

power plants poses implications for the proper balance between state and federal control that regulation of other sources does not. Accordingly, Congress maintained a greater role for States in establishing standards for incinerators and gave EPA discretion to maintain a greater role for States in establishing standards for power plants. But Congress in no way empowered EPA to subject power plants (or any other category of existing sources) to *both* national and mandated state-by-state standards.

II. EPA WRONGLY IGNORES THE TEXT OF SECTION 111(D) AND ERRONEOUSLY CLAIMS THERE ARE DUELING “VERSIONS” OF THE STATUTE.

In launching its rulemaking and concluding that double regulation is authorized, EPA had to cast aside the text of the Clean Air Act based upon the vague and unsupportable assertion that the United States Code “conflict[s]” with the Statutes at Large. Response to Petition at 4. EPA then had to rest its authority to doubly regulate on a purported legislative glitch. Response to Petition at 28. In reality, there is no glitch — the text of the law now in force is accurately reflected in the Code. And even were there a reasonable doubt, Congress tasked its own legislative agency, not EPA, with determining in the first instance what the text of the law in force is and Congress provided that courts should defer to this agency’s reasonable determinations.

A. The Code Accurately Reflects the Text of Section 111(d).

In addition to the substantive amendment to the mandate program that prohibits Section 111(d) mandates for sources regulated under Section 112, the 1990 Amendments also contained a conforming amendment. Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). The conforming amendment has no effect on the Act because the provision substantively amending the mandate program and striking the reference to Section 112 that it would have amended has execution priority and the United States Code, prepared by the House Office of Law Revision Counsel (“the Office”), accurately reflects the text of Section 111(d) after application of the 1990 Amendments to the Clean Air Act.

The conforming amendment EPA stakes the rulemaking on purported to replace language that no longer existed due to the prior execution of the earlier substantive amendment, and so the Office determined the conforming amendment failed to execute. The two amendments are set out in the Statutes at Large as follows:

SEC. 108. MISCELLANEOUS GUIDANCE. . . .

(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”. . . .

SEC. 302. CONFORMING AMENDMENTS.

(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)”.

Pub. L. 101–549, § 108(g), 104 Stat. 2,399, 2,467 (1990); Pub. L. 101–549, § 302(a), 104 Stat. 2,399, 2,574 (1990). Prior to 1990, the Code’s text provided for regulation of “any air pollutant . . . which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title.” 42 U.S.C. § 7411(d) (1988). The current Code’s text now provides for regulation of “any air pollutant . . . 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.” 42 U.S.C. § 7411(d) (2012). In the amendment note, the Office explained its determination in applying the amendments:

Subsec. (d)(1)(A)(i). Pub. L. 101–549, §302(a), which directed the substitution of “7412(b)” for “7412(b)(1)(A)”, could not be executed, because of the prior amendment by Pub. L. 101–549, §108(g), see below.

Pub. L. 101–549, §108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A)”.

42 U.S.C. § 7411, Amendments, 1990, Subsec. (d)(1)(A)(i) (2012). Thus, the substantive amendment — Section 108(g) — was duly executed while the conforming amendment — Section 302(a) — could not be executed and failed.

EPA asserts that “[t]his situation appears to be unique.” Response to Petition at 23 n.8. EPA is wrong. A bill containing an amendment to a statutory provision that fails to execute because of another amendment to the same provision contained earlier in the same bill is not unusual. This happens often and Congress and the Office have an established rule to resolve it: An amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment would amend. The Office consistently and frequently applies this rule in this circumstance.⁹

9. *See, e.g.*, 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395l, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amend-

This is Congress's rule — Congress is aware of this rule and drafts legislation in light of it. *See* UNITED STATES SENATE, OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL § 126(d) (1997) (“If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed.”); UNITED STATES HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE § 332(d) (1995) [“MANUAL ON DRAFTING STYLE”] (“The assumption is that the earlier (preceding) amendments have been executed.”). In this case, the Office simply followed Congress’s rule and correctly determined that the amendment directing the substitution of “112(b)(1)(A)” for “112(b)” failed to execute because a prior amendment earlier substituted “or emitted from a source category which is regulated under section 112” for “or 112(b)(1)(A).” The Code therefore accurately reflects the text of Section 111(d) in force today.¹⁰

ments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

10. Notably, the text of Section 111(d) would be the same if the conforming amendment had execution priority, for the substantive amendment would strike out the text that the conforming amendment updates and insert in its place the new substantive language.

The failure of the conforming amendment in no way frustrated the intent of Congress, as Congress never intends for a non-substantive amendment to limit or frustrate an important substantive amendment. Indeed, as this Court has held, conforming amendments that are unnecessary do not call into question the meaning of federal statutes or render them ambiguous. *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). The legal irrelevance of the conforming amendment here is especially obvious for it would do nothing other than update a reference by deleting the text “(1)(A).” It beggars belief that the superfluous instruction to remove these six characters when the entire reference “112(b)(1)(A)” had already been removed by a substantive amendment with real force and purpose could cloud the meaning of the Clean Air Act, let alone form the basis for a massive regulatory undertaking seeking to utterly transform the nation’s energy system.

B. EPA Wrongly Asks this Court to Disregard the Current Text of Section 111(d) as Determined by the Office of Law Revision Counsel.

EPA claims that, because there was a failed conforming amendment, Section 111(d) “is rife with ambiguity” that “EPA should have the first opportunity to resolve” and that EPA must receive deference in resolving this purported “ambiguity.” Response to Petition at 22, 30. But as explained above, there is no ambiguity because the conforming amendment failed to execute. Moreover, EPA is not entitled to deference in determining the current text of the Clean Air Act. Executive agencies may get deference on how to *construe* their statutes, but they do not get to *write* them as well. To the extent there is any question as to what the current text of the Clean Air Act is in light of the 1990 Amendments, that decision falls to the Office, a legislative agency, and then, in cases of clear error, to this Court, but never to EPA. Allowing EPA to usurp that function would unduly interfere with the functioning of the legislative process and subordinate the position of Congress.

The Office is the legislative agency that prepares and publishes the United States Code, including titles like Title 42 that are not yet positive law. 2 U.S.C. § 285b. The Office is directed by the nonpartisan Law Revision Counsel appointed by and serving at the pleasure of the Speaker of the House. 2 U.S.C. § 285c. Chief among its responsibilities, this nonpartisan legislative agency keeps the Code up to date by faithfully executing Acts and applying amendments according to Congress’s instructions and thereby aids the functioning of the legislative branch.

Congress has commanded that, in determining the text of its statutes, deference be given to the Office's determinations, providing that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . in force." 1 U.S.C. § 204. To give effect to this provision, the Code must be considered to be the authoritative statement of the law unless it is plainly inconsistent with the Statutes at Large or the determinations of the Office are unreasonable. *See Stephan v. United States*, 319 U.S. 423, 426 (1943) (inclusion of provision "inconsistent" with the repeal of the provision in the Statutes at Large); *United States National Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439 (1993) (omission of provision unreasonably based on punctuation error in light of "overwhelming evidence from the structure, language, and subject matter" of the Act).

By deferring to the Office, courts will, as the Supreme Court has instructed, avoid "undue judicial interference with the functioning of the Legislative Branch" and follow the "precedent instructing [courts] to respect . . . coequal and independent departments." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) (quotation omitted). The Supreme Court has made clear that the avoidance of undue judicial interference with the legislative process is vital. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892); *Noel Canning*, 134 S. Ct. at 2577. This separation of powers concern demands deference for the legislative process whenever "[j]udicial efforts to engage in" more searching "inquiries would risk undue judicial interference with the functioning of the Legislative Branch." *Noel Canning*, 134 S. Ct. at 2576. Deference is also

appropriate if “judges cannot easily determine . . . matters” relating to the legislative process. *Id.* Both of these circumstances are applicable here.

The determinations of the Office should also be deferred to because this is “how Congress would likely have meant to allocate . . . authority” amongst the three branches. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring). Congress crafts Acts with the aid of the congressional Offices of Legislative Counsel and closely supervises a reliable legislative agency that executes the congressional commands contained therein without regard to partisanship or policy. Then executive agencies under the President’s supervision apply their technical and policy expertise in interpreting the statutory text. Courts review these agencies’ interpretations to ensure they are neither inconsistent with the statutory text nor unreasonable. But if Congress cannot determine what the text of the law is or how amendments will be executed, Congress cannot effectively perform its central role in this process. Thus, rejecting reasonable determinations made by Congress’s legislative agent “subordinates the legislature and disregards that coequal position in our system of the three departments of government.” *Ex parte Wren*, 63 Miss. 512, 532 (1886).

Furthermore, failing to defer to the Office would also likely unnecessarily burden the judicial process by leading to “an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law” because “[e]very suit before every court where the validity of” the determinations of the Office

applying amendments “may be called in question” will be an appeal of the Office’s determination embroiling courts into the intricacies of the legislative process. *Id.*

In this case, the Office did its job and applied the 1990 Amendments in updating the Code. EPA has identified no oversight or error by the Office. To the contrary, it is clear from the Office’s amendment note to Section 111 that the Office executed the substantive amendment and determined that the superfluous conforming amendment failed. EPA cannot second guess that determination.

III. THE RELIEF SOUGHT BY THE PETITIONS IS AVAILABLE NOW.

Without any substantive defense for its actions, EPA has focused most of its efforts arguing that *even if* EPA has wrongly claimed authority expressly denied it by Congress, and *even if* it is relying on that illegal power grab to initiate rulemaking which it has no lawful right commence, and *even if* that rulemaking is costing States and the private sector millions to prepare for and in potentially wasted compliance costs and is weakening the nation's power grid by pressuring existing coal-fired power plants to shut down or abandon coal for more expensive and less reliable fuels, this Court has no authority to review its actions until EPA finalizes an unlawful rule. Again EPA's arguments are groundless. This Court has authority to issue extraordinary writs when appropriate, including to stop unlawful agency conduct. The Clean Air Act also expressly grants direct judicial review not just of final rules promulgated by EPA, but of "any other" final agency action as well. 42 U.S.C. § 7607(b)(1); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980). EPA's legal conclusion, stated in certain and definitive terms, in a publication signed by the Administrator and supported by a lengthy legal memorandum, easily qualifies as a final agency action and is therefore reviewable regardless of whether EPA initiated any rulemaking under that improperly-claimed authority.

A. This Court Can and Should Issue a Writ Prohibiting EPA From Doubly Regulating Power Plants.

1. This Court Can Issue a Writ Prohibiting *Ultra Vires* Agency Action When It Is Necessary or Appropriate To Do So.

Under the All Writs Act, federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

This Court has long recognized its expansive authority to engage in expedited review under the All Writs Act when such review promotes the administration of justice. *See, e.g., Colonial Times v. U.S. District Court (Gasch)*, 509 F.2d 517, 525–26 (D.C. Cir. 1975). As explained in *Colonial Times* in the context of the availability of mandamus to a trial court notwithstanding the normal rule that a party may appeal only a final judgment, the “true test is whether the trial court had any legal power to act or refuse to act as it did.” *Id.* at 523. The exercise of an “appellate supervisory power” over the lower court is a “more modern ground for the issuance of mandamus,” *id.* at 524, but is firmly grounded in Supreme Court jurisprudence. In holding that mandamus was available, this Court applied the “principle of *Schlagenhauf*” in concluding that mandamus lies to review an issue of first impression in order to settle new and important problems. *Id.* at 524–25 (discussing *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964)). “*Schlagenhauf* authorizes departure from the final judgment rule when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice.” *Id.*

Similarly, an extraordinary writ is available when it is an administrative agency (rather than a trial court) acting beyond its power notwithstanding the general principle that affected parties may only appeal final agency actions (rather than final judgments). Thus, while proceedings under the All Writs Act to challenge non-final agency action may be relatively rare, a Court can and should issue a writ prohibiting an agency from taking an action beyond its power — an *ultra vires* action — before it is final.

In *Leedom v. Kyne*, the Supreme Court held that a court could strike down a non-final action taken “in excess of [the agency’s] delegated powers and contrary to a specific prohibition.” 358 U.S. 184, 188, 190–91 (1958). And in *McCulloch v. Sociedad Nacional*, the Supreme Court held that a court could enjoin an agency from taking unlawful non-final actions when those actions involve “public questions particularly high in the scale of our national interest” because such questions are “a uniquely compelling justification for prompt judicial resolution of [a] controversy.” 372 U.S. 10, 16–17 (1963).

This Court, too, has recognized that appropriate circumstances warrant relief from non-final agency actions. In *Sierra Club v. Thomas*, this Court, in clarifying a line of previous cases, held that a court can provide “interlocutory review of an unreasonable delay claim” when interlocutory review is “necessary to protect” the court’s “prospective jurisdiction.” 828 F.2d 783, 790 (D.C. Cir. 1987) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75–76 (D.C. Cir. 1984)). In that case, this Court explained that “this interlocutory intervention is necessary” when “a substantive statutory right

would be effectively denied as a result of agency delay . . . and such delay cannot be remedied when reviewing the final order because the clock cannot be turned back.” *Id.* at 792 n.66. Additionally, in *Meredith v. Fed. Mine Safety & Health Review Comm’n*, this Court held that a court may review non-final agency action that meets the requirements of the collateral order doctrine — separability, unreviewability, and conclusiveness. 177 F.3d 1,042, 1,050 (D.C. Cir. 1999).

2. A Writ Is Necessary and Appropriate Under these Extraordinary Circumstances.

Here, a writ prohibiting EPA from issuing the unlawful mandate is necessary and appropriate. The petition for a writ is based on the fundamental legal infirmity of EPA’s forthcoming mandate. EPA cannot resolve its lack of authority by revising the proposed rule, since EPA has no other legal basis for the rule and the illegality demonstrated by the petition can only be redressed by total withdrawal of the rule (with no future replacement rule). There is no other suitable “fix” to deal with EPA’s *ultra vires* conduct other than to instruct EPA not to proceed.

Moreover, that instruction to EPA needs to occur now. Petitioner and others will suffer irreparable injury if this Court does not provide immediate relief. First, utility companies are now making decisions about the future viability of their coal-fired power plants in the face of impending compliance deadlines under the 2012 Section 112 rule that will cost millions to meet. The proposed mandate adds to that cost evaluation the prospect of even more

expenditures in order to comply with an independent standard that also strives to achieve maximum emission reductions. The power plants face an April 16, 2016 final compliance deadline under the 2012 rule, and prior to that time need to decide whether or not to seek the necessary compliance extension. In other words, utilities must make a decision over the coming months as to each of their coal-fired power plants whether to proceed with significant investments or to begin the process of shutting down (or converting) the power plant. They must now take into account the uncertainties of a Section 111(d) mandate as a part of that analysis. With the specter of the mandate hanging over them, utilities face uncertainty and many coal-fired power plants may shut down based on the risk that the mandate could be upheld, no matter its final form, and they would be forced to invest millions more. Meanwhile, utilities must grapple with the potential wasted investment to comply with the earlier Section 112 requirements.

Second, States right now must begin development of plans designed to meet the requirements of the Section 111(d) mandate. Although the President has announced that States will have one year from the date of the final mandate to submit their plans, each State must begin that process now given the complexities involved as it tries to balance intra-state power supply and demand, including reliability concerns, and concerns about economic growth and employment. In some cases, States have to enact enabling legislation as a preliminary step in order to abide by the demands by EPA. All of this effort takes time. Simply put, States cannot wait for the final mandate to begin a

complete overhaul of the nation's production and use of energy in the short time provided by EPA. A failure to meet the deadline would turn over critical policy decisions about the future of existing coal-fired power plants to EPA. To avoid these potential consequences, States must immediately devote tremendous time and resources toward an effort that, ultimately, stems from an *ultra vires* act by EPA.

These circumstances are different from the typical rulemaking. The scope and consequences of the proposed rule are unprecedented, with wholesale reordering of the power system and massive financial impacts on power plants and the coal industry. Also, unlike a typical rulemaking, the legal issue presented here cannot be impacted by revision of the proposed rule and will never be clearer. Because the legal issue presented focuses exclusively on the legal basis, it does not address the content of the proposed rule. It will, however, result in judicial economy since a ruling that EPA's legal foundation is flawed would moot the inevitable challenges to the final rule, avoiding the current injury and wasted effort of a continued rulemaking that has no valid legal basis.

These circumstances more than qualify as appropriate for relief by a writ prohibiting EPA from issuing the unlawful mandate. Analogizing to the test laid out by this Court in *Colonial Times* in the context of a trial court acting beyond its power, first, the issue of EPA's authority under Section 111(d) of the Act when the same source category has already been regulated under Section 112, is an important issue that must be expeditiously resolved. 509 F.2d at 525. Second,

given the massive undertaking called for by the proposed mandate, “there is an undeniable need to forestall future error and uncertainty” in the availability of Section 111(d) as a basis for greenhouse gas emission regulation of coal-fired power plants, as well as for future rulemaking efforts by EPA. *Id.* And third, clearly resolution of this issue is “significant” to finalization of the proposed rule, since the writ would result in the withdrawal of the proposed mandate. *Id.*

The analysis in the administrative context flows directly from the long history of the extraordinary writ authority recognized by the Supreme Court and this Court. As in *Leedom*, EPA acts beyond its authority. As in *McCulloch*, the issue is of urgent national importance. As in *Thomas*, only an immediate remedy can prevent a substantial portion of the harm facing the nation’s power plants that must decide whether to invest millions or shut down coal fired power plants by the national standard’s compliance deadline. And as in *Meredith*, each of the three requirements of the collateral order doctrine is satisfied. In short, the circumstances in this case present a compelling justification for prompt judicial resolution. A federal agency has commenced a rulemaking of unprecedented scope with significant implications for federal and state relations and the national economy, irrespective of the details of the final rule. Such a critical circumstance offers its own “uniquely compelling justification for prompt judicial resolution of [a] controversy.” *McCulloch*, 372 U.S. at 17.

B. This Court Can and Should Hold Unlawful and Set Aside EPA's Erroneous Legal Conclusion that It Can Doubly Regulate Existing Sources Under Sections 111(d) and 112 of the Clean Air Act.

In addition to prohibiting EPA from proceeding with the *ultra vires* rulemaking, this Court can and should hold unlawful and set aside EPA's announced legal conclusion that double regulation is authorized and required by the Clean Air Act because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

1. EPA Has Concluded that It Has the Authority to Mandate the Double Regulation of Sources under Sections 111(d) and 112.

In the preamble to the proposed rule, EPA announced the agency's conclusion that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions at these sources regardless of whether they are already regulated under the Section 112 program. *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34,830 (June 18, 2014). Specifically, in a section entitled "Summary of Legal Basis," the agency pronounced that "EPA *reasonably interprets* the provisions identifying which air pollutants are covered under CAA section 111(d) to authorize the EPA to regulate CO₂ from fossil fuel-fired EGUs." *Id.* at 34,852 (emphasis added). In Section V of the preamble, EPA unequivocally stated the agency's conclusion: "The EPA *has the authority* to regulate, under CAA section 111(d), CO₂ emissions from EGUs, *under the Agency's construction* of the ambiguous provisions in CAA section 111(d)(1)(A)(i) that identify the air pollutants subject to CAA section 111(d)." *Id.* at 34,853 (emphasis added). The preamble describes in detail the agency's

legal analysis in support of this conclusion, including its position on the meaning of Section 111(d), its interpretation of legislative history, and its analysis of Supreme Court precedent to support the agency's conclusion. *Id.* This Federal Register publication is signed by the Administrator of EPA, Gina McCarthy. *See id.* at 34,950.

Along with the publication of the agency's legal conclusion in the preamble in the Federal Register, EPA placed in the rulemaking docket a 104-page legal memorandum to "supplement the preamble by providing background for the legal issues discussed in the preamble. . . ." LEGAL MEMORANDUM FOR PROPOSED CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS, EPA-HQ-OAR-2013-0602-0419 (posted June 18, 2014) ("Legal Memorandum"); *see also* 79 Fed. Reg. at 34,853 (referencing the Legal Memorandum for further discussion and legal support for the conclusion that EPA can doubly regulate power plants).

In a section entitled "Authority to regulate CO₂ from EGUs," EPA lays out in detail its case law, statutory, and regulatory history arguments, definitively concluding in certain and unequivocal terms: "Applying this interpretation of the Section 112 Exclusion to this rule, *we conclude* that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs." Legal Memorandum at 27 (emphasis added). The Legal Memorandum is referred to directly in the preamble signed by EPA's Administrator and is listed in EPA's online docket as "issued by the Environmental Protection Agency (EPA)." *See Legal Memorandum for Proposed*

Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, REGULATIONS.GOV (June 18, 2014) <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-0419>.

Since the publication of EPA's legal conclusion, both EPA's Administrator and the Acting Assistant for the Office of Air and Radiation have made statements, on the record before Congress, reaffirming that EPA intends to adhere to this legal position.¹¹

While EPA has generally stated that EPA "invites further input through public comment on all aspects of" its proposal, 79 Fed. Reg. 34,835, at no

11. The day after EPA published its legal conclusion, Representative Morgan Griffith of Virginia, a member of the House Energy & Commerce Committee, asked Assistant Administrator Janet McCabe whether it was correct that the "decision by the EPA" to regulate power plants under Section 112 "foreclosed the agency's ability to regulate . . . under Section 111." EPA's Proposed Carbon Dioxide Regulations for Power Plants: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce at 2:09 (June 19, 2014), *available at* <http://energycommerce.house.gov/hearing/epa%E2%80%99s-proposed-carbon-dioxide-regulations-power-plants>. Assistant Administrator McCabe answered: "That is not correct." *Id.* at 2:10. Then on July 23, 2014, Senator Roger Wicker of Mississippi, a member of the Senate Environment and Public Works Committee, asked Administrator McCarthy if it was correct that "Section 111(d) says if it's regulated under 112 you can't regulate it" under that provision and "EPA has imposed extensive regulations on coal-fired power plants under Section 112." Oversight Hearing: EPA's Proposed Carbon Pollution Standards for Existing Power Plants: Hearing Before the S. Comm. on Environment & Public Works at 1:38 (July 23, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.LiveStream&Hearing_id=8655edd9-03ac-bb36-cab8-7913ec6c2b94. McCarthy answered "I think that the framing of the legal argument is incorrect, Senator." *Id.* at 1:38.

point has EPA indicated that it is uncertain of its legal conclusion that EPA has authority to proceed with a rulemaking under Section 111(d) for sources regulated under Section 112 or that EPA is still evaluating its position on this specific and important issue or that there is any possible basis for the rule other than Section 111(d). To the contrary, while EPA in several places *proposes* legal positions in the preamble relating to the implementation of the proposed rule, *see, e.g., Id.* at 34,903 (“EPA *is proposing to interpret* CAA section 111 as allowing state CAA section 111(d) plans to include measures that are neither standards of performance nor measures that implement or enforce those standards. . . .”) (emphasis added); the legal conclusion at issue here is stated conclusively. *Id.* at 34,853 (“The EPA *has the authority to regulate*, under CAA section 111(d). . . .”).

2. EPA’s Legal Conclusion Is Final Action under the Clean Air Act.

EPA’s legal conclusion published in the Federal Register in a preamble signed by the Administrator and supported by statements and analysis in a legal memorandum represents a “final” action reviewable under Section 307.

a. EPA’s Legal Conclusion Is Presumptively Final Because It Was Signed by the Administrator of EPA.

An agency’s interpretation of the law is presumptively final if it is signed by the head of the agency. *Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702–03 (D.C. Cir. 1971). The preamble announcing EPA’s legal conclusion was signed by the Administrator. 79 Fed. Reg. at 34,950. It is therefore presumptively a final action by the agency.

Indeed, it would be surprising if EPA would initiate a rulemaking of the magnitude proposed, which has imposed significant and immediate obligations on States and others to start planning now for the dramatic impacts of the proposed rule, effectively re-ordering the electric generating system of the United States on a very tight time frame, if EPA had not first concluded that it had legal authority to do so. However, with the commencement of litigation, EPA's counsel now argue that the agency's legal conclusion was merely "tentative." Motion to Dismiss at 20. But EPA cannot rebut the presumption of finality through "mere argument by its court counsel." *Nat'l Automatic Laundry*, 443 F.2d at 703. Rather, EPA must produce *evidence* that the statutory interpretation is not final despite bearing the signature of the head of the agency. As this Court has held, such evidence would include "an affidavit by the agency head" adducing that the matter "is still under meaningful refinement and development." *Nat'l Automatic Laundry*, 443 F.2d. at 703. While an affidavit alone is not always enough, *cf. Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (holding agency action final even after agency provided affidavit asserting nonfinality), here EPA has failed to provide this Court any evidence at all to rebut finality.

To the contrary, EPA's actions since the publication of its legal conclusion "belie[] the claim that its interpretation is not final." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001). When questioned by members of Congress, EPA leadership brushed aside assertions that EPA's legal conclusion may be wrong and should be reconsidered. *See supra* note 11

and accompanying text. EPA leadership's statements before Congress stand in stark contrast to unsupported arguments by counsel before this Court that the agency's legal conclusion is merely "tentative."

It also does not matter that EPA has stated that it will accept public comments on "all aspects of [its] proposal." 79 Fed. Reg. at 34,835. The agency is free to modify its legal positions, but this does not render them any less final at the time they are made, or any less fit for judicial review. *See Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (the "mere possibility that an agency might reconsider does not suffice to make an otherwise final agency action nonfinal"); *UAW v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986) (EPA could "reverse its interpretation at some future date, but that does not change the reality that the current interpretation could quite likely be used" until that happens.); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). This is especially true for review of EPA's actions under the Clean Air Act, because Congress has explicitly provided for judicial review of EPA's actions that are the subject of petitions for reconsideration even though such petitions would ordinarily render the actions nonfinal. *See* 42 U.S.C. § 7607(b)(1).

b. EPA's Legal Conclusion Meets the General Conditions for Finality Announced by the Supreme Court in *Bennett v. Spear*.

EPA's failure to rebut the presumption that the Administrator's signed preamble represents the agency's final action justifies denial of EPA's Motion to Dismiss. EPA's legal conclusion also satisfies both conditions of the general standard for finality described in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the Court explained that, as a general matter, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177–78 (citations omitted).

First, EPA marked the consummation of its decisionmaking process when it certainly and unequivocally announced its legal conclusion in the Federal Register and immediately acted on its assumed authority.

EPA's unequivocal legal conclusion "'mark[s] the consummation of the agency's decisionmaking process" and "'EPA has rendered its last word on the matter' in question." *Whitman*, 531 U.S. at 478. Indeed, as this Court held in *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, the initiation of an agency proceeding can, in and of itself, constitute final action establishing the agency's conclusion that it has legal authority to proceed. 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983) ("By filing a complaint . . . the Commission, for all practical purposes, made a final determination that such proceedings were within its

statutory jurisdiction. . . . Thus, with respect to the issue we address, the Commission has taken a definitive position.”). EPA cited no authority for its rulemaking other than Section 111(d) and expressly relied on that provision as its only legal basis. Accordingly, even without an explicit statement from EPA that it has concluded that it has authority to doubly regulate existing power plants under Section 111(d), this Court would still have jurisdiction to review the agency’s implicit conclusion of legal authority. EPA has done far more here, however, pronouncing in no uncertain terms that it has concluded that it can doubly regulate power plants.

EPA arrived at its legal conclusion following a decisionmaking process that was spurred by a Presidential order *mandating* that EPA proceed with rulemaking under Section 111(d). President Barack Obama, Memorandum on Power Sector Carbon Pollution Standards for the Administrator of the Environmental Protection Agency at § 1(b), Daily Comp. Pres. Doc., 2013 DCPD No. 00457 (June 25, 2013). That process resulted in the 104-page Legal Memorandum that proclaims “***we conclude*** that section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs.” Legal Memorandum at 27 (emphasis added). And EPA published a preamble signed by the Administrator that declares “EPA ***has the authority*** to regulate, under CAA section 111(d), CO₂ emissions from EGUs. . . .” 79 Fed. Reg. at 34853 (emphasis added). As this Court found in *Appalachian Power*, where the agency publishes, after deliberation, in “certain” and “unequivocal” terms its legal conclusion, the agency’s conclusion is final:

The . . . condition [that the decision marks the consummation of the agency's decisionmaking process] is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and another, more extensive draft circulated in May 1998. . . . On the question whether States must review their emission standards . . . the Guidance is unequivocal—the State agencies must do so. On the question whether the States may supersede federal and State standards . . . the Guidance is certain—the State agencies must do so if they believe existing requirements are inadequate

208 F.3d at 1022; *see also Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1530–32 (D.C. Cir. 1990) (finding "nothing tentative," "equivocal," or unreviewable in EPA's statement of its historic view and conclusion that "we *continue* to hold [that] view" (emphasis and alterations in original)); *Natural Res. Def. Council, Inc. v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (finding that language "definitively interpreted" the Clean Air Act where EPA stated that it was "electing to consider alternative programs to satisfy" a Clean Air Act requirement but that "if EPA's preliminary assessment indicates that the alternative program is not less stringent, we would issue a notice in the Federal Register proposing to make such a determination").

This Court has also looked to whether EPA has acted on its conclusions to determine whether they were final. *See Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1132–33 (D.C. Cir. 1994). In *Natural Res. Def. Council, Inc.*, for example, EPA announced in a series of documents its intention to conditionally approve certain state submittals under the Clean Air Act. *Id.* at 1132. While EPA asserted that its decision was not yet final, and so unreviewable, this Court found that EPA's own actions relying on that

authority showed otherwise. “By granting such approval,” this Court held, “the EPA has already caused the very effect that the NRDC claims is outside the agency’s statutory authority Thus, the documents at issue reflect a final agency decision.” *Id.* at 1133. EPA’s legal conclusion here is similarly final because EPA has not only concluded that EPA has authority to mandate state-by-state standards for sources under Section 111(d) that are subject to Section 112 regulations, EPA has initiated a rulemaking to issue a mandate under that authority at the same time, “already caus[ing] the very effect” that is outside EPA’s Clean Air Act authority. *Id.*

When, as here, the agency has staked out a certain and unequivocal legal position after considered deliberation, it is unquestionably final action. There is “nothing tentative about the EPA’s interpretation” because “it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision.” *Her Majesty the Queen*, 912 F.2d at 1531–32. The language in the Federal Register publication and memorandum “clearly and unequivocally rejected” the contention that EPA does not have authority to doubly regulate power plants, and EPA’s subsequent statements in response to Congressional questioning make clear that EPA’s deliberations have concluded. *Id.*

It is irrelevant that EPA may get comments in the proposed rulemaking on the legal conclusion. “The mere possibility that an agency might reconsider in light of . . . invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.” *Sackett*, 132 S.Ct. at 1372; *see also Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1066 (D.C. Cir. 2014)

(finding no merit in EPA's argument that its directive was not final because "EPA's deliberations surrounding the matter are ongoing" because "[a]n agency action may be final even if the agency's position is 'subject to change' in the future") (internal quotations omitted). This is especially so where, as here, the agency has already brushed off efforts by Congress to question the agency's legal conclusion. *Cf. Sackett*, 132 S.Ct. at 1372.

Second, EPA's legal conclusion has legal consequences because it expansively redefines the scope of EPA's Clean Air Act authority and subjects numerous regulated sources to the threat of double regulation.

There is little question that EPA's expansion of its own authority under the Clean Air Act gives rise to significant legal consequences. EPA's legal conclusion does not address a hypothetical issue of no immediate significance. *Cf. Nat'l Automatic Laundry*, 443 F.2d at 699. Rather, it addresses the scope of EPA's entire Section 111(d) program, bearing "direct and appreciable legal consequences" for both the regulated community and those, like Murray Energy Corporation, who depend on them, States, and EPA itself. *Bennett*, 520 U.S. at 178; *see also Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 29 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part) ("Time and again, we have turned, ultimately, to the impact guidance has on an agency, a petitioner, or both. Where agency guidance alters the obligations of either, we have found final action." (internal citations omitted)).

EPA's legal conclusion fundamentally "alter[s] the legal regime" to which existing coal-fired power plants are subject. *Bennett*, 520 U.S. at 178.

Until EPA's determination, power plants subject to federal Section 112 standards knew that they could not be subject to federally mandated state-specific performance standards under Section 111(d). By issuing its legal conclusion, EPA has removed that certainty and left in place the risk that facilities can be subject to inconsistent, expanded, and more stringent regulation. Simultaneously, EPA initiated its Section 111(d) rulemaking to mandate state-by-state standards for greenhouse gases, confirming that EPA seeks to impose broader and more expensive regulatory burdens on the nation's existing coal-fired power plants. EPA's legal conclusion is also not limited to impacting power plants and coal companies, however. By concluding that it has authority to require state standards for sources already regulated under Section 112, EPA has changed the legal landscape for all source categories regulated under Section 112 and the States implementing the Act.

EPA's legal conclusion also "alter[s] the legal regime" to which the agency itself will be subject. *Bennett*, 520 U.S. at 178. By recasting the scope of Section 111(d), EPA has announced the conclusion that the agency is not just *authorized* to doubly regulate existing sources, the agency will be *required* to do so for all sources subject to Section 111(b) standards. *See* 79 Fed. Reg. at 34,844. Such a mandatory obligation under the Clean Air Act would be enforceable through citizen suits in district courts. *See* 42 U.S.C. § 7604(a)(2).

EPA's interpretation of its own authority under the Clean Air Act is fundamentally an agency action from which "legal consequences will flow" and from which the "rights and obligations" of numerous parties, from EPA

itself to the regulated community and beyond, will be impacted. *Bennett*, 520 U.S. at 178 (quotation omitted). EPA's announcement of a legal interpretation that expands the fundamental scope of its authority under the Section 111(d) program to extend that program to all existing sources that are already subject to national standards promulgated under Section 112, the second *Bennett* general condition for finality is easily satisfied.

* * *

EPA "rendered its last word on the matter in question" when EPA concluded that the agency has the authority to mandate state standards under Section 111(d) for power plants that are already subject to a national emission standard issued under Section 112. *Whitman*, 531 U.S. at 478 (quotation omitted). That legal conclusion is final action reviewable in this Court now. Accordingly, EPA's Motion to Dismiss should be denied.

CONCLUSION

For the foregoing reasons, Petitioner Murray Energy Corporation respectfully requests that this Court issue a writ for extraordinary relief prohibiting EPA from proceeding with its illegal rulemaking and vacate EPA's erroneous legal conclusion that it has the authority to doubly regulate sources under Section 111(d) and 112 of the Clean Air Act.

Dated: December 15, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing OPENING BRIEF OF PETITIONER complies with the type-volume limitations of Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and this Court's order of November 13, 2014, limiting this brief to 14,000 words. I certify that this brief contains 13,905 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1112 & No. 14-1151

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 14-1112: IN RE MURRAY ENERGY CORPORATION
Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A.
MCCARTHY, Administrator, United States Environmental Protection Agency
Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

PETITIONER STANDING ADDENDUM

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December 15, 2014

Counsel for Murray Energy Corporation

CONTENTS

DECLARATION OF ROBERT E. MURRAY

DECLARATION OF ROBERT E. MURRAY

BEFORE ME, the undersigned authority, personally appeared Mr. Robert E. Murray, who after being duly sworn states as follows:

1. My name is Robert E. Murray. I am the Founder, Chairman, President, and Chief Executive Officer of Murray Energy Corporation.

2. I am the son of a coal miner, and began working in the coal mines at the age of 17.

3. I received a Bachelor's Degree of Engineering in Mining from The Ohio State University, completed the advanced management program at the Harvard School of Business, and am a registered Professional Engineer.

4. I am serving or have served on the boards of the National Mining Association, American Coal Foundation, National Coal Council, Ohio Coal Association, and Pennsylvania Coal Association. I am also the past president and a trustee of the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. and the Society for Mining, Metallurgy and Exploration, Inc., and past president of the Rocky Mountain Coal Mining Institute.

5. Prior to founding Murray Energy Corporation, I was President and Chief Executive Officer of The North American Coal Corporation, which is now part of Nacco Industries, Inc.

6. Murray Energy Corporation began in 1988 with the purchase of a single continuous mining operation in the Ohio Valley mining region with an

annual output of approximately 1.2 million tons per year.

7. Today, Murray Energy Corporation is the largest privately-held coal company in the United States, the largest underground coal mine operator in the United States, and the fifth largest coal producer in the United States determined by combined annual coal production.

8. In 2014, Murray Energy Corporation will produce approximately 65 million tons of coal from twelve active coal mining complexes. We currently employ approximately 7,500 people.

9. Murray Energy Corporation's operations are located in six States: Illinois, Kentucky, Ohio, Pennsylvania, Utah and West Virginia.

10. Murray Energy Corporation also owns or controls approximately 2.0 billion tons of proven or probable coal reserves in the United States, strategically located near our customers, near favorable transportation, and high in heat value.

11. Additionally, Murray Energy Corporation owns about 80 subsidiary and support companies directly or indirectly related to the domestic coal industry, including numerous coal transportation facilities such as coal transloading facilities, harbor boats, towboats and barges.

12. The vast majority of the coal produced by Murray Energy Corporation is supplied to coal-fired electric utility generating units (i.e., "EGUs" or power plants), providing affordable energy to households and

businesses across the country.

13. In 2013-2014, we supplied coal from our mines to coal-fired EGUs located in sixteen (16) States: Alabama, California, Delaware, Florida, Georgia, Indiana, Kentucky, Mississippi, New Hampshire, New Jersey, North Carolina, Pennsylvania, Utah, West Virginia, and Wisconsin. Many of our customers operate EGUs throughout the United States.

14. I am familiar with the Administration's proposed plan to cut carbon emissions at coal-burning power plants, published by EPA on June 18, 2014 (*Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 CFR Part 60, Subpart UUUU*).

15. EPA's plan expressly contemplates the shifting of fuel at power plants from coal to other fossil fuels, and the shifting of energy supply from fossil fuel power plants to nuclear power plants and renewable energy sources such as wind and solar. Thus, EPA's plan calls for the shutting down and/or conversion of even more coal-fired power plants than already planned as a result of this piling on of regulation after regulation directly aimed at coal.

16. In fact, the Preamble to EPA's proposed rule states that, due to the rule, it estimates 24–32 gigawatts of additional coal-fired EGU retirements through 2020. EPA states that the rule will result in a decline in coal production for use by the power sector by roughly 25 to 27 percent in 2020 from base case levels. Further, according to EPA, the use of coal by the power sector will decrease roughly 30 to 32 percent in 2030. Based on other reports,

we suspect EPA is understating its predicted impact. But whether EPA is right or wrong in the detail, the intent of the rule is clear – reduce the use of coal.

17. Coal production in the central Appalachian region is already down approximately 43% compared to 2008 levels. The American Coalition for Clean Coal Electricity (“ACCCE”) recently concluded that 421 coal-fired power plants in the United States are being shut down or converted to a different fuel source. This represents nearly 63,000 megawatts of electric generating capacity. Of this total, ACCCE found that 299 are being shut down and 39 are being converted due to EPA policies, for a total of 338 units representing over 51,000 megawatts of electric generating capacity.

18. SNL Energy reported in October 2014 that more than 12,000 megawatts of coal-fired capacity in the United States has converted or is slated to convert to alternative fuel sources between 2011 and 2023, and that the top NERC regions in terms of coal conversion are ReliabilityFirst and SERC Reliability Corp., which are the two NERC regions that include much of our customer base including Ohio, West Virginia and Kentucky.

19. SNL further reported that nearly 25,000 megawatts of coal capacity has been permanently retired since 2009, with about that much scheduled to be retired between now and 2022, noting that “the influx of coal unit conversion in the U.S. power sector heaps more pressure on coal producers already facing a dwindling customer base caused by the permanent retirement of a large number of coal-fired units.”

20. Also in October 2014, the Institute for Energy Research (“IER”) estimated that 72 gigawatts of generating capacity have already retired or are set to retire due to EPA regulations, approximately 7 times the predicted closure rate by EPA in its recent air regulations, without even taking into account EPA’s proposed rules aimed at existing power plants.

21. The Electric Reliability Council of Texas (“ERCOT”) reported in November 2014 that the proposed rule “will result in the retirement of between 3,300 MW and 8,700 MW of coal generation capacity” in Texas. This is up to half of the existing coal capacity in the ERCOT region.

22. The Salt River Project Agricultural Improvement and Power District’s Coronado Generating Station (“SRP”), SRP recently stated in filings with EPA that “EPA’s planned carbon dioxide (CO₂) performance standards for existing coal- and natural gas-fired electric generating units ... will likely require Coronado to cease operations in 2020. The publication and pendency of the 111(d) Proposal create enormous uncertainty regarding the future viability of Coronado and whether installation of costly new emission controls to satisfy [best available retrofit technology, or BART] requirements ... would be reasonable or economically feasible.” SRP predicts the forced shutdown of its two coal-fired units by 2020. SRP must make decisions about massive additional capital expenditure now in order to meet BART deadlines, and if the 111(d) rule is going to force a shutdown by 2020, SRP stands to lose significant investment monies if it moves forward with BART compliance.

23. As a major supplier of coal to numerous power plants in the United States, Murray Energy's regularly tracks the analyses, studies and reports published by SNL Energy, ACCCE, IER and others, in order to plan for our survival in the face of increasingly stringent EPA regulation. We develop our marketing and business development plans based in part on this type of information; thus, announced conversions and shutdowns are affecting our plans today.

24. Specific examples of the direct impact upon Murray Energy's business include the following power plants, each of which is/was a customer of ours and has been shut down or slated for closure: First Energy Corporation's Hatfield Ferry Power Station, Mitchell Power Station, and Eastlake Plant; NRG's Indian River Generating Station; Appalachian Power Company's Philip Sporn Plant; GDF Suez Energy North America's Mount Tom Station; and Dairyland Power Cooperative's Alma Generating Station.

25. Indiana Power & Light, to whom Murray Energy has supplied coal for its coal-fired EGUs, recently announced that it will convert the last of the coal-fired units at its Harding Street Generation Station to natural gas in 2016. Reportedly, this last conversion (and prior conversions) is a direct result of EPA's increasingly stringent regulation, including the double regulation of the power plant industry under Section 111(d) of the Clean Air Act, and the Indiana Utility Commission advised that future rate increases due to Section 111(d) and other environmental rules would not be forthcoming, such that

future investment costs would be at IP&L's risk.

26. While we are not in a position to relay specific warnings from our customers of planned shutdowns, conversions or curtailments – for confidentiality reasons – Murray Energy's business is impacted even when coal-fired units not supplied with coal by Murray Energy are converted or shuttered. Basic concepts of supply and demand in the marketplace dictate that a decline in demand has a downward effect on pricing.

27. Clearly, the shift away from coal has and will have a direct and significant impact on the primary business of Murray Energy Corporation.

28. Based on the significant comments submitted by many States in the Administrative Record for the proposed rule, and/or in related litigation, and in my own conversations with various States, it is also clear that the re-writing of energy policy in the United States by EPA is underway right now, even though the proposed rule has not yet been promulgated in final form.

29. Murray Energy Corporation and its employees depend upon the presence of a stable and continuing domestic market for coal. Every coal fired power plant that is shut down (or converted) affects the financial bottom line of Murray Energy Corporation and enough shutdowns threaten the existence of Murray Energy Corporation and the well paid and well benefited jobs of our 7,500 employees.

Further Affiant sayeth naught.

By:

Robert E. Murray

Robert E. Murray, Affiant

Subscribed and sworn to me this 11th day of December, 2014.

Gary M. Broadbent

Notary Public



GARY M. BROADBENT
Notary Public, State of Ohio
My Commission Has No Expiration Date

CERTIFICATE OF SERVICE

I hereby certify that the foregoing OPENING BRIEF OF PETITIONER has been served electronically by Petitioner, Murray Energy Corporation, through the Court's CM/ECF system on all ECF registered counsel.

Dated: December 15, 2014

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA
ex rel. E. Scott Pruitt,
in his official capacity as
Attorney General of Oklahoma,
and

Case No. 15-CV-369-CVE-FHM

(2) OKLAHOMA
DEPARTMENT OF
ENVIRONMENTAL
QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her
official capacity as
Administrator of the U.S.
Environmental Protection
Agency,

and

(2) U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

COMPLAINT

1. This is an action for declaratory judgment and injunctive relief against the *ultra vires* actions of a government officer and agency that are currently inflicting substantial irreparable injury on the State of Oklahoma. Not only do Defendants United States Environmental Protection Agency and Administrator Gina McCarthy claim authority to compel state governments to reorganize their energy economies—in contravention of at least three separate statutory bars and two constitutional

limitations on federal power—but they are already acting to exercise that bogus authority. By “proposing” that states will be required to fundamentally restructure the generation, transmission, and regulation of electricity, and do so at a breakneck pace, Defendants have left states no choice but to begin carrying out EPA’s commands at this time, well before any court has an opportunity to review their “final” rule. The entire point of this unprecedented approach is to evade judicial review by forcing states to take burdensome and expensive actions that will be difficult or impossible to reverse even when Defendants’ assertion of authority is ultimately rejected—as it inevitably will be. Unless this Court intervenes, Oklahoma will have no meaningful or adequate remedy to enforce the limitations that the Clean Air Act and the Constitution place on the authority of the United States Environmental Protection Agency and its Administrator and to avoid injury to its sovereign, quasi-sovereign, fiscal, and economic interests.

PARTIES

2. The State of Oklahoma is a State of the United States of America with all rights, powers, and immunities of a State, including the sovereign power over individuals and entities within its jurisdiction and the power to create and enforce legal codes, statutes, and constitutional provisions, and to act pursuant to its police powers. The State of Oklahoma has exercised these powers to create a comprehensive energy regulatory scheme that is administered across several governmental components. By exercising its regulatory authority, the State of Oklahoma has acted to secure for itself and its citizens affordable and reliable generation and transmission of electricity. Coal-fired generation contributes 38 percent of electricity generation in the State.

3. Scott Pruitt, in his official capacity as Attorney General, brings this action on behalf of the State of Oklahoma as chief law officer for the State of Oklahoma. In that capacity, he has a statutory duty to prosecute and defend all

actions and proceedings in any federal court in which the State, including any of its components, is interested as a party. *See* 74 O.S. § 18b(A)(2).

4. The Oklahoma Department of Environmental Quality (“ODEQ”) is the State of Oklahoma’s primary environmental regulator, responsible for formulating and enforcing air and water quality standards, among other laws, within the State.

5. The State of Oklahoma has an interest in contesting the *ultra vires* actions taken by Defendant McCarthy purportedly under her office as Administrator of the U.S. Environmental Protection Agency because these actions harm the State of Oklahoma’s interests by, *inter alia*, requiring the restructuring of the State’s energy sector, impairing the functioning of the statutory and regulatory system that ensures Oklahoma’s citizens have access to a reliable electric system, undermining the State of Oklahoma’s exercise of its police powers in reliance on reliable electric power, compelling the state to expend substantial administrative and bureaucratic resources, compromising investment and tax revenue, and threatening the health and welfare of Oklahoma’s citizens by undermining electric reliability and affordability.

6. Defendant Gina McCarthy is Administrator of the U.S. Environmental Protection Agency (“EPA”) and is responsible for administering the Clean Air Act (“CAA” or the “Act”). All actions challenged in this case were taken pursuant to McCarthy’s direct or indirect orders and under the color of her office.

7. Defendant U.S. Environmental Protection Agency is a federal regulatory agency administered by Defendant McCarthy. “EPA” refers to both the U.S. Environmental Protection Agency and Administrator McCarthy in her official capacity.

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because Defendants’ actions undertaken in asserted reliance on federal law exceed their delegated authority, contravene specific statutory and constitutional

prohibitions, involve enormous waste of governmental resources, purport to require the complete restructuring of the energy industry within the State of Oklahoma, and are currently inflicting substantial irreparable injuries on the State of Oklahoma, for which the State has no other adequate prospect of relief. *See generally Leedom v. Kyne*, 358 U.S. 184 (1958); *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549 (2d Cir. 1978).

9. The State of Oklahoma and other parties attempted to obtain relief from the EPA Power Plan by filing All Writs Act petitions in the D.C. Circuit pursuant to that Court's decision in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). The D.C. Circuit dismissed those petitions, holding that the EPA Power Plan was not "final action" pursuant to Clean Air Act Section 307(b), 42 U.S.C. § 7607(b), and that it therefore lacked jurisdiction to consider them. *In re Murray Energy Corp.*, ___ F.3d ___, Nos. 14-1112, 14-1151, 14-1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). That decision denying statutory jurisdiction under the Clean Air Act supports this Court's exercise of residual Section 1331 jurisdiction pursuant to *Leedom*. See 358 U.S. at 190–91.

10. CAA § 307, 42 U.S.C. § 7607, does not displace or limit the Court's jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper under 28 U.S.C. § 1391(e)(1).

BACKGROUND

A. CAA Section 111(d)

12. The Clean Air Act is founded on the principle of cooperative federalism, with states retaining the primary authority to regulate emissions from sources in their territories. The Act specifically recognizes that "air pollution control at its source is the primary responsibility of States and local governments." CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).

13. CAA § 111(d), 42 U.S.C. § 7411(d), concerns the application of standards of performance to certain existing sources within categories of sources of air pollution that are also subject to new source performance standards under CAA § 111(b).

14. A “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated.” CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).

15. In Section 111(d), Congress charged states with establishing standards of performance for certain minor categories of sources for which new source performance standards had already been promulgated, but which are not subject to regulation under Section 112 of the Act and which emit pollutants that are not listed under Section 108 of the Act. Congress expressly authorized states, when establishing these standards and applying them to particular sources, to “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”

16. EPA’s role under Section 111(d) is limited to creating regulations to establish a “procedure” under which states submit their Section 111(d) implementation plans, disapproving plan submissions that are unsatisfactory, and promulgating federal plans for states that do not submit satisfactory plans.

17. Section 111(d) is subject to a statutory limitation on EPA’s authority to call for states to submit Section 111(d) plans. In relevant limitation, that part provides that EPA may not mandate that states establish standards for performance for existing sources that are part of “a source category which is regulated under section [112 of the CAA].”

B. EPA’s Regulation of Coal-Fired Power Plants Under Section 112

18. Section 112 of the Act, 42 U.S.C. § 7412, establishes a program regulating emissions of certain “hazardous air pollutants” from certain categories of sources that are included in the Section 112(c) list of source categories.

19. Although Section 112 permits EPA to list categories of major and area sources of listed hazardous air pollutants, it specifically precludes regulation of “electric utility steam generating units” (i.e., fossil-fuel-fired power plants) unless and until “the Administrator finds such regulation is appropriate and necessary.” CAA § 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A).

20. On December 20, 2000, EPA published a notice of its finding that regulation of electric utility steam generating units was appropriate and necessary, adding electric utility steam generating units to the list of regulated source categories under CAA § 112. 65 Fed. Reg. 79,825. EPA’s attempt to reconsider that finding was vacated by the D.C. Circuit in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

21. On February 16, 2012, EPA promulgated a rule pursuant to Section 112 establishing national emissions standards for power plants. 77 Fed. Reg. 9,304. The lawfulness of EPA’s “appropriate and necessary” finding that triggered regulation under Section 112 was affirmed by the D.C. Circuit in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Subsequently, the Supreme Court held that EPA unlawfully failed to consider costs when deciding whether to regulate under Section 112 and remanded the matter to the D.C. Circuit without vacating the rule. *Michigan v. EPA*, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015).

22. Upon exercising its asserted discretion to list electric utility steam generating units as a regulated source category under Section 112 of the Clean Air Act, EPA by operation of law lost authority under Section 111(d) to mandate that states establish standards of performance for existing sources in that category.

C. The EPA Power Plan

23. On June 18, 2014, EPA proposed a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to CAA § 111(d) (the “EPA Power Plan”). 79 Fed. Reg. 34,830. The EPA Power Plan is intended to extend federal authority over all aspects of the production, distribution, and use of electricity, with an aim of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels. *Id.* at 34,832. It aims to achieve that goal by requiring states to overhaul their “production, distribution and use of electricity.”

24. EPA describes its Power Plan as a “plant to plug” approach that comprehensively addresses all aspects of energy production and consumption based on “the interconnected nature of the power sector.” EPA Fact Sheet (June 2, 2014), *available at* <http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibility.pdf>; 79 Fed. Reg. at 34,845. EPA stated its position that “anything that reduces the emissions of affected sources may be considered a ‘system of emission reduction’” for purposes of Section 111. 79 Fed. Reg. at 34,886.

25. The EPA Power Plan identified four means of reducing carbon-dioxide emissions from the power sector, which it calls “building blocks.” These building blocks recognize that, to implement the “best system of emission reduction,” states will have to (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation capacity with increased use of natural gas, (3) replace fossil-fuel-fired generation with nuclear and renewable sources, such as wind and solar, and (4) mandate more efficient use of energy by consumers.

26. The EPA Power Plan specifies numerical “emission rate-based CO₂ goals” for each state. 79 Fed. Reg. at 34,833. These rate-based goals are based on

projected emissions reductions that EPA believes can be achieved through the combination of the four “building blocks” that it says represent a baseline “best system of emission reduction.” Accordingly, the “goals” differ from state to state.

27. The EPA Power Plan requires states to submit state plans to achieve interim and final goals that EPA has specified for each state.

28. The EPA Power Plan’s “building blocks,” in one combination or another, are the only ways that a state could reorganize its electric generating capacity to achieve the targets set by EPA.

29. The EPA Power Plan relies almost entirely on “beyond-the-fenceline” measures—that is, regulation of things other than the categories or subcategories of sources that it has listed for regulation under Section 111(d). States have no choice but to undertake such “beyond-the-fenceline” measures to achieve the targets set by EPA.

30. EPA recognizes that states will be required to undertake such “beyond-the-fenceline” measures. In testimony before Congress, Administrator McCarthy stated that EPA’s plan is “really . . . an investment opportunity. *This is not about pollution control.* . . . It’s about investments in renewables and clean energy.”

31. EPA and Administrator McCarthy have determined that they possess the legal authority to regulate in the manner laid out in the EPA Power Plan and that such regulation is appropriate. They have determined to promulgate a final rule that maintains the goal of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels; that maintains the “building block” approach and the specific “building blocks”; and that requires states to submit state plans to achieve state-specific goals based on the “building blocks.”

32. These determinations are reflected in the rule that EPA delivered to the Office of Management and Budget on June 3, 2015.

33. EPA has stated that it intends to take official final action on its Power Plan in late August. In reality, EPA's action already imposes substantial obligations on regulated entities—the states.

D. The EPA Power Plan Requires Oklahoma To Restructure Its Energy Sector

34. Although states are, in principle, free to achieve the goals established by the EPA Power Plan in any manner, or to decline to submit a state plan and allow EPA to promulgate a federal implementation plan, achieving the goals without plunging the states' electric supply system into chaos and threatening continuity of electric service will require wholesale restructuring of states' electricity sectors. This is true of Oklahoma, which will suffer all of the following burdens.

35. An electric system consists of numerous sources of electricity connected to consumers through a transmission grid. To ensure that electric service is reliable, the supply of electricity across all electricity generating sources must exceed the highest possible demand among all consumers. In order to maintain reliability and to provide electricity at a low cost to consumers, state regulation controls the order in which particular sources are “dispatched” to meet demand. In general, large coal-fired facilities, which provide affordable and reliable power, operate 24 hours per day year-round, barring maintenance outages, to satisfy “base load” demand. Smaller, more-expensive generators (often powered by natural gas) operate on a fairly regular schedule to meet cyclical demand and are often called “cycling” units. Older and less efficient coal- and gas-fired units operate during times of particularly high demand, such as hot summer days, to satisfy “peaking” demand. The order in which sources are dispatched generally depends on such factors as cost, transmission capacity, and the characteristics of local generating units. The percentage of a generation source's total capacity that is actually used over a period of time is its “utilization rate.”

36. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to reduce the use of coal-fired power plants, even though these plants typically supply base load power in state energy systems. That change, in turn, will require additional state actions to ensure that customers in areas relying on coal-fired plants are not left without power or forced to bear unreasonable costs. It will also require substantial changes to utility regulation systems that put cost and reliability first in dispatch determinations.

37. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to increase the utilization rates of natural gas-fired power plants, even though maintaining what appears to be “excess” capacity is essential to integrating renewable energy sources into the grid.

38. States will be required to develop or incentive zero-emissions generation, which will require authorizing legislation and expenditures. Developing sources of alternative energy will also require that state regulators take action to integrate those sources into the grid. It will also inevitably implicate other environmental requirements, such as endangered-species protection, that states must address at considerable burden and expense.

39. States must address how increased renewable-energy capacity, which may fluctuate, fits into the transmission system and dispatch, as well as how such capacity will be compensated. In states where it is not feasible to add renewable capacity, or that do not receive credit for such capacity that is exported, other measures will be required, such as participation in interstate programs for the purchase and sale of energy, typically requiring new statutory authority, significant groundwork in negotiating compacts between and among states, creation of a multi-state entity to administer the program, and time to accomplish all of this.

40. States must enact programs to reduce electricity demand in an enforceable fashion, requiring legislative and regulatory action. States with

deregulated or partially deregulated electricity markets will face particular challenges because power plants may be independent of power distribution companies.

41. Achieving the goals of the EPA Power Plan will also require direct regulation of consumers of electricity, which will be a new mission for state environmental and utility regulators.

42. Inevitably, states will be required to force the owners of coal-fired power plants to retire those units, resulting in substantial challenges to maintaining electric service for all customers, ensuring that plant operators are appropriately compensated, and ensuring that the financial impact on electricity consumers is acceptable.

43. In sum, the EPA Power Plan will require states to overhaul their regulation of electricity and public utilities and to take numerous regulatory and other actions to comply with and accommodate the Proposed Rule while maintaining electric service, let alone affordability and reliability.

44. And that will be the case even for states that take no direct action and become subject to a federal plan, due to states' pervasive regulation of state power systems, transmission, and utilities.

45. EPA lacks the authority to undertake regulation of state power systems, transmission, and utilities, even though carrying out its Power Plan will require the exercise of such regulatory authority. Accordingly, the EPA Power Plan will require states to exercise such regulatory authority, whether or not they submit state plans.

E. The EPA Power Plan Is Currently Causing Oklahoma Irreparable Harm

46. Planning for power plants, transmission, and other aspects of electric generation and transmission is an intensive, years-long process. It can take six years or more from the time that the need for a new transmission project has been

identified to the time that it is placed into service. Likewise, power plants take years to plan, construct, and integrate into the grid.

47. Such planning is undertaken by the State of Oklahoma in conjunction with utilities, the Southwest Power Pool, and other entities.

48. Energy regulation in the State of Oklahoma is primarily the responsibility of the Oklahoma Corporation Commission (“OCC”), an independent regulatory agency created in 1907 that regulates rates charged and services provided by investor-owned electric utilities and reviews triennial integrated resource plans that the utilities submit. The Commission also regulates the exploration, production, storage, distribution, and intrastate transportation of oil and gas. The Oklahoma Municipal Power Authority regulates utilities operated by local governments within the State. The Oklahoma Department of Environmental Quality (“ODEQ”) is charged with implementing and enforcing the State’s various environmental regulatory programs, including those relating to the Clean Air Act. The Secretary of Energy and Environment is responsible for oversight and coordination of the state’s energy and environmental authorities and for assisting in the development of the state’s overall energy and resource policy. Finally, the Energy Office within the state’s Department of Commerce promotes renewable energy and energy efficiency. Within the limits of the authorization of the Oklahoma Legislature, these governmental entities administer a comprehensive regulatory scheme for Oklahoma’s power sector.

49. According to the U.S. Energy Information Administration, coal-fired facilities located within Oklahoma generated 29,301,758 megawatt hours of power in 2012. That accounts for more than 37 percent of all power generated within the State in 2012.

50. The EPA Power Plan sets a goal of 35.5 percent reduction in power-plant greenhouse gas emissions for Oklahoma by 2030. It also sets an “interim goal” of 33 percent by 2020.

51. Nowhere near a 33-percent, much less a 35.5-percent, reduction in emissions can be achieved through “inside-the-fenceline” emission-control measures that are achievable at those units.

52. The only way that a 33-percent reduction in emissions could occur by 2020 would be through the mass retirement of coal-fired plants.

53. Even EPA recognizes that “inside-the-fenceline” efficiency improvements are insufficient to achieve the goals it set for the State of Oklahoma. EPA projects that improvements in coal-plant efficiency will be able to yield only negligible reductions in carbon-dioxide emissions. Accordingly, EPA recognizes that shuttering coal plants and/or “beyond-the-fenceline” measures will be required for Oklahoma to achieve EPA’s goals.

54. Even with “beyond-the-fenceline” measures that may somewhat ease the need for retirements, EPA projects that the EPA Power Plan will cause an increase of approximately 200 percent in retiring generating capacity in and around Oklahoma relative to current expectations. In other words, even if the State of Oklahoma accedes to EPA’s coercion and commandeering and agrees to regulate its own citizens in the manner that EPA has specified, the State will still see substantial reductions in generating capacity that require it to take further regulatory measures to ensure electric reliability.

55. Whether the State of Oklahoma adopts a state plan to meet EPA’s goals or EPA promulgates a federal implementation plan, the EPA Power Plan forces the State of Oklahoma to undertake substantial legislative, regulatory, planning, and other activities.

56. The State of Oklahoma's regulatory agencies lack statutory authority to carry out the second, third, and fourth of EPA's "building blocks." Doing so therefore requires legislative authorization and then implementing regulations.

57. Integrating new renewable energy sources into the grid will require substantial State effort, over a period of years, regarding planning, permitting, and construction.

58. Increasing the dispatch of natural gas-fired power plants will also require extensive planning and regulatory activities, as well as permitting and construction of new facilities, over a period of years. Current excess capacity in Oklahoma's existing natural gas plants is required to accommodate the variable nature of renewable sources like wind and solar.

59. Likewise, adding additional renewable sources will also require planning, permitting, and constructing additional natural gas or other traditional sources to account for variable production.

60. In sum, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma requires substantial expenditures of time, effort, and money by the Oklahoma Legislature, OCC, ODEQ, and other state actors, as well as private utilities. These expenditures cannot be recouped. If the State does nothing while EPA implements anything like a 35.5-percent reduction in carbon-dioxide emissions from Oklahoma's coal-fired power plants, the lights will go out in many Oklahoma communities, impacting State governmental operations, as well as the health and welfare of citizens. The same is true of the 33 percent "interim goal" set by EPA and would be true of even a substantially smaller goal, on the order of 15 or 20 percent.

61. These activities cannot be undertaken in anything like the EPA Power Plan's timeline, which allows states only five years or less to meet "interim goals." At a minimum, the State of Oklahoma will require eight years to undertake the

activities that are required to maintain electric service. Accordingly, carrying out the EPA Power Plan requires that state officials engage in planning, regulatory, and other activities in advance of a nominally final rule.

62. Many of these activities are irreversible and/or cause the State of Oklahoma irreparable injury. For example, devoting administrative manpower to activities required by the EPA Power Plan prevents the State from undertaking other activities in its sovereign capacity. Being forced by the federal government to change its own laws and to exercise aspects of its police power subjects the State of Oklahoma to *per se* sovereign injury. Actions taken now and decisions made now—for example, committing to new projects necessary to maintain electric service—will cost the State of Oklahoma money and manpower in the years ahead.

63. Once the EPA Power Plan is finalized—but not until it is finalized—Oklahoma will have recourse to challenge it in the D.C. Circuit by means of a petition for review of EPA’s final action under Section 307 of the Clean Air Act. Oklahoma can reasonably expect that it will take, at minimum, nine months from the time the petition is filed to the time the D.C. Circuit will issue a final decision invalidating the Proposed Rule. It may take much longer.

64. Even if Oklahoma is able to obtain a stay of the EPA Power Plan in the D.C. Circuit, that is still likely to take months.

65. By that time, Oklahoma will have either implemented or taken irreversible steps towards implementing most, if not all, of the changes described above, meaning that they will be implemented even though the EPA Power Plan is certain to be invalidated.

66. The ordinary petition process under Section 307 is not an adequate means of obtaining the relief required if Oklahoma is to maintain its power sector in anything like the form it exists today and if it is to forgo the massive expenditure of resources required to accommodate the EPA Power Plan. The EPA Power Plan will

result in the complete restructuring of Oklahoma's power sector even though it has no chance of surviving eventual judicial scrutiny.

F. The EPA Power Plan Is Plainly *Ultra Vires*

67. The EPA Power Plan plainly exceeds EPA's authority under the Clean Air Act and the authority of the Federal Government under the United States Constitution in at least five separate respects.

68. First, the EPA Power Plan violates the provision of Section 111(d) that precludes EPA from requiring states to establish existing source standards of performance for sources that are part of "a source category which is regulated under section [112 of the CAA]" because EPA has already acted to regulate coal-fired power plants under Section 112.

69. Second, the EPA Power Plan's "building block" approach is not a permissible "best system of emission reduction" under Section 111, particularly due to the serious constitutional doubt caused by EPA's interpretation of that term.

70. Third, the EPA Power Plan's rigid numerical goals for each state, based on its existing sources, violates Section 111(d)'s mandate that EPA allow states to "take into consideration . . . the remaining useful life of the existing source to which such standard applies."

71. Fourth, as described above, the EPA Power Plan unlawfully commandeers the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution.

72. Fifth, the EPA Power Plan unlawfully coerces the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution, by threatening to withhold states' highway funding, to impose substantial injuries on states' citizens, and to severely impair states' exercise of their police powers if they do not comply with EPA's demands.

CLAIMS FOR RELIEF

COUNT I: DECLARATORY RELIEF

73. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

74. An actual controversy exists between Defendants and the State of Oklahoma regarding the lawfulness of the EPA Power Plan under the Clean Air Act and United States Constitution.

75. The State of Oklahoma is entitled to a declaration of its rights under the Clean Air Act and United States Constitution pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT II: INJUNCTIVE RELIEF

76. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

77. The State of Oklahoma has a strong likelihood of success on the merits of this case because Defendants' action is plainly unlawful and the State lacks any meaningful and adequate opportunity for judicial review in light of the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry, as well as other injuries, caused by Defendants' action.

78. The State of Oklahoma is suffering irreparable injury as a result of Defendants' unlawful actions. Defendants' interference with state statutes, violation of the State's constitutional rights through commandeering and coercion, and interference with the exercise of the State's police power all constitute *per se* irreparable harm. The State is also injured by the substantial expenditure of state resources, injuries to its citizens and economy, and abrogation of its legitimate policymaking discretion for years into the future.

79. Defendants will suffer no injury at all if they are enjoined.

80. An injunction would serve the public interest, by preventing violation of the United States Constitution and abrogation of state sovereignty and avoiding substantial economic injury and job loss.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court grant them the following relief:

A. A declaration that the EPA Power Plan violates the Clean Air Act, that Defendants lack authority to regulate coal-fired power plants under Section 111(d) of the Clean Air Act, that Defendants lack authority to directly or indirectly prescribe “outside-the-fenceline” measures under Section 111(d), and that the EPA Power Plan exceeds Congress’s Article I authority and violates the Tenth Amendment to the U.S. Constitution;

B. A preliminary injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan;

C. A permanent injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan; and

D. Such other relief as the Court deems just and proper.

Respectfully submitted,

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14-1112 & 14-1151

In the United States Court of Appeals
for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,
Petitioner

MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A.
MC CARTHY, ADMINISTRATOR,
Respondents.

**EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT
BY INTERVENOR PEABODY ENERGY CORPORATION**

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August 13, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties, Intervenors, and *Amici*. The parties in this case are Murray Energy Corporation (Petitioner); U.S. Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); the State of West Virginia (Intervenor); the State of Alabama (Intervenor); the State of Alaska (Intervenor); the State of Arkansas (Intervenor); the State of Indiana (Intervenor); the State of Kansas (Intervenor); the Commonwealth of Kentucky (Intervenor); the State of Louisiana (Intervenor); the State of Nebraska (Intervenor); the State of Ohio (Intervenor); the State of Oklahoma (Intervenor); the State of South Dakota (Intervenor); the State of Wisconsin (Intervenor); the State of Wyoming (Intervenor); National Federation of Independent Business (Intervenor); Utility Air Regulatory Group (Intervenor); Peabody Energy Corporation (Intervenor); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of Maryland (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the

State of Oregon (Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor). Amici include the State of South Carolina; National Mining Association; American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; the State of New Hampshire; Chamber of Commerce of the United States of America; Clean Wisconsin; Council for Industrial Boiler Owners; Michigan Environmental Council; Independent Petroleum Association of America; Ohio Environmental Council; Metals Service Center Institute; Calpine Corporation; National Association of Manufacturers; Jody Freeman; and Richard J. Lazarus.

B. Rulings Under Review. The Petition relates to EPA's final rule styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).

C. Related Cases: This Court has previously issued an opinion in this case, and in *West Virginia v. EPA*, Nos. 14-1112, 14-1146, 14-1151 (D.C. Cir.) *In re: West Virginia, et al.*, No. 15-1277 (filed Aug. 13, 2015) also is related.*

* Petitioner Peabody has filed this submission as a renewed writ, believing that to be the procedurally proper course, but does not oppose having the new writ submitted by the State Attorneys General consolidated with this proceeding and is

authorized to say that the State Attorneys General likewise do not oppose such consolidation. See Emergency Motion to Consolidate and For Expedited Treatment, *In re: West Virginia, et al.*, No. 15-1277, ECF 1567767 (filed Aug. 13, 2015).

Dated: August 13 , 2015

/s/ Tristan L. Duncan

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Peabody Energy Corporation (“Peabody”) provides the following disclosure:

Peabody is a publicly-traded company on the New York Stock Exchange (“NYSE”) under the symbol “BTU.” Peabody has no parent corporation and no publicly held corporation owns more than 10% of Peabody’s outstanding shares.

Dated: August 13, 2015

/s/ Tristan L. Duncan

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GLOSSARY

CO ₂	Carbon dioxide
EPA	United States Environmental Protection Agency
Final Rule	<i>Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units</i> , issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).
GHGs	Greenhouse Gases
Peabody	Peabody Energy Corporation
Section 111	42 U.S.C. § 7411
Section 111(b)	42 U.S.C. § 7411(b)
Section 111(d)	42 U.S.C. § 7411(d)
Section 111(h)	42 U.S.C. § 7411(h)
Section 112	42 U.S.C. § 7412
Section 307(b)(1)	42 U.S.C. § 7607(b)(1)
Waxman-Markey bill	H.R. 2454, 111th Cong.

EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT

INTRODUCTION

On June 9, 2015, this Court denied a previous writ in this case, explaining that, “[a]fter EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review.” *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). On Aug. 3, 2015, EPA issued the Final Rule.¹ Therefore, this Petition is now ripe for review.² Peabody has filed this submission as a renewed writ and does not oppose having the new writ filed by State Attorneys General consolidated with this proceeding, as further discussed in the Related Cases section on pages ii-iii above.

On its face, Section 111(d) prohibits exactly what EPA seeks to do in the Final Rule: to regulate coal-fueled power plants *both* under Section 111(d) *and* as a source category under Section 112’s Hazardous Air Pollutants (HAP) program. The so-called “Section 112 Exclusion” provides

¹ Although the Final Rule has not yet been published in the Federal Register, this Petition is still ripe for the reasons discussed herein.

² On Aug. 6, 2015, Peabody filed an application with EPA asking for an immediate stay of the Rule, pursuant to EPA’s authority under 5 U.S.C. § 705. EPA did not respond to Peabody’s request for relief within the timeframe requested by Peabody. Counsel for Peabody contacted EPA by telephone on Aug. 13, 2015 to notify it of this motion in advance of filing.

that Section 111(d) applies only to a pollutant “which is not . . . emitted from a source category which is regulated under section [112] of this title.” 42 U.S.C. § 7411(d). Since coal-fueled plants already are regulated under Section 112, Section 111(d) expressly prohibits their double regulation here. Despite EPA’s prior representations that it was open to comments on its legal rationale, the Final Rule recites virtually the same arguments that EPA previously raised before this Court. Indeed, EPA effectively concedes that, if Peabody’s interpretation of the Section 112 Exclusion is correct, EPA lacks the power to adopt the Final Rule under Section 111(d). (Final Rule 263).

This Court should not wait to address the critical threshold question of EPA’s statutory authority, when so much hangs in the balance and irreparable harm is occurring now. To be sure, once the Final Rule is published in the Federal Register, aggrieved parties will file petitions for review, together with stay motions. But this Petition is necessary now because there may well be a substantial delay in publication. News reports indicate that EPA may hold off publication until Dec. 2015.³ EPA has

³ See InsideEPA, EPA Said To Target Early August for ESPS Release (Jul. 13, 2015) (reporting that the final rules “are unlikely to appear in the Federal Register—which would start the 60-day clock for filing legal

denied those reports. However, as this Court is aware, even in an ordinary case there can be a significant lag between promulgation of a final rule and its publication in the Federal Register. And this is no ordinary case. It is extraordinary by any measure. The Final Rule alone (not counting technical support documents) runs to 1,560 pages. With significant rules like this one, the delay can be much longer. For example, EPA issued a proposed Section 111(b) rule on Sept. 20, 2013, but it was not published in the Federal Register until Jan. 8, 2014. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014). Similarly, the FCC released the 2010 Net Neutrality rule on Dec. 21, 2010, but it was not published in the Federal Register until Sept. 23, 2011.⁴ Thus, ordinary course here can easily mean a delay of months.

This Petition is therefore necessary in light of the unmeasurable risk that there will be significant delay in the Final Rule's Federal Register publication. If (on the other hand) EPA promptly publishes the Final Rule, the ensuing petitions for review and motions for stay can simply be

challenges—until after the United Nations climate talks in Paris in December.”).

⁴ *See In the Matter of Preserving the Open Internet, Broadband Industry Practices: Report and Order*, No. 09-919, GN Dkt. No. 09-191, WC Dkt. No. 07-52 (Dec. 21, 2010); *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011).

consolidated into this proceeding, and Petitioners will propose a workable plan for managing and briefing the legal challenges to the Final Rule.

Moreover, no purpose is now served by withholding prompt judicial review. EPA already has had ample opportunity to address the objections to its legal authority during the notice and comment period (and it ignored those objections). No change in the Final Rule will occur between now and publication. Further, the Final Rule directs States to file plans or detailed “initial submittals” by Sept. 6, 2016. That is barely a year away and an eye-blink in the context of the multi-year planning horizon of energy suppliers, utilities, and private industry. Compliance efforts will thus begin while the Rule is being litigated. Moreover, the scale of the required effort ensures that compliance costs will not be the run-of-the-mill expenses typically associated with interstitial rule-making. Quite the reverse. The changes wrought by the Final Rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rules. Ironically, EPA touts the Final Rule as creating cap-and-trade systems, when a bill to do just that was rejected by Congress in 2009-2010.

The Rule has caused and will continue to cause immediate and irreparable harm, which will only intensify in the coming months, while

judicial review is pending. A stay of the Final Rule is warranted now. No purpose would be served by waiting for publication.

JURISDICTION AND STANDING

This Court has jurisdiction to review nationally applicable EPA final actions under Clean Air Act § 307(b)(1). “A long progression of cases” confirms this Court’s authority to stay agency action pending judicial review, where this Court would ultimately have appellate jurisdiction over the agency’s rule. *Sampson v. Murray*, 415 U.S. 61, 73 (1974); *see also* 5 U.S.C. § 705; *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966); *In re Tennant*, 359 F.3d 523, 531 (D.C. Cir. 2004) (Roberts, J.). Peabody has standing because the Final Rule will cause it imminent and irreparable injury for the reasons adduced in the accompanying Declaration of Bryan A. Galli (“Galli Decl.”), attached as Exhibit A.

STATEMENT OF RELIEF SOUGHT

Peabody seeks a stay of the Final Rule and a suspension of all deadlines therein pending the completion of judicial review.

STATEMENT OF ISSUE PRESENTED

Whether the Final Rule should be stayed because it exceeds EPA’s legal authority and will cause irreparable injury, and because the public interest and balance of equities also favor a stay.

STATEMENT OF THE CASE AND FACTS

The Final Rule seeks to restructure the energy industry in the United States and to compel a drastic reduction in the use of coal, traditionally the most reliable and affordable source of electricity. The Final Rule is more draconian than the proposed rule, seeking a 32% (rather than 30%) reduction in power-plant CO₂ emissions by 2030. (Tellingly, nine States that filed comments challenging the proposed rule wound up with stricter limits under the Final Rule, compared with only one State supporting the plan – Rhode Island, whose goal changed by only 1%.) The Final Rule directs States by Sept. 6, 2016 to file plans (or detailed “initial submittals”) and establishes onerous power-plant CO₂ emission rates for States to follow – all of which will result in consumers having to pay substantially more for electricity. The fixed date of Sept. 6 is extremely unusual, if not unprecedented, because it does not depend on when the Final Rule is published in the Federal Register. Judicial review of a fixed compliance deadline barely one year away should not be held hostage by an uncertain publication date.

The Final Rule contains an interim 2022 compliance date, but the far-reaching changes needed to implement the rule must begin immediately. The Final Rule stresses that EPA seeks “to promote early action” (Final Rule 39), based on “EPA’s conclusion that it was essential . . . that utilities and

states establish the path towards emissions reductions as early as possible.” (*Id.* at 73). “The final guidelines include provisions to encourage early actions.” (*Id.* at 42).

Given long lead times for energy planning, private industry will be forced to begin implementing the Rule *now*. (*See* Galli Decl., ¶¶ 12-21). This accelerated decision-making process will create significant and irreparable injury – not merely when the Rule’s compliance deadlines begin, but immediately, during the pendency of judicial review. From the day before the rule was announced to the close of the markets the day after the announcement, Peabody’s public shares and bonds lost more than \$90 million in value, demonstrating the powerful, immediate and irreparable damage that the Final Rule is now imposing. *Id.* at ¶ 28. And the harm will not be confined to coal producers and utilities; the attached declaration from the head of the National Black Chamber of Commerce shows that the Final Rule will impose enormous costs (on the order of \$565 billion), increase consumer retail electric rates by 12-17%, and inflict disproportionate harm on minorities. (*See* Declaration of Harry C. Alford, attached as Exhibit B). The Final Rule will increase black poverty numbers by 23% and Hispanic poverty by 26%; reduce average black annual household income by \$455 and Hispanic income by \$515; and lead to the loss of 7 million African-

American and 12 million Hispanic jobs. (*See id.*). Senior citizens and those on fixed incomes are also at risk; a senior advocacy group warns that “[m]ore than 70% of the elderly are living on fixed incomes that do not keep pace with inflation, and causing a critical necessity like their electric bill to spike 20% to 30% as CPP will do is flat out unconscionable.”⁵

REASONS FOR GRANTING THE PETITION

This Court outlined the standards for an extraordinary writ in *Murray Energy*, 788 F.3d at 335. The familiar four factors governing requests for stay are: (1) likelihood of success on the merits; (2) irreparable harm; (3) risk of harm to others; and (4) the public interest. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). “A stay may be granted with either a high probability of success and some injury, or vice versa.” *Cuomo v. U.S. Nuclear Reg. Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*per curiam*).

This Court has previously stayed much less disruptive and less obviously flawed EPA rules, *e.g.*, *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302, *et al.* (D.C. Cir. Dec. 30, 2011); *Michigan v. EPA*, No.

⁵ 60-Plus Ass’n, “Seniors Feel Pain as EPA Finalizes ‘Cruel Power Plan’” (visited Aug. 4, 2015), available at <http://60plus.org/seniors-feel-pain-as-epa-finalizes-cruel-power-plan/>.

98-1497, 1999 U.S. App. LEXIS 38833, at *10 (D.C. Cir. May 25, 1999). A stay is urgently needed here.

I. The Final Rule Exceeds EPA's Legal Authority.

The Final Rule contains many legal flaws, but the Section 112 Exclusion (which has already been briefed and argued to this Court) provides a clear and ample basis for a stay. EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow and obscure provision, Section 111(d), whose plain meaning *prohibits* rather than authorizes the Final Rule. EPA has *never before* used its reinterpretation of the Section 112 Exclusion to adopt *any* regulation (let alone one as sweeping as the Final Rule) for a source category it was already regulating under Section 112. Reading Section 111(d) as supporting the Final Rule would render that provision "unrecognizable to the Congress that designed it." *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*").

Chevron does not apply, and EPA is not entitled to deference even if its legal authority were ambiguous. "This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000). The statutory question is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, __ U.S. __, No. 14-

114, 2015 WL 2473448, at *8 (Jun. 25, 2015) (quoting *UARG*, 134 S. Ct. at 2444). Indeed, in the one instance in the 1990 Clean Air Act amendments where Congress *did* intend for EPA to address a major question regarding power plant regulation, it *expressly delegated* that authority to EPA. See 42 U.S.C. § 7412(n)(1)(A). In addition, it is “especially unlikely” that Congress would have delegated the authority in question to EPA, an agency with “no expertise” in regulating electricity production and transmission. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)). The Final Rule is literally an impermissible “power” grab. Not even FERC or the Cabinet-level Department of Energy, much less EPA, has been delegated power by Congress to assert authority over intrastate electricity generation and distribution. See Federal Power Act, 16 U.S.C § 824(a); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983).

A. The Final Rule Flies In The Face Of An Express Statutory Prohibition.

The Supreme Court recognized the plain meaning of the Section 112 Exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011): “EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§

7408–7410, or the ‘hazardous air pollutants’ program, § 7412. *See* § 7411(d)(1).” *Id.* at 2537 n.7; *see also New Jersey v. EPA*, 517 F. 3d 574, 583 (D.C. Cir. 2008) (“under EPA’s own interpretation of the section, it cannot be used to regulate sources listed under section 112”). Because coal-fueled power plants are sources regulated under Section 112, EPA has no authority to regulate them under Section 111(d).

In 1990, EPA officials testified before Congress that imposing double regulation on existing sources, *even for different pollutants*, would be “ridiculous.”⁶ Since its 1990 amendment, Section 111(d) has been used for only one rule, involving municipal landfills, and there the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions that are “emitted from a source category that is actually being regulated under section 112”⁷ – *i.e.*, precisely the situation here.

EPA’s new-found interpretation would trigger a sea change in the way Section 111(d) has always been understood. EPA would turn Section 111(d)

⁶ Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res. 101st Cong. 603 (1990).

⁷ *See* EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, at 1-6 (1995) (“1995 EPA Landfill Memo”), available at <http://www.epa.gov/ttn/atw/landfill/bidfl.pdf>.

into one of the Clean Air Act's most powerful provisions and render most of its other provisions surplusage. EPA's new-found interpretation of Section 111(d) would have rendered the proposed 2009 Waxman-Markey cap-and-trade bill unnecessary as well. The Final Rule describes Section 111(d) as a "gap-filling" provision. (Final Rule 250). It is not. As explained by Sen. David Durenberger, a leading Senate architect of the 1990 Amendments, Section 111(d) was considered to be "some obscure, never-used section of the law."⁸ By EPA's own count, it has used Section 111(d) to regulate only four pollutants and five sources⁹ — and none remotely on the scale of CO₂. All these situations involve unique, localized pollutants, such as sulfuric acid, emitted from distinctive sources, like a sulfuric acid plant. None of them concerned a ubiquitous substance like CO₂, benign in itself, emitted from sources across the nation and indeed the globe, rather than from discrete local sources. Further, EPA has never before adopted a Section

⁸ Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcmte. on Env'tl. Prot. of the S. Cmte. on Env't and Public Works, 100th Cong. 13 (1987).

⁹ 79 Fed. Reg. at 34,844 ("Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (i.e., sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur), and municipal solid waste landfills (landfill gases)).").

111(d) rule like this one, which holds existing sources to a stricter standard than new sources (Final Rule 638), even though the reverse has been invariably true in the past (because new sources can more readily adopt new technologies without the need for costly retrofits). Section 111(d) authorizes EPA to adopt “standards of performance,” but the Final Rule is actually a standard of *nonperformance*; it says that the best system of emissions reduction is simply to use coal generation less, or not at all. Every other Section 111(d) rule has involved a technological means of reducing emissions from a source. The Final Rule is an energy policy – a shift from coal to renewables – masquerading as an emissions limit.

In short, Section 111(d) is far too thin a reed to support the dramatic change that EPA seeks to impose. Congress does not “hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). As the Supreme Court previously admonished EPA, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” *UARG*, 134 S. Ct. at 2444.

B. EPA’s “Two Versions of Section 111(d)” Theory Distorts The Legislative Record And Triggers A Separation Of Powers Violation.

In the Final Rule, EPA flip-flops on its theory that Congress enacted two “versions” of Section 111(d) in 1990, one in a substantive House amendment and the other in a conforming Senate amendment. In May 1990, the House adopted a substantive amendment changing Section 111(d) to bar regulation under that provision for any source category (like coal-fueled power plants) already regulated under Section 112. This amendment followed an April 1990 Senate amendment that was simply a clerical or “conforming” one updating a statutory cross-reference in the previous version of Section 111(d) by deleting the text “(1)(A),” to reflect other proposed changes to the statute. The Legal Memo accompanying the proposed rule contended that “[t]he two versions conflict with each other and thus render the Section 112 Exclusion ambiguous.”¹⁰ Now, EPA contends that the House amendment is ambiguous, the Senate amendment is clear, but the two do not conflict. (Final Rule 251-70). The agency’s latest gymnastics cannot save its legal rationale.

Even under EPA’s view that there are two “versions” of Section 111(d), its job would be to reconcile them by applying both prohibitions

¹⁰ Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units (“Proposed Rule Legal Memo”), at 23, available at <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum>.

simultaneously, *see Brown & Williamson*, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the Final Rule effectively does. It is easy to harmonize the two “versions” by applying both prohibitions simultaneously: EPA should be prohibited from setting a Section 111(d) standard *either* for source categories regulated under Section 112 *or* for pollutants regulated under Section 112. Any other approach would raise grave constitutional difficulties. *Chevron* does not allow an agency to choose which of two competing “versions” of a statute to make legally operative; that is an exercise of lawmaking power. *Whitman*, 531 U.S. at 473 (“The very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority.”).

Moreover, EPA’s “two versions” theory is wrong. It presupposes that in 1990 the House Office of Law Revision Counsel mistakenly failed to turn the conforming amendment into a second version of Section 111(d) and that the U.S. Code has been wrong ever since. The theory is contrary to the position the Clinton EPA took in 1995, that the substantive amendment was “the correct amendment” to codify and follow because it tracked the “revised section 112 to include regulation of source categories,” while the conforming amendment “is a simple substitution of one subsection citation for another.” (1995 EPA Landfill Memo at 1-5).

Indeed, the conforming Senate amendment was *not* an independent version of Section 111(d) at all, but simply deleted six characters, four of which were parentheses. It cannot bear the weight of EPA's 1,560-page Final Rule. The conforming amendment was a scrivener's provision, *not a separate "version" of Section 111(d)*, as the legislative record makes clear. Congress placed the substantive amendment in § 108 of Public Law 101-549 (the 1990 amendments), as part of a substantive provision occupying five pages of the Statutes at Large (104 Stat. 2,465-2,469 (1990)), which rewrote Section 111 to mirror the new source-category focus and structure of Section 112. In contrast, Congress placed the conforming amendment some 107 pages later, in § 302 of Public Law 101-549, a short section entitled "Conforming Amendments," which contained a potpourri of eight small clerical changes to six different parts of the Clean Air Act. If there were any ambiguity as to Congress' intent (and there is not) the 1990 Conference Report indicated that the "Senate recedes to the House" in relevant respects.¹¹ Thus, the amendments do not have equal weight or significance.

¹¹ 136 Cong. Rec. 36,065 (1990) (Chafee-Baucus Statement of Senate Managers), reprinted in *A Legislative History of the Clean Air Act Amendments of 1990* (1998), Volume I, Book 2 at 885 (emphasis added), excerpts available at

The House amendment was substantive, while the Senate amendment was not, and in conference the Senate receded to the House. The Senate amendment was subordinate in every respect.

The Office of Law Revision Counsel properly concluded that, once the substantive amendment in § 108 was executed, the conforming amendment in § 302 was mooted because it referred to language that no longer existed (there was no “112(b)(1)(A)” in the post-1990 version of Section 112). Nor was it necessary to “strik[e] ‘112(b)(1)(A)’” as the conforming amendment sought to do, in order to conform Section 111 to the revised Section 112. The substantive amendment had already accomplished that. The substantive amendment controls.

The Supreme Court has repeatedly distinguished between substantive and conforming (or “clerical”) amendments. *See Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating “conforming amendment” as nonsubstantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same). This Court has done the same. *American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (disregarding mistake in renumbering statute and correcting cross-reference where it conflicted with

<http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-20140619-SD011.pdf>.

substantive provision). In fact, EPA's own Respondents' brief in this case acknowledged that a conforming amendment should be disregarded where it is "obviously in error," citing 2008 amendments to 15 U.S.C. § 2081(b)(1), which involved (as EPA described it) an instance where the "section amended had been repealed." (ECF 1541205, at 48 n.23). That is exactly the situation here.

Substantive amendments routinely moot conforming ones, and EPA's approach has never previously been accepted.¹² The U.S. Code would be turned upside down if moot conforming amendments caused prior versions of substantively amended statutory provisions to spring back to life.

¹² See, e.g., Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff-28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 49 U.S.C. § 47115.

C. EPA's Textual Distortions Of Section 111(d) Do Not Withstand Scrutiny.

In its Legal Memorandum accompanying the Proposed Rule, EPA acknowledged that “a literal” application of Section 111(d) would likely preclude its proposal. (Proposed Rule Legal Memo 26). EPA stated: “As presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) any pollutant if it is emitted from a source category that is regulated under Section 112.” (*Id.* at 22).

Undeterred, in the Final Rule, EPA switches gears (as it did before this Court earlier in this case) and now offers a fanciful reinterpretation of Section 111(d) in an attempt to label it “ambiguous.” Final Rule 258. This attempt fails. EPA's reinterpretation cannot trigger *Chevron* deference, even if *Chevron* applied here (which it does not).

EPA contends Section 111(d) is “ambiguous” because of the phrases “a source category” and “regulated under Section 112.” (*Id.* at 262). EPA acknowledges “one possible reading” of these phrases is “to preclude the regulation of CO₂ from power plants under CAA section 111(d) because power plants have been regulated for (HAP) under CAA Section 112.” (*Id.* at 262-63). EPA admits that “[t]his is the interpretation that the EPA applied

to the House amendment in connection with the CAMR rule in 2005.” (*Id.* at 263). However, EPA now rejects its prior interpretation.

EPA’s view of Section 111(d) was correct under the Clinton Administration in 1995, correct in connection with the CAMR rule in 2005, and correct in the 2014 Legal Memorandum as to the plain meaning of the Section 112 Exclusion. And EPA is wrong today. Its suggestion of ambiguity cannot be squared with the text and structure of Section 111(d). The statute refers to “a source category which is regulated under section [112]” – *not* to “a pollutant which is regulated under section [112].” EPA seeks to rewrite the statute to suit its policy preferences.¹³

EPA complains that the plain meaning of the Section 112 Exclusion would bar the agency from regulating non-HAP emissions from source categories regulated under Section 112. But that is virtue, not a vice. That result is a natural consequence of Congress’ decision in 1990 to rewrite

¹³ The only natural reading is that the clause “which is regulated under section [112]” modifies the phrase “source category” because it immediately follows that phrase in the statute. Moreover, the phrase “any air pollutant” cannot refer solely to HAPs because that same phrase is also modified by the words “for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title.” “[A]ny air pollutant” must be broader than “hazardous air pollutants” because it must also include these other two categories, which overlap but are not coextensive.

Section 111(d) to mirror the “source category” structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of what constitutes a HAP (in Section 112(b)) and required regulation under Section 112 by “source category” (in Section 112(c)). The ordinary reading of the Section 112 Exclusion is better (not worse) because it aligns Section 111(d) with the “source category” focus of post-1990 Section 112.

EPA says the plain meaning of Section 111(d) would create a “gap” in the Clean Air Act. (Final Rule 268). But that supposed concern has never previously posed an issue; never before has EPA attempted to adopt a Section 111(d) standard for a source category it was already regulating under Section 112. At stake here is *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory “gap.” There is no “gap” in EPA’s authority; for example, the agency is already regulating greenhouse gas emissions from existing and new major sources, including power plants, under the agency’s permitting (or “PSD”) program involved in *UARG*. Even if there were a “gap,” it would have to be filled by Congress, not by an independent agency that is only a creature of statute and lacks any “implied” or “inherent” authority.

EPA errs in imputing to the 1990 Congress a monolithic intention to ensure that the agency is authorized to regulate every conceivable emission

under whatever section of the Clean Air Act the agency chooses, regardless of statutory overlaps. The Supreme Court has already rejected that very imputation. It made clear in *UARG* that EPA is *not* automatically entitled to regulate *all forms* of greenhouse gas emissions from any source just because the agency has the authority to regulate CO₂ from cars and trucks. 134 S. Ct. at 2440-41. EPA construes the 1990 amendments to favor more regulation above all other concerns. That construction ignores the necessary policy trade-offs that inevitably accompany legislation. As the Supreme Court has instructed, “no legislation pursues its purposes at all costs.”¹⁴ “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”¹⁵ EPA therefore lacks legal authority to adopt the Final Rule.

II. The Final Rule Threatens Irreparable Injury.

¹⁴ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks and citation omitted).

¹⁵ *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

Absent a stay, Petitioner faces irreparable harm.¹⁶ The Final Rule is aimed squarely at coal. Press reports have stated that “[t]he U.S.’ largest coal producer, Peabody Energy Corporation stands to lose the most as the newly-proposed rules will harm local consumption of coal.”¹⁷ (*See also* Galli Decl., ¶28 (noting \$90 million decline in value)).

¹⁶ An “enduring restraint on the manner in which a business is conducted” constitutes irreparable harm. *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584 (D.D.C. 2005), *rev’d on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996). “[L]oss of profits which could never be recaptured” is irreparable harm. *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J. concurring) (“[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs”) (emphasis in original); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (financial loss was irreparable harm); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (argument that economic losses are not irreparable harm “is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]”). Forcing a facility to retire before the end of its useful life also constitutes irreparable harm. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹⁷ “How Peabody Energy Corporation Has Responded To EPA’s New Carbon Rules,” Bidness Etc., Aug. 4, 2015 (available at <http://www.bidnesstetc.com/49291-how-peabody-energy-corporation-has-responded-to-epas-new-carbon-rules/>); *see also* “Only One Loser In Obama’s Clean Power Plan,” Forbes, Aug. 4, 2015 (available at <http://www.forbes.com/sites/jamesconca/2015/08/04/only-one-loser-in-obamas-clean-power-plan/>) (“The only big loser in the U.S. from these rules will be coal *producers*.”) (emphasis in original).

The Final Rule will force coal-fueled power plants to close (or to lock in the closure process) before judicial review is complete. EPA expects that the Final Rule will cause 15GW to 17GW of electricity generation to retire in 2016. (*Id.* at ¶ 17). For example, EPA expects its plan will cause the 2016 closure of the Big Brown plant in Fairfield, Texas and the 2016 partial closure of two units at the Monticello plant in Mount Pleasant, Texas, to which Peabody supplies coal. (*Id.* at ¶¶ 18-19). On July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter 2016, to which Peabody also supplies coal. (*Id.* at ¶¶ 14-15). Because Peabody and its utility customers must make future planning and investment decisions for existing plants and resources on a multi-year time horizon, irreversible closure decisions will be made years before actual closure and before judicial review is complete. (*Id.* at ¶¶ 12-13). In fact, the proposed rule (let alone the Final) caused Sunflower Electric Power Corp. and Mid-Kansas Electric Co. to take costly steps to comply. (*Id.* at ¶ 13). These illustrative impacts are likely an underestimate based on experience. (*Id.* at ¶ 22). The New York Times reported that “[t]he rule will probably lead to the closing of hundreds of coal-fired power

plants.”¹⁸ These decisions will harm employees, consumers, and entire communities. (*Id.* at ¶ 20). Even EPA admits its “analysis indicates that there may be some additional job losses in sectors related to coal extraction and generation that are attributable to implementation of this rule.” (Final Rule 1140).¹⁹

The Mercury and Air Toxics (“MATS”) rule illustrates the irreparable harm that will occur absent a stay. Although *Michigan v. EPA*, 135 S. Ct. 2699 (2015), rejected EPA’s refusal to consider costs before deciding to impose the MATS rule, EPA subsequently announced the decision was not important because the majority of plants had already complied or were locked into decisions to comply. (Galli Decl., ¶¶ 24-25).

In this case, power plants that begin to shut down and States that begin to implement the Final Rule will essentially lock in EPA’s policy

¹⁸ “5 Questions About Obama’s Climate Change Plan,” N.Y. TIMES, Aug. 3, 2015 (available at <http://www.nytimes.com/2015/08/04/us/politics/5-questions-about-obamas-climate-change-plan.html>).

¹⁹ The Final Rule’s Regulatory Impact Analysis (“RIA”) acknowledges that retail electricity rates will rise (at 3-35), the electrical sector will lose tens of thousands of full-time job-years (at 6-24 to 6-25 (Tables 6-4 & 6-5)), and there will be ripple effects in other sectors of the economy (at 5-3). EPA, RIA for the Clean Power Plan Final Rule (Aug. 2015), available at <http://www.epa.gov/airquality/cpp/cpp-final-rule-ria.pdf>.

preferences, even if the Rule is ultimately invalidated. In this instance, “[t]he injury against which a court would protect is not merely the expense to the plaintiff,...but...the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry.” *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.).

III. The Remaining Factors Favor a Stay.

A stay will merely preserve the status quo while this Court considers the lawfulness of the Final Rule. Electric power markets will continue business as usual, with no injury as a result of the Court’s stay order. EPA can hardly claim there is any particular urgency to its regulatory actions during the period necessary for judicial review. EPA has not quantified *any* environmental benefit from the Final Rule, let alone one that would occur while judicial review is pending. In fact, EPA has waited years to regulate power plant CO₂ emissions and has already allowed its deadlines to slip numerous times.²⁰

Also relevant to the stay calculus is the unprecedented nature of EPA’s action. Its legal theory is completely novel and represents a stark

²⁰ See Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to adopt Section 111(d) standards by May 26, 2012).

change in the agency's interpretation of the Section 112 Exclusion. And the Final Rule is strikingly different from traditional pollution regulations:

- CO₂ is unlike familiar pollutants with localized impacts and documented human health effects. We are all CO₂ emitters, and atmospheric CO₂ is the intermingled result of all human activity and Mother Nature. Although EPA tries to cast this regulation in traditional air emissions terms, it is anything but. CO₂ is different in kind from traditional air emissions because *it is not unique to the regulated source*. Congress rejected cap-and-trade legislation partly out of concern for disproportionate adverse impacts on coal-reliant States. Now, EPA is forcing coal-reliant consumers, communities, regions, businesses and utilities to bear the burden for a stated objective that is global in nature.

- The Final Rule's impact is far more severe and discriminatory than that of ordinary regulation. As Secretary of State John Kerry described U.S. policy regarding coal-fueled power plants: "We're going to take a bunch of them out of commission."²¹ This deliberate targeting is qualitatively different from other programs. The transportation sector accounts for 27%

²¹ Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. TIMES (Dec. 11, 2014), available at http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=3.

of total GHG emissions, barely less than 31% from the entire electric power industry,²² and yet transportation does not face the same treatment. Although the government regulates cars, it does not embark on a “war” against the automobile. Never before has a regulation been accompanied with a governmental pronouncement that it intends to extinguish an entire industry *for conduct in which we all engage*. EPA has arbitrarily singled out coal-fueled plants for shutdown and extinction, for emissions produced by Mother Nature and virtually every human activity on the planet.

- Worse, EPA does not even claim that the Final Rule will have any measureable impact on climate. In fact, the EPA Administrator testified before the Senate Environment and Public Works Committee on July 23, 2014: “The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. *This is not about pollution control.*”²³

- State participation in federal programs is “in the nature of a contract,” with the key question being “whether the State voluntarily and

²² RIA for the Clean Power Plan Final Rule, p. 2-25, Table 2-15.

²³ U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can’t Get Carbon Message Straight (Jul. 23, 2014), *available at* <http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight> (emphasis added).

knowingly accepts the terms of the ‘contract.’” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (internal quotation marks and citations omitted). The Final Rule improperly remakes the agreement between States and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted costly implementation plans to regulate power plants’ conventional pollutants like NO₂, SO₂, and particulates, that EPA would do an about-face and seek to phase out those power plants altogether.

These features of the Final Rule are not merely striking; they in fact raise serious constitutional questions,²⁴ which provides yet another reason

²⁴ Under our Federalism, the federal government may not compel the States to implement federal regulatory programs, making “a ‘balancing’ analysis” “inappropriate.” *Printz v. United States*, 521 U.S. 898, 932 (1997). Even when some States agree to expand federal power, structural principles of federalism prevent such collusion. *New York v. United States*, 505 U.S. 144, 181-82 (1992). Whether coercive or collusive, federal commandeering blurs the lines of political accountability by making it appear as though the harmful effects of federal policies are attributable to state choices. *Printz*, 521 U.S. at 930. That is exactly what will occur here: the Final Rule will force States to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the Emperor’s garb of state “choice” – even though in fact the policies are compelled by EPA. In addition, regulations that single out a few to bear a burden that ought to be borne by all, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion), or that impose targeted burdens that simply go “too far,” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), trigger just compensation obligations. Courts avoid statutory constructions triggering

that EPA is not entitled to *Chevron* deference. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 174 (2001).

The public has a substantial interest “in having legal questions decided on the merits, as correctly and expeditiously as possible,” rather than through administrative fiat. *WMATA*, 559 F.2d at 843. Absent a stay, the Final Rule will trigger costly and irreversible decisions by States and private industry. EPA should not be permitted to circumvent timely judicial review in imposing such vast burdens. Indeed, the possibility that fundamentally important agency action might permanently evade judicial review that is meaningful enough to make a difference would risk impairment of the judicial function and raise separation of powers concerns.

CONCLUSION

The Petition should be granted, the Final Rule should be stayed, and all deadlines in it suspended pending the completion of judicial review. To ensure the least amount of harm while permitting this Court sufficient time to consider this request, Peabody seeks a stay by Tuesday, September 8, 2015, approximately one year before state plans must be submitted.

potential duties to compensate, especially when Congress has not authorized such a result. *Bell Atl. Tel. Cos. v FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

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I hereby certify that this brief has been prepared with 14-point Times Roman type and contains 6,827 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

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I hereby certify that on this day, August 13, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

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ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363 (and consolidated cases)

**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, *et al.*,
Respondents.

**On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and Amici Curiae

These cases involve the following parties:

Petitioners:

No. 15-1363: State of West Virginia; State of Texas; State of Alabama; State of Arizona Corporation Commission; State of Arkansas; State of Colorado; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; State of New Jersey; State of North Carolina Department of Environmental Quality; State of Ohio; State of South Carolina; State of South Dakota; State of Utah; State of Wisconsin; and State of Wyoming.

No. 15-1364: State of Oklahoma *ex rel.* E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma and Oklahoma Department of Environmental Quality.

No. 15-1365: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.

No. 15-1366: Murray Energy Corporation.

No. 15-1367: National Mining Association.

No. 15-1368: American Coalition for Clean Coal Electricity.

No. 15-1370: Utility Air Regulatory Group and American Public Power Association.

No. 15-1371: Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company.

No. 15-1372: CO₂ Task Force of the Florida Electric Power Coordinating Group, Inc.

No. 15-1373: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

No. 15-1374: Tri-State Generation and Transmission Association, Inc.

No. 15-1375: United Mine Workers of America.

No. 15-1376: National Rural Electric Cooperative Association; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Power Electric Cooperative, Inc.; Corn Belt Power Cooperative; Dairyland Power Cooperative; Deseret Generation & Transmission Co-operative; East Kentucky Power Cooperative, Inc.; East River Electric Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Georgia Transmission Corporation; Golden Spread Electrical Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Kansas Electric Power Cooperative, Inc.; Minnkota Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northeast Texas Electric Cooperative, Inc.; Northwest Iowa Power

Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; San Miguel Electric Cooperative, Inc.; Seminole Electric Cooperative, Inc.; South Mississippi Electric Power Association; South Texas Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tex-La Electric Cooperative of Texas, Inc.; Upper Missouri G. & T. Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Western Farmers Electric Cooperative; and Wolverine Power Supply Cooperative, Inc.

No. 15-1377: Westar Energy, Inc.

No. 15-1378: NorthWestern Corporation d/b/a NorthWestern Energy.

No. 15-1379: National Association of Home Builders.

No. 15-1380: State of North Dakota.

No. 15-1382: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

No. 15-1383: Association of American Railroads.

No. 15-1386: Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC.

No. 15-1393: Basin Electric Power Cooperative.

No. 15-1398: Energy & Environment Legal Institute.

No. 15-1409: Mississippi Department of Environmental Quality; State of Mississippi; and Mississippi Public Service Commission.

No. 15-1410: International Brotherhood of Electrical Workers, AFL-CIO.

No. 15-1413: Entergy Corporation.

No. 15-1418: LG&E and KU Energy LLC.

No. 15-1422: West Virginia Coal Association.

No. 15-1432: Newmont Nevada Energy Investment, LLC, and Newmont USA Limited.

No. 15-1442: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas.

No. 15-1451: The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty

Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company.

No. 15-1459: Indiana Utility Group.

No. 15-1464: Louisiana Public Service Commission.

No. 15-1470: GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC.

No. 15-1472: Prairie State Generating Company, LLC.

No. 15-1474: Minnesota Power (an operating division of ALLETE, Inc.).

No. 15-1475: Denbury Onshore, LLC.

No. 15-1477: Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation.

No. 15-1483: Local Government Coalition for Renewable Energy.

No. 15-1488: Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1364, 15-1365, 15-1367, 15-1368, 15-1370, 15-1373, 15-1374, 15-1375, 15-1376,

15-1380, 15-1383, 15-1398, 15-1410, 15-1418, 15-1442, 15-1472, 15-1474, 15-1475, 15-1483) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1363, 15-1366, 15-1371, 15-1372, 15-1377, 15-1378, 15-1379, 15-1382, 15-1386, 15-1393, 15-1409, 15-1413, 15-1422, 15-1432, 15-1451, 15-1459, 15-1464, 15-1470, 15-1477, 15-1488).

Intervenors and *Amici Curiae*:

Dixon Bros., Inc.; Gulf Coast Lignite Coalition; Joy Global Inc.; Nelson Brothers, Inc.; Norfolk Southern Corp.; Peabody Energy Corp.; and Western Explosive Systems Company are Petitioner-Intervenors.

Advanced Energy Economy; American Lung Association; American Wind Energy Association; Broward County, Florida; Calpine Corporation; Center for Biological Diversity; City of Austin d/b/a Austin Energy; City of Boulder; City of Chicago; City of Los Angeles, by and through its Department of Water and Power; City of New York; City of Philadelphia; City of Seattle, by and through its City Light Department; City of South Miami; Clean Air Council; Clean Wisconsin; Coal River Mountain Watch; Commonwealth of Massachusetts; Commonwealth of Virginia; Conservation Law Foundation; District of Columbia; Environmental Defense Fund; Kanawha Forest Coalition; Keepers of the Mountains Foundation; Mon Valley Clean Air Coalition; National Grid Generation, LLC; Natural Resources Defense Council; New York Power Authority; NextEra Energy, Inc.; Ohio Environmental Council; Ohio Valley Environmental Coalition; Pacific Gas and Electric Company; Sacramento

Municipal Utility District; Sierra Club; Solar Energy Industries Association; Southern California Edison Company; State of California by and through Governor Edmund G. Brown, Jr., and the California Air Resources Board, and Attorney General Kamala D. Harris; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota by and through the Minnesota Pollution Control Agency; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; and West Virginia Highlands Conservancy are Respondent-Intervenors.

Philip Zoebisch; Pedernales Electric Cooperative, Inc.; Municipal Electric Authority of Georgia; Pacific Legal Foundation; Texas Public Policy Foundation; Morning Star Packing Company; Merit Oil Company; Loggers Association of Northern California; Norman R. “Skip” Brown; Southeastern Legal Foundation; National Black Chamber of Commerce; Hispanic Leadership Fund; 60Plus Association; Joseph S. D’Aleo; Dr. Harold H. Doiron; Dr. Don J. Easterbrook; Dr. Theodore R. Eck; Dr. Gordon J. Fulks; Dr. William M. Gray; Dr. Craig D. Idso; Dr. Richard A. Keen; Dr. Anthony R. Lupo; Dr. Thomas P. Sheahen; Dr. S. Fred Singer; Dr. James P. Wallace III; Dr. George T. Wolff; Senator Mitch McConnell of Kentucky; Senator James M. Inhofe of Oklahoma; Senator Lamar Alexander of Tennessee; Senator John Barrasso of Wyoming; Senator Roy Blunt of Missouri; Senator John Boozman of Arkansas; Senator Shelly Moore Capito of West Virginia;

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Commerce and Industry; Arkansas State Chamber of Commerce/Associated Industries of Arkansas; Associated Industries of Missouri; Association of Commerce and Industry; Bakersfield Chamber of Commerce; Beaver Dam Chamber of Commerce; Billings Chamber of Commerce; Birmingham Business Alliance; Bismarck Mandan Chamber of Commerce; Blair County Chamber of Commerce; Bowling Green Area Chamber of Commerce; Bullitt County Chamber of Commerce; Business Council of Alabama; Campbell County Chamber of Commerce; Canton Regional Chamber of Commerce; Carbon County Chamber of Commerce; Carroll County Chamber of Commerce; Catawba Chamber of Commerce; Central Chamber of Commerce; Central Louisiana Chamber of Commerce; Chamber Southwest Louisiana; Chamber630; Chandler Chamber of Commerce; Colorado Association of Commerce and Industry; Colorado Business Roundtable; Columbus Area Chamber of Commerce; Dallas Regional Chamber; Davis Chamber of Commerce; Detroit Regional Chamber of Commerce; Eau Claire Area Chamber of Commerce; Erie Regional Chamber & Growth Partnership; Fall River Area Chamber of Commerce & Industry; Fremont Area Chamber of Commerce; Georgia Association of Manufacturers; Georgia Chamber of Commerce; Gibson County Chamber of Commerce; Gilbert Chamber of Commerce; Grand Junction Area Chamber; Grand Rapids Area Chamber of Commerce; Great Lakes Metro Chambers Coalition; Greater Flagstaff Chamber of Commerce; Greater Green Bay Chamber of Commerce; Greater Irving-Las Colinas Chamber of Commerce; Greater Lehigh Valley Chamber

of Commerce; Greater Muhlenberg Chamber of Commerce; Greater North Dakota Chamber of Commerce; Greater Orange Area Chamber of Commerce; Greater Phoenix Chamber of Commerce; Greater Shreveport Chamber of Commerce; Greater Summerville/Dorchester County Chamber of Commerce; Greater Tulsa Hispanic Chamber of Commerce; Greater West Plains Area Chamber of Commerce; Hartford Area Chamber of Commerce; Hastings Area Chamber of Commerce; Hazard Perry County Chamber of Commerce; Illinois Manufacturers Association; Indiana Chamber of Commerce; Indiana County Chamber of Commerce; Iowa Association of Business and Industry; Jackson County Chamber; Jax Chamber of Commerce; Jeff Davis Chamber of Commerce; Johnson City Chamber of Commerce; Joplin Area Chamber of Commerce; Kalispell Chamber of Commerce; Kansas Chamber of Commerce; Kentucky Association of Manufacturers; Kentucky Chamber of Commerce; Kingsport Chamber of Commerce; Kyndle, Kentucky Network for Development, Leadership and Engagement; Latino Coalition; Lima-Allen County Chamber of Commerce; Lincoln Chamber of Commerce; Longview Chamber of Commerce; Loudoun Chamber of Commerce; Lubbock Chamber of Commerce; Madisonville-Hopkins County Chamber of Commerce; Maine State Chamber of Commerce; Manhattan Chamber of Commerce; McLean County Chamber of Commerce; Mercer Chamber of Commerce; Mesa Chamber of Commerce; Metro Atlanta Chamber of Commerce; Metropolitan Milwaukee Association of Commerce; Michigan Chamber of Commerce; Michigan Manufacturers Association; Midland

Chamber of Commerce; Milbank Area Chamber of Commerce; Minot Area Chamber of Commerce; Mississippi Economic Council – The State Chamber of Commerce; Mississippi Manufacturers Association, Missouri Chamber of Commerce; Mobile Area Chamber of Commerce; Montana Chamber of Commerce; Montgomery Area Chamber of Commerce; Morganfield Chamber of Commerce; Mount Pleasant/Titus County Chamber of Commerce; Myrtle Beach Chamber of Commerce; Naperville Area Chamber of Commerce; Nashville Area Chamber of Commerce; National Black Chamber of Commerce; Nebraska Chamber of Commerce and Industry; Nevada Manufacturers Association; New Jersey Business & Industry Association; New Jersey State Chamber of Commerce; New Mexico Business Coalition; Newcastle Area Chamber of Commerce; North Carolina Chamber of Commerce; North Country Chamber of Commerce; Northern Kentucky Chamber of Commerce; Ohio Manufacturers Association; Orrville Area Chamber of Commerce; Oshkosh Chamber of Commerce; Paducah Area Chamber of Commerce; Paintsville/Johnson County Chamber of Commerce; Pennsylvania Manufacturers Association; Port Aransas Chamber of Commerce/Tourist Bureau; Powell Valley Chamber of Commerce; Putnam Chamber of Commerce; Rapid City Area Chamber of Commerce; Rapid City Economic Development Partnership; Redondo Beach Chamber of Commerce; Roanoke Valley Chamber of Commerce; Rock Springs Chamber of Commerce; Salt Lake Chamber of Commerce; San Diego East County Chamber of Commerce; San Gabriel Valley Economic Partnership; Savannah Area Chamber of Commerce;

Schuylkill Chamber of Commerce; Shoals Chamber of Commerce; Silver City Grant County Chamber of Commerce; Somerset County Chamber of Commerce; South Bay Association of Chambers of Commerce; South Carolina Chamber of Commerce; South Dakota Chamber of Commerce; Southeast Kentucky Chamber of Commerce; Southwest Indiana Chamber; Springerville-Eagar Chamber of Commerce; Springfield Area Chamber of Commerce; St. Louis Regional Chamber; State Chamber of Oklahoma; Superior Arizona Chamber of Commerce; Tempe Chamber of Commerce; Tennessee Chamber of Commerce and Industry; Tucson Metro Chamber of Commerce; Tulsa Chamber of Commerce; Tyler Area Chamber of Commerce; Upper Sandusky Area Chamber of Commerce; Utah Valley Chamber; Victoria Chamber of Commerce; Virginia Chamber of Commerce; Wabash County Chamber of Commerce; West Virginia Chamber of Commerce; West Virginia Manufacturers Association; Westmoreland County Chamber of Commerce; White Pine Chamber of Commerce; Wichita Metro Chamber of Commerce; Williamsport/Lycoming Chamber of Commerce; Wisconsin Manufacturers & Commerce; Wyoming Business Alliance; Wyoming State Chamber of Commerce; Youngstown Warren Regional Chamber; State of Nevada; and Consumers' Research are *amici curiae* in support of Petitioners.

Former EPA Administrators William D. Ruckelshaus and William K. Reilly; Institute for Policy Integrity at New York University School of Law; National League of Cities; U.S. Conference of Mayors; Baltimore, MD; Boulder County, CO; Coral

Gables, FL; Grand Rapids, MI; Houston, TX; Jersey City, NJ; Los Angeles, CA; Minneapolis, MN; Pinecrest, FL; Portland, OR; Providence, RI; Salt Lake City, UT; San Francisco, CA; West Palm Beach, FL; American Thoracic Society; American Medical Association; American College of Preventive Medicine; American College of Occupational and Environmental Medicine; Service Employees International Union; American Sustainable Business Council; and South Carolina Small Business Chamber of Commerce are *amici curiae* in support of Respondents.

Ann Arbor, MI; Arlington County, VA; Aurora, IL; Bellingham, WA; Berkeley, CA; Bloomington, IN; Boise, ID; Boston, MA; Carmel, IN; Chapel Hill, NC; Clarkston, GA; Cutler Bay, FL; Elgin, IL; Eugene, OR; Evanston, IL; Fort Collins, CO; Henderson, NV; Highland Park, IL; Hoboken, NJ; Holyoke, MA; King County, WA; Madison, WI; Miami, FL; Miami Beach, FL; Milwaukie, OR; Newburgh Heights, OH; Oakland, CA; Pittsburgh, PA; Portland, ME; Reno, NV; Rochester, NY; Syracuse, NY; Tucson, AZ; Washburn, WI; West Chester, PA; West Hollywood, CA; Mayor of Dallas, TX; Mayor of Knoxville, TN; Mayor of Missoula, MT; Mayor of Orlando, FL; American Academy of Pediatrics; National Medical Association; National Association for Medical Direction of Respiratory Care; American Public Health Association; Former State Energy and Environmental Officials Matt Baker, Janet Gail Besser, Ron Binz, Garry Brown, Michael H. Dworkin, Jeanne Fox, Dian Grueneich, Paul Hibbard, Karl Rábago, Cheryl Roberto, Barbara Roberts, Jim Roth, Larry R. Soward, Kelly Speakes-Backman, Sue Tierney, Kathy Watson; Union of

Concerned Scientists; Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, James D. McCalley, Brian Parsons; Frank Pallone, Jr., Representative of New Jersey; Jared Huffman, Representative of California; Nancy Pelosi, Representative of California; Steny H. Hoyer, Representative of Maryland; James E. Clyburn, Representative of South Carolina; Xavier Becerra, Representative of California; Joseph Crowley, Representative of New York; John Conyers, Jr., Representative of Michigan; Elijah E. Cummings, Representative of Maryland; Peter A. DeFazio, Representative of Oregon; Eliot L. Engel, Representative of New York; Raúl M. Grijalva, Representative of Arizona; Eddie Bernice Johnson, Representative of Texas; Sander Levin, Representative of Michigan; John Lewis, Representative of Georgia; Nita M. Lowey, Representative of New York; Jim McDermott, Representative of Washington; Richard E. Neal, Representative of Massachusetts; David Price, Representative of North Carolina; Charles B. Rangel, Representative of New York; Bobby L. Rush, Representative of Illinois; José E. Serrano, Representative of New York; Louise M. Slaughter, Representative of New York; Alma S. Adams, Representative of North Carolina; Pete Aguilar, Representative of California; Karen Bass, Representative of California; Ami Bera, Representative of California; Donald S. Beyer, Jr., Representative of Virginia; Earl Blumenauer, Representative of Oregon; Suzanne Bonamici, Representative of Oregon; Brendan F. Boyle, Representative of Pennsylvania; Robert A. Brady, Representative of Pennsylvania; Corrine Brown, Representative of Florida; Julia Brownley, Representative of California; Cheri Bustos,

Representative of Illinois; G.K. Butterfield, Representative of North Carolina; Lois Capps, Representative of California; Tony Cárdenas, Representative of California; John C. Carney, Jr., Representative of Delaware; André Carson, Representative of Indiana; Matt Cartwright, Representative of Pennsylvania; Kathy Castor, Representative of Florida; Joaquin Castro, Representative of Texas; Judy Chu, Representative of California; David N. Cicilline, Representative of Rhode Island; Katherine M. Clark, Representative of Massachusetts; Emanuel Cleaver, II, Representative of Missouri; Steve Cohen, Representative of Tennessee; Gerald E. Connolly, Representative of Virginia; Joe Courtney, Representative of Connecticut; Danny K. Davis, Representative of Illinois; Susan A. Davis, Representative of California; Diana L. DeGette, Representative of Colorado; John K. Delaney, Representative of Maryland; Rosa L. DeLauro, Representative of Connecticut; Suzan K. DelBene, Representative of Washington; Mark DeSaulnier, Representative of California; Theodore E. Deutch, Representative of Florida; Debbie Dingell, Representative of Michigan; Michael F. Doyle, Representative of Pennsylvania; Tammy Duckworth, Representative of Illinois; Donna F. Edwards, Representative of Maryland; Keith Ellison, Representative of Minnesota; Anna G. Eshoo, Representative of California; Elizabeth H. Esty, Representative of Connecticut; Sam Farr, Representative of California; Chaka Fattah, Representative of Pennsylvania; Bill Foster, Representative of Illinois; Lois Frankel, Representative of Florida; Ruben Gallego, Representative of Arizona; John Garamendi, Representative of California;

Alan Grayson, Representative of Florida; Luis V. Gutierrez, Representative of Illinois; Janice Hahn, Representative of California; Alcee L. Hastings, Representative of Florida; Denny Heck, Representative of Washington; Brian Higgins, Representative of New York; Jim Himes, Representative of Connecticut; Michael M. Honda, Representative of California; Steve Israel, Representative of New York; Shelia Jackson Lee, Representative of Texas; Hakeem Jeffries, Representative of New York; Henry C. “Hank” Johnson, Representative of Georgia; William R. Keating, Representative of Massachusetts; Robin L. Kelly, Representative of Illinois; Joseph P. Kennedy, III, Representative of Massachusetts; Daniel T. Kildee, Representative of Michigan; Derek Kilmer, Representative of Washington; Ann McLane Kuster, Representative of New Hampshire; James R. Langevin, Representative of Rhode Island; John B. Larson, Representative of Connecticut; Brenda L. Lawrence, Representative of Michigan; Barbara Lee, Representative of California; Ted W. Lieu, Representative of California; Daniel Lipinski, Representative of Illinois; Dave Loebsack, Representative of Iowa; Zoe Lofgren, Representative of California; Alan Lowenthal, Representative of California; Ben Ray Luján, Representative of New Mexico; Michelle Lujan Grisham, Representative of New Mexico; Stephen F. Lynch, Representative of Massachusetts; Carolyn B. Maloney, Representative of New York; Sean Patrick Maloney, Representative of New York; Doris Matsui, Representative of California; Betty McCollum, Representative of Minnesota; James P. McGovern, Representative of Massachusetts; Jerry McNerney, Representative of California; Gregory W. Meeks,

Representative of New York; Grace Meng, Representative of New York; Gwen Moore, Representative of Wisconsin; Seth Moulton, Representative of Massachusetts; Patrick E. Murphy, Representative of Florida; Jerrold Nadler, Representative of New York; Grace F. Napolitano, Representative of California; Donald Norcross, Representative of New Jersey; Eleanor Holmes Norton, Representative of District of Columbia; Beto O'Rourke, Representative of Texas; Bill Pascrell, Jr., Representative of New Jersey; Donald M. Payne, Jr., Representative of New Jersey; Ed Perlmutter, Representative of Colorado; Scott H. Peters, Representative of California; Chellie Pingree, Representative of Maine; Mark Pocan, Representative of Wisconsin; Jared Polis, Representative of Colorado; Mike Quigley, Representative of Illinois; Kathleen M. Rice, Representative of New York; Cedric L. Richmond, Representative of Louisiana; Lucille Roybal-Allard, Representative of California; Raul Ruiz, Representative of California; C.A. Dutch Ruppersberger, Representative of Maryland; Gregorio Kilili Camacho Sablan, Representative of Northern Mariana Islands; Linda T. Sánchez, Representative of California; Loretta Sanchez, Representative of California; John P. Sarbanes, Representative of Maryland; Jan Schakowsky, Representative of Illinois; Adam B. Schiff, Representative of California; Kurt Schrader, Representative of Oregon; Robert C. "Bobby" Scott, Representative of Virginia; Brad Sherman, Representative of California; Albio Sires, Representative of New Jersey; Adam Smith, Representative of Washington; Jackie Speier, Representative of California; Eric Swalwell, Representative of California; Mark Takai,

Representative of Hawaii; Mark Takano, Representative of California; Mike Thompson, Representative of California; Dina Titus, Representative of Nevada; Paul D. Tonko, Representative of New York; Niki Tsongas, Representative of Massachusetts; Chris Van Hollen, Representative of Maryland; Juan Vargas, Representative of California; Debbie Wasserman Schultz, Representative of Florida; Maxine Waters, Representative of California; Bonnie Watson Coleman, Representative of New Jersey; Peter Welch, Representative of Vermont; Frederica S. Wilson, Representative of Florida; John Yarmuth, Representative of Kentucky; Tammy Baldwin, Senator of Wisconsin; Michael F. Bennet, Senator of Colorado; Richard Blumenthal, Senator of Connecticut; Cory A. Booker, Senator of New Jersey; Barbara Boxer, Senator of California; Sherrod Brown, Senator of Ohio; Maria Cantwell, Senator of Washington; Benjamin L. Cardin, Senator of Maryland; Thomas R. Carper, Senator of Delaware; Robert P. Casey, Jr., Senator of Pennsylvania; Christopher A. Coons, Senator of Delaware; Richard J. Durbin, Senator of Illinois; Dianne Feinstein, Senator of California; Al Franken, Senator of Minnesota; Kirsten E. Gillibrand, Senator of New York; Martin Heinrich, Senator of New Mexico; Mazie Hirono, Senator of Hawaii; Tim Kaine, Senator of Virginia; Angus S. King, Jr., Senator of Maine; Amy Klobuchar, Senator of Minnesota; Patrick J. Leahy, Senator of Vermont; Edward J. Markey, Senator of Massachusetts; Robert Menendez, Senator of New Jersey; Jeff Merkley, Senator of Oregon; Patty Murray, Senator of Washington; Gary C. Peters, Senator of Michigan; Jack Reed, Senator of Rhode Island; Harry Reid,

Senator of Nevada; Bernard Sanders, Senator of Vermont; Brian Schatz, Senator of Hawaii; Charles E. Schumer, Senator of New York; Jeanne Shaheen, Senator of New Hampshire; Debbie Stabenow, Senator of Michigan; Mark R. Warner, Senator of Virginia; Sheldon Whitehouse, Senator of Rhode Island; Ron Wyden, Senator of Oregon; Sherwood Boehlert, Representative of New York (retired); Milton “Bob” Carr, Representative of Michigan (retired); Thomas A. Daschle, Senator and Representative of South Dakota (retired); Thomas Downey, Representative of New York (retired); David Durenberger, Senator of Minnesota (retired); Tom Harkin, Senator and Representative of Iowa (retired); Bill Hughes, Representative of New Jersey (retired); J. Robert Kerrey, Senator of Nebraska (retired); Carl Levin, Senator of Michigan (retired); Joseph I. Lieberman, Senator of Connecticut (retired); George Miller, Representative of California (retired); George J. Mitchell, Senator of Maine (retired); Jim Moran, Representative of Virginia (retired); Henry Waxman, Representative of California (retired); Timothy E. Wirth, Senator and Representative of Colorado (retired); Amazon.com, Inc.; Apple Inc.; Google Inc.; Microsoft Corp.; Leon G. Billings; Thomas C. Jorling; Citizens Utility Board; Consumers Union; Public Citizen, Inc.; Climate Scientists David Battisti, Marshall Burke, Ken Caldeira, Noah Diffenbaugh, William E. Easterling III, Christopher Field, John Harte, Jessica Hellman, Daniel Kirk-Davidoff, David Lobell, Katherine Mach, Pamela Matson, James C. McWilliams, Mario J. Molina, Michael Oppenheimer, Jonathan Overpeck, Scott R. Saleska, Noelle Eckley Selin, Drew Shindell, and Steven Wofsy; Dominion

Resources, Inc.; U.S. Black Chambers, Inc.; CABA (Climate Action Business Association, New England); Pioneer Valley Local First; Local First Ithaca; Green America; Kentucky Sustainable Business Council; West Virginia Sustainable Business Council; Ohio Sustainable Business Council; Idaho Clean Energy Association; Integrative Healthcare Policy Consortium; Sustainable Furnishings Council; National Small Business Network; New York State Sustainable Business Council; P3Utah; Business and Labor Coalition of New York; Small Business Minnesota; Metro Independent Business Council (Minneapolis); Lowcountry Local First (South Carolina); Local First Arizona; Sustainable Business Network of Massachusetts; Sustainable Business Network of Greater Philadelphia; Hampton Roads Hispanic Chamber of Commerce; Heartland Black Chamber of Commerce (Kansas); Madeleine K. Albright; Leon E. Panetta; William J. Burns; Catholic Climate Covenant; Catholic Rural Life; Evangelical Environmental Network; National Council of Churches USA; Coalition on the Environment and Jewish Life; Church World Service; Union of Reform Judaism; Women of Reform Judaism; National Baptist Convention of America; Progressive National Baptist Convention; Hazon; Sisters of Mercy of the Americas, Institute Leadership Team; Maryknoll Sisters; Sisters of the Divine Compassion; The Columban Center for Advocacy and Outreach; Cabrini College; Fordham University; University of San Diego; Center for Sustainability at Saint Louis University; Center for Human Rights and International Justice, Boston College; The Boisi Center of Boston College; Conference for Mercy Higher Education; University

of San Francisco; Le Moyne College; The Center for Peace and Justice Education; Loyola University Maryland; The College of the Holy Cross; Florida Council of Churches; Wisconsin Council of Churches; The Diocese of Stockton, California; The Diocese of Des Moines, Iowa; The Diocese of Davenport, Iowa; Catholic Committee of Appalachia; Sisters of Charity of New York; Dominican Sisters of Springfield, IL; Sisters of St. Joseph Earth Center: SSJ Earth Center; Sisters of St. Joseph Peace Leadership Team; Sisters of Charity of Saint Elizabeth Office of Peace, Justice and Ecological Integrity; School Sisters of Notre Dame Atlantic Midwest Province Department of Justice, Peace and Integrity of Creation; Buffalo Diocese Care for Creation Committee; Dominican Sisters of Grand Rapids; Adobe, Inc.; Mars, Incorporated; IKEA North America Services LLC; and Blue Cross and Blue Shield of Massachusetts, Inc. filed motions and *amici curiae* briefs in support of Respondents that remain pending as of the time of filing of this final form brief.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” and published on October 23, 2015, at 80 Fed. Reg. 64,662.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of five related cases that, as of the time of filing, have appeared before this Court:

- (1) *In re Murray Energy Corporation*, No. 14-1112,
- (2) *Murray Energy Corporation v. EPA*, No. 14-1151 (consolidated with No. 14-1112),
- (3) *State of West Virginia v. EPA*, No. 14-1146,
- (4) *In re State of West Virginia*, No. 15-1277, and
- (5) *In re Peabody Energy Corporation*, No. 15-1284 (consolidated with No. 15-1277).

Counsel is aware of five related proceedings that, as of the time of filing, have appeared before the United States Supreme Court:

- (1) *West Virginia v. EPA*, 136 S. Ct. 1000 (2016),
- (2) *Basin Electric Power Coop. v. EPA*, 136 S. Ct. 998 (2016),
- (3) *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016),
- (4) *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016), and
- (5) *North Dakota v. EPA*, 136 S. Ct. 999 (2016).

Per the Court's order of January 21, 2016, the following cases are consolidated and being held in abeyance pending potential administrative resolution of biogenic carbon dioxide emissions issues in the Final Rule: *National Alliance of Forest Owners v.*

EPA, No. 15-1478; *Biogenic CO2 Coalition v. EPA*, No. 15-1479; and *American Forest & Paper Association, Inc. and American Wood Council v. EPA*, No. 15-1485.

CORPORATE DISCLOSURE STATEMENTS

Non-governmental Petitioners submit the following statements pursuant to

Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

Alabama Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Alabama Power Company's stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol "SO."

American Chemistry Council ("ACC") states that it represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health, and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$801 billion enterprise and a key element of the nation's economy. ACC has no parent corporation, and no publicly held company has 10% or greater ownership in ACC.

American Coalition for Clean Coal Electricity ("ACCCE") is a partnership of companies that are involved in the production of electricity from coal. ACCCE recognizes the inextricable linkage between energy, the economy and our environment. Toward that end, ACCCE supports policies that promote the wise use of coal, one of America's largest domestically produced energy resources, to ensure a reliable and affordable supply of electricity to meet our nation's demand for energy. The ACCCE is a "trade association" within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10% or greater interest in the ACCCE.

American Coke and Coal Chemicals Institute ("ACCCI"), founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. ACCCI also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods, and services to the industry. ACCCI has no parent corporation, and no publicly held company has 10% or greater ownership in ACCCI.

American Forest & Paper Association ("AF&PA") is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent

of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion. AF&PA has no parent corporation, and no publicly held company has 10% or greater ownership in AF&PA.

American Foundry Society (“AFS”), founded in 1896, is the leading U.S. based metalcasting society, assisting member companies and individuals to effectively manage their production operations, profitably market their products and services, and equitably manage their employees. AFS is comprised of more than 7,500 individual members representing over 3,000 metalcasting firms, including foundries, suppliers, and customers. AFS has no parent corporation, and no publicly held company has 10% or greater ownership in AFS.

American Fuel & Petrochemical Manufacturers (“AFPM”) states that it is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products that are used daily in homes and businesses. AFPM has no parent corporation, and no publicly held company has 10% or greater ownership in AFPM.

American Iron and Steel Institute (“AISI”) states that it serves as the voice of the North American steel industry and represents 19 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states, Canada, and Mexico, and approximately 125 associate members who are suppliers to or customers of the steel industry. AISI has no parent corporation, and no publicly held company has 10% or greater ownership in AISI.

American Public Power Association (“APPA”) is the national association of publicly-owned electric utilities. APPA has no outstanding shares or debt securities in the hands of the public. APPA has no parent company. No publicly held company has a 10% or greater ownership in APPA.

American Wood Council (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry that provides approximately 400,000 men and women with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. AWC has no parent corporation, and no publicly held company has a 10% or greater ownership interest in AWC.

Arizona Electric Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Arizona Electric Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Associated Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Associated Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Association of American Railroads (“AAR”) is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), as well as some smaller freight railroads and Amtrak. AAR represents its member railroads in proceedings before Congress, the courts, and administrative agencies in matters of common interest, such as the issues that are the subject matter of this litigation. AAR has no parent corporation, and no publicly held company owns a 10% or greater interest in AAR.

Basin Electric Power Cooperative (“Basin Electric”) is a not-for-profit regional wholesale electric generation and transmission cooperative owned by over 100 member cooperatives. Basin Electric provides wholesale power to member rural electric systems in nine states, with electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa serving approximately 2.9 million customers. Basin Electric has no parent companies. There are no publicly held corporations that have a 10% or greater ownership interest in Basin Electric.

Big Brown Lignite Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Big Brown Power Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is

owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Big Rivers Electric Corporation has no parent corporation. No publicly held corporation owns any portion of Big Rivers Electric Corporation, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Brazos Electric Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Brazos Electric Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Brick Industry Association (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states. BIA has no parent corporation, and no publicly held company has 10% or greater ownership in BIA.

Buckeye Institute for Public Policy Solutions (“Buckeye Institute”) is a nonprofit organization incorporated in Ohio under Section 501(c)(3) of the Internal Revenue Code. The Buckeye Institute seeks to improve Ohio policies by performing research and promoting market-oriented policy solutions. No parent company or publicly-held company has a 10% or greater ownership interest in the Buckeye Institute.

Buckeye Power, Inc. has no parent corporation. No publicly held corporation owns any portion of Buckeye Power, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Central Montana Electric Power Cooperative has no parent corporation. No publicly held corporation owns any portion of Central Montana Electric Power Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Central Power Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Central Power Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies, state and local chambers, and trade associations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

CO₂ Task Force of the Florida Electric Power Coordinating Group, Inc.

(“FCG”) is a non-profit, non-governmental corporate entity organized under the laws of Florida. The FCG does not have a parent corporation. No publicly held corporation owns 10% or more of the FCG’s stock.

Competitive Enterprise Institute (“CEI”) is a nonprofit organization incorporated in Washington D.C. under Section 501(c)(3) of the Internal Revenue Code. CEI focuses on advancing market approaches to regulatory issues. No parent company or publicly-held company has a 10% or greater ownership interest in CEI.

Corn Belt Power Cooperative has no parent corporation. No publicly held corporation owns any portion of Corn Belt Power Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Coteau Properties Company (“Coteau Properties”) is a wholly-owned subsidiary of The North American Coal Corporation (“NACoal”). No publicly held entity has a 10% or greater ownership interest in Coteau Properties. The general nature and purpose of Coteau Properties, insofar as relevant to this litigation, is the mining and marketing of lignite coal as fuel for power generation in North Dakota.

Coyote Creek Mining Company, LLC (“Coyote Creek Mining”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in Coyote Creek Mining. The general nature and purpose of Coyote Creek Mining, insofar as relevant to this litigation, is the mining and marketing of lignite coal as fuel for power generation in North Dakota.

Dairyland Power Cooperative has no parent corporation. No publicly held corporation owns any portion of Dairyland Power Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Denbury Onshore, LLC is a wholly owned subsidiary of Denbury Resources Inc., a publicly held corporation whose shares are listed on the New York Stock Exchange. Other than Denbury Resources Inc., no publicly-held company owns 10% or more of any of Petitioner’s stock and no publicly-held company holds 10% or more of Denbury Resources, Inc., stock. The stock of Denbury Resources, Inc. is traded publicly on the New York Stock Exchange under the symbol “DNR.” Denbury is an oil and gas production company. As a part of its oil recovery operations (generally termed “tertiary” or “enhanced” recovery) that are performed in several states, Denbury, with its affiliated companies, produces, purchases, transports, and injects carbon dioxide for the purpose of the recovery of hydrocarbon resources.

Deseret Generation & Transmission Co-operative has no parent corporation. No publicly held corporation owns any portion of Deseret Generation & Transmission Co-operative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

East Kentucky Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of East Kentucky Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

East River Electric Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of East River Electric Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

East Texas Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of East Texas Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Electricity Consumers Resource Council (“ELCON”) is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of industrial commodities and consumer goods from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities in all regions of the United States. Many ELCON members also cogenerate electricity as a by-product to serving a manufacturing steam requirement. ELCON has no parent corporation, and no publicly held company has 10% or greater ownership in ELCON.

Energy & Environment Legal Institute (“EELI”) is a non-profit, non-governmental corporate entity organized under the laws of the Commonwealth of Virginia. EELI does not have a parent corporation. No publicly held corporation owns 10% or more of EELI’s stock.

Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation (“EIM”) is a coalition of individual companies. EIM has no outstanding shares or debt securities in the hands of the public. EIM has no parent corporation, and no publicly held company has 10% or greater ownership in EIM.

Entergy Corporation (“Entergy”) is a publicly traded company incorporated in the State of Delaware, with its principal place of business in the city of New Orleans, Louisiana. Entergy does not have any parent companies that have a 10% or greater ownership interest in Entergy. Further, there is no publicly-held company that has a 10% or greater ownership interest in Entergy. Entergy is an integrated energy company engaged primarily in electric power production and electric retail

distribution operations. Entergy delivers electricity to approximately 2.8 million customers in Arkansas, Louisiana, Mississippi, and Texas.

Falkirk Mining Company (“Falkirk Mining”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in Falkirk Mining. The general nature and purpose of Falkirk Mining, insofar as relevant to this litigation, is the mining and marketing of lignite coal as fuel for power generation in North Dakota.

GenOn Mid-Atlantic, LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG North America LLC, a limited liability corporation wholly owned by GenOn Americas Generation, LLC. GenOn Americas Generation, LLC is a limited liability corporation wholly owned by NRG Americas, Inc. NRG Americas, Inc. is a corporation wholly owned by GenOn Energy Holdings, Inc., a corporation wholly owned by GenOn Energy, Inc. GenOn Energy, Inc. is a corporation wholly owned by NRG Energy, Inc. a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc., a publicly-traded company.

Georgia Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Georgia Power Company’s stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol “SO.”

Georgia Transmission Corporation has no parent corporation. No publicly held corporation owns any portion of Georgia Transmission Corporation, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Golden Spread Electrical Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Golden Spread Electrical Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Gulf Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Gulf Power Company’s stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol “SO.”

Hoosier Energy Rural Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Hoosier Energy Rural Electric

Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Independence Institute is a nonprofit organization incorporated in Colorado under Section 501(c)(3) of the Internal Revenue Code. The Independence Institute is a public policy think tank whose purpose is to educate citizens, legislators, and opinion makers in Colorado about policies that enhance personal and economic freedom. No parent company or publicly-held company has a 10% or greater ownership interest in the Independence Institute.

Indian River Power LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

Indiana Utility Group (“IUG”) is a continuing association of individual electric generating companies operated for the purpose of promoting the general interests of the membership of electric generators. IUG has no outstanding shares or debt securities in the hand of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in IUG.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers (“IBB”) is a non-profit national labor organization with headquarters in Kansas City, Kansas. IBB’s members are active and retired members engaged in various skilled trades of welding and fabrication of boilers, ships, pipelines, and other industrial facilities and equipment in the United States and Canada, and workers in other industries in the United States organized by the IBB. IBB provides collective bargaining representation and other membership services on behalf of its members. IBB is affiliated with the American Federation of Labor-Congress of Industrial Organizations. IBB and its affiliated lodges own approximately 60 percent of the outstanding stock of Brotherhood Bancshares, Inc., the holding company of the Bank of Labor. Bank of Labor’s mission is to serve the banking and other financial needs of the North American labor movement. No entity owns 10% or more of IBB.

International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”) is a non-profit national labor organization with headquarters located at 900 7th Street, N.W., Washington, D.C. 20001. IBEW’s members are active and retired skilled electricians and related professionals engaged in a broad array of U.S. industries, including the

electrical utility, coal mining, and railroad transportation sectors that stand to be impacted adversely by implementation of EPA's final agency action. IBEW provides collective bargaining representation and other membership services and benefits on behalf of its members. IBEW is affiliated with the American Federation of Labor-Congress of Industrial Organizations. IBEW has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Kansas Electric Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Kansas Electric Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

LG&E and KU Energy LLC is the holding company for Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU"), regulated utilities that serve a total of 1.2 million customers. LG&E serves 321,000 natural gas and 400,000 electric customers in Louisville, Kentucky and 16 surrounding counties, whereas KU serves 543,000 customers in 77 Kentucky counties and five counties in Virginia. LG&E and KU Energy LLC is a wholly-owned subsidiary of PPL Corporation. Other than PPL Corporation, no publicly-held company owns 10% or more of any of LG&E and KU Energy LLC's membership interests. No publicly held company has a 10% or greater ownership interest in PPL Corporation.

Lignite Energy Council ("LEC") is a regional, non-profit organization whose primary mission is to promote the continued development and use of lignite coal as an energy resource. LEC's membership includes: (1) producers of lignite coal who have an ownership interest in and who mine lignite; (2) users of lignite who operate lignite-fired electric generating plants and the nation's only commercial scale "synfuels" plant that converts lignite into pipeline-quality natural gas; and (3) suppliers of goods and services to the lignite coal industry. LEC has no parent corporation, and no publicly held company has 10% or greater ownership in LEC.

Louisiana Generating LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG South Central Generating LLC, a limited liability corporation which in turn is wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

Luminant Big Brown Mining Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC

(“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Luminant Generation Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Luminant Mining Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Midwest Generation LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by Midwest Generation Holdings II, LLC. Midwest Generation Holdings II, LLC is a limited liability corporation wholly owned by Midwest Generation Holdings I, LLC. Midwest Generation Holdings I, LLC is a limited liability corporation 95% of which is owned by Mission Midwest Coal, LLC and 5% of which is owned by Midwest Generation Holdings Limited, which in turn is wholly owned by Mission Midwest Coal, LLC. Mission Midwest Coal, LLC is a limited liability corporation wholly owned by NRG Midwest Holdings LLC, which in turn is a limited liability corporation wholly owned by Midwest Generation EME, LLC. Midwest Generation EME, LLC is a limited liability corporation wholly owned by NRG Energy Holdings Inc. which is a

corporation wholly owned by NRG Acquisition Holdings Inc. NRG Acquisition Holdings, Inc. is a corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

Minnesota Power is an operating division of ALLETE, Inc. No publicly-held company has a 10% or greater ownership interest in ALLETE, Inc.

Minnkota Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Minnkota Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Mississippi Lignite Mining Company (“Mississippi Lignite Mining”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in Mississippi Lignite Mining. The general nature and purpose of Mississippi Lignite Mining, insofar as relevant to this litigation, is the mining and marketing of lignite coal as fuel for power generation in Mississippi.

Mississippi Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Mississippi Power Company’s stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol “SO.”

Montana-Dakota Utilities Co. is engaged in the distribution of natural gas and the generation, transmission, and distribution of electricity in the states of North Dakota, South Dakota, Montana, and Wyoming. Montana-Dakota Utilities Co. is a division of MDU Resources Group, Inc. No publicly held company has a 10% or greater ownership interest in MDU Resources Group, Inc.

Murray Energy Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock. Murray Energy Corporation is the largest privately-held coal company and largest underground coal mine operator in the United States.

National Association of Home Builders (“NAHB”) is a not-for-profit trade association organized under the laws of Nevada. NAHB does not have any parent companies that have a 10% or greater ownership interest in NAHB. Further, there is no publicly-held company that has a 10% or greater ownership interest in NAHB. NAHB has issued no shares of stock to the public. NAHB is comprised of

approximately 800 state and local home builders associations with whom it is affiliated, but all of those associations are, to the best of NAHB's knowledge, nonprofit corporations that have not issued stock to the public. NAHB's purpose is to promote the general commercial, professional, and legislative interests of its approximately 140,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

National Association of Manufacturers ("NAM") states that it is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes roughly \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

National Federation of Independent Business ("NFIB") is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB has no parent corporation, and no publicly held company has 10% or greater ownership in NFIB.

National Lime Association ("NLA") is the national trade association of the lime industry and is comprised of U.S. and Canadian commercial lime manufacturing companies, suppliers to lime companies, and foreign lime companies and trade associations. NLA's members produce more than 99% of all lime in the U.S., and 100% of the lime manufactured in Canada. NLA provides a forum to enhance and encourage the exchange of ideas and technical information common to the industry and to promote the use of lime and the business interests of the lime industry. NLA is a non-profit organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in NLA.

National Mining Association ("NMA") is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or

affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

National Oilseed Processors Association ("NOPA") is a national trade association that represents 12 companies engaged in the production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants in 19 states, including 57 plants which process soybeans. NOPA has no parent corporation, and no publicly held company has 10% or greater ownership in NOPA.

National Rural Electric Cooperative Association has no parent corporation. No publicly held corporation owns any portion of National Rural Electric Cooperative Association, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Newmont Nevada Energy Investment, LLC is a wholly-owned subsidiary of Newmont USA Limited and is the owner and operator of the TS Power Plant, a 242 MW coal-fired power plant located in Eureka County, Nevada, which provides power to Newmont USA Limited's mining operations. No other publicly held corporation owns 10% or more of the stock of Newmont Nevada Energy Investment, LLC.

Newmont USA Limited owns and operates 11 surface gold and copper mines, eight underground mines, and 13 processing facilities in Nevada that are served by the TS Power Plant. Newmont USA Limited is a wholly owned subsidiary of Newmont Mining Corporation and no other publicly held corporation owns 10% or more of its stock.

NODAK Energy Services, LLC ("NODAK") is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in NODAK. The general nature and purpose of NODAK, insofar as relevant to this litigation, is the operation of a lignite beneficiation facility within Great River Energy's Coal Creek Station, a lignite-fired power generating station in North Dakota.

The North American Coal Corporation ("NACoal") is a wholly-owned subsidiary of NACCO Industries, Inc. NACoal is not publicly held, but NACCO Industries, Inc., its parent, is a publicly traded corporation that owns more than 10% of the stock of NACoal. No other publicly-held corporation owns more than 10% of the stock of NACoal. The general nature and purpose of NACoal, insofar as relevant to this litigation, is the mining and marketing of lignite coal as fuel for power generation and the provision of mining services to natural resources companies.

North American Coal Royalty Company (“North American Coal Royalty”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in North American Coal Royalty. The general nature and purpose of North American Coal Royalty, insofar as relevant to this litigation, is the acquisition and disposition of mineral and surface interests in support of NACoal’s mining of lignite coal as fuel for power generation, and the provision of mining services to natural resources companies.

North Carolina Electric Membership Corporation has no parent corporation. No publicly held corporation owns any portion of North Carolina Electric Membership Corporation, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Northeast Texas Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Northeast Texas Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Northwest Iowa Power Cooperative has no parent corporation. No publicly held corporation owns any portion of Northwest Iowa Power Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

NorthWestern Corporation is a publicly traded company (NYSE: NWE) incorporated in the State of Delaware with corporate offices in Butte, Montana and Sioux Falls, South Dakota. NorthWestern Corporation has no parent corporation. As of February 17, 2016, based on a review of statements filed with the Securities and Exchange Commission pursuant to Sections 13(d), 13(f), and 13(g) of the Securities and Exchange Act of 1934, as amended, BlackRock Fund Advisors is the only shareholder owning more than 10% or more of NorthWestern Corporation’s stock. In addition to publicly traded stock, NorthWestern Corporation has issued debt and bonds to the public.

NRG Chalk Point LLC exists to provide safe, reliable, and affordable electric power to consumers. It is wholly owned by GenOn Mid-Atlantic, LLC. GenOn Mid-Atlantic, LLC is a limited liability corporation wholly owned by NRG North America LLC, a limited liability corporation wholly owned by GenOn Americas Generation, LLC. GenOn Americas Generation, LLC is a limited liability corporation wholly owned by NRG Americas, Inc. NRG Americas, Inc. is a corporation wholly owned by GenOn Energy Holdings, Inc., a corporation wholly owned by GenOn Energy, Inc. GenOn Energy, Inc. is a corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price

Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

NRG Power Midwest LP exists to provide safe, reliable, and affordable electric power to consumers. It is a limited partnership 99% of which is owned by NRG Power Generation Assets LLC and 1% of which is owned by NRG Power Midwest GP LLC, a limited liability corporation wholly owned by NRG Power Generation Assets LLC. NRG Power Generation Assets LLC is a limited liability corporation wholly owned by NRG Power Generation LLC, which is a limited liability corporation wholly owned by NRG Americas, Inc. NRG Americas, Inc. is a corporation wholly owned by GenOn Energy Holdings, Inc., a corporation wholly owned by GenOn Energy, Inc. GenOn Energy, Inc. is a corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

NRG Rema LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG Northeast Generation, Inc., a corporation wholly owned by NRG Northeast Holdings Inc. NRG Northeast Holdings Inc. is a corporation wholly owned by NRG Power Generation LLC, a limited liability corporation wholly owned by NRG Americas, Inc. NRG Americas, Inc. is a corporation wholly owned by GenOn Energy Holdings, Inc., a corporation wholly owned by GenOn Energy, Inc. GenOn Energy, Inc. is a corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

NRG Texas Power LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG Texas LLC, which in turn is a limited liability corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

NRG Wholesale Generation LP exists to provide safe, reliable, and affordable electric power to consumers. It is a limited partnership 99% owned by NRG Power

Generation Assets LLC and 1% owned by NRG Wholesale Generation GP LLC, both of which are wholly owned by NRG Power Generation LLC. NRG Power Generation LLC is a limited liability corporation wholly owned by NRG Americas, Inc. NRG Americas, Inc. is a corporation wholly owned by GenOn Energy Holdings, Inc., a corporation wholly owned by GenOn Energy, Inc. GenOn Energy, Inc. is a corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

Oak Grove Management Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Oglethorpe Power Corporation has no parent corporation. No publicly held corporation owns any portion of Oglethorpe Power Corporation, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Otter Creek Mining Company, LLC (“Otter Creek”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in Otter Creek. The general nature and purpose of Otter Creek, insofar as relevant to this litigation, is the development of a mine to deliver lignite coal as fuel for power generation in North Dakota.

Portland Cement Association (“PCA”) is a not-for-profit “trade association” within the meaning of Circuit Rule 26.1(b). It represents companies responsible for more than 80 percent of cement-making capacity in the United States. PCA members operate manufacturing plants in 35 states, with distribution centers in all 50 states. PCA conducts market development, engineering, research, education, technical assistance, and public affairs programs on behalf of its members. Its mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment. PCA has no parent corporation, and no publicly held company owns a 10% or greater interest in PCA.

PowerSouth Energy Cooperative has no parent corporation. No publicly held corporation owns any portion of PowerSouth Energy Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Prairie Power, Inc. has no parent corporation. No publicly held corporation owns any portion of Prairie Power, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Prairie State Generating Company, LLC (“PSGC”) is a private non-governmental corporation that is principally engaged in the business of generating electricity for cooperatives and public power companies. PSGC does not have a parent corporation and no publicly-held corporation owns ten percent or more of its stock.

Rio Grande Foundation is a nonprofit organization incorporated in New Mexico under Section 501(c)(3) of the Internal Revenue Code. The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for New Mexico’s citizens. No parent company or publicly-held company has a 10% or greater ownership interest in the Rio Grande Foundation.

Rushmore Electric Power Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Rushmore Electric Power Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

The Sabine Mining Company (“Sabine Mining”) is a wholly-owned subsidiary of NACoal. No publicly held entity has a 10% or greater ownership interest in Sabine Mining. The general nature and purpose of Sabine Mining, insofar as relevant to this litigation, is the mining of lignite coal as fuel for power generation in Texas.

Sam Rayburn G&T Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Sam Rayburn G&T Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

San Miguel Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of San Miguel Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Sandow Power Company, LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC (“TCEH”). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company (“EFCH”), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. (“EFH Corp.”).

Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater equity ownership interest in EFH Corp.

Seminole Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Seminole Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

South Mississippi Electric Power Association has no parent corporation. No publicly held corporation owns any portion of South Mississippi Electric Power Association, and it is not a subsidiary or an affiliate of any publicly owned corporation.

South Texas Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of South Texas Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Southern Illinois Power Cooperative has no parent corporation. No publicly held corporation owns any portion of Southern Illinois Power Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Sunflower Electric Power Corporation has no parent corporation. No publicly held corporation owns any portion of Sunflower Electric Power Corporation, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Sutherland Institute is a nonprofit organization incorporated in Utah under Section 501(c)(3) of the Internal Revenue Code. The Sutherland Institute is a public policy think tank committed to influencing Utah law and policy based on the core principles of limited government, personal responsibility, and charity. No parent company or publicly-held company has a 10% or greater ownership interest in the Sutherland Institute.

Tex-La Electric Cooperative of Texas, Inc. has no parent corporation. No publicly held corporation owns any portion of Tex-La Electric Cooperative of Texas, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Tri-State Generation and Transmission Association, Inc. (“Tri-State”) is a wholesale electric power supply cooperative which operates on a not-for-profit basis and is owned by 1.5 million member-owners and 44 distribution cooperatives. Tri-State issues no stock and has no parent corporation. Accordingly, no publicly held corporation owns 10% or more of its stock.

United Mine Workers of America (“UMWA”) is a non-profit national labor organization with headquarters in Triangle, Virginia. UMWA’s members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. UMWA provides collective bargaining representation and other membership services on behalf of its members. UMWA is affiliated with the America Federation of Labor-Congress of Industrial Organizations. UMWA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Upper Missouri G. & T. Electric Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Upper Missouri G. & T. Electric Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

Utility Air Regulatory Group (“UARG”) is a not-for-profit association of individual generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Vienna Power LLC exists to provide safe, reliable, and affordable electric power to consumers. It is a limited liability corporation wholly owned by NRG Energy, Inc., a Delaware publicly-traded corporation. NRG Energy, Inc. has no parent corporation. As of the last reporting period, T. Rowe Price Associates, Inc. held a 10% or greater ownership in NRG Energy, Inc. As of the last reporting period, T. Rowe Price Associates, Inc. was a subsidiary of T. Rowe Price Group, Inc. a publicly-traded company.

Wabash Valley Power Association, Inc. has no parent corporation. No publicly held corporation owns any portion of Wabash Valley Power Association, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

West Virginia Coal Association (“WVCA”) is a trade association representing more than 90% of West Virginia’s underground and surface coal mine production. No publicly-held company has 10% or greater ownership of the WVCA.

Western Farmers Electric Cooperative has no parent corporation. No publicly held corporation owns any portion of Western Farmers Electric Cooperative, and it is not a subsidiary or an affiliate of any publicly owned corporation.

Westar Energy, Inc. (“Westar”) is a publicly traded company (symbol: WR) incorporated in the State of Kansas, with its principal place of business in the city of Topeka, Kansas. Westar is the parent corporation of Kansas Gas and Electric Company (“KGE”), a Kansas corporation with its principal place of business in Topeka, Kansas. Westar owns all of the stock of KGE. In addition to Westar’s publicly traded stock, both Westar and KGE have issued debt and bonds to the public. Westar does not have any parent companies that have a 10% or greater ownership interest in Westar. Further, there is no publicly-held company that has a 10% or greater ownership interest in Westar.

Wolverine Power Supply Cooperative, Inc. has no parent corporation. No publicly held corporation owns any portion of Wolverine Power Supply Cooperative, Inc., and it is not a subsidiary or an affiliate of any publicly owned corporation.

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GLOSSARY OF TERMS

Act (or CAA)	Clean Air Act
CO ₂	Carbon Dioxide
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
JA	Joint Appendix
MWh	Megawatt-Hour
Rule	U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

JURISDICTIONAL STATEMENT

Petitioners seek review of a U.S. Environmental Protection Agency (“EPA”) final rule entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“Rule”), Joint Appendix (“JA”) 143-445. Petitions for review were timely filed in this Court under section 307(b)(1) of the Clean Air Act (“Act” or “CAA”).¹

STATEMENT OF ISSUES

1. Whether the Rule violates section 111 of the Clean Air Act by:
 - a. Requiring that States adopt standards of performance that are not “for,” and cannot be “applied” to, individual existing fossil fuel-fired electric generating units, but that instead require the owners and operators of these facilities to subsidize EPA-preferred facilities;
 - b. Requiring that States adopt standards of performance that are not based on technological or operational processes that continuously limit the rate at which the regulated pollutant is emitted by regulated sources, but instead require non-performance by sources; and/or
 - c. Requiring that States adopt standards for *existing* units that are more stringent even than those EPA contemporaneously established under section 111(b) for the best state-of-the-art *new* units.

¹ All citations are to the CAA; the Table of Authorities provides parallel citations to the U.S. Code.

2. Whether the Rule exceeds EPA’s authority under CAA section 111(d) by requiring States to adopt standards of performance for sources in source categories that are already regulated under section 112.

3. Whether the Rule abrogates authority granted to the States under section 111(d) by forbidding States from setting performance standards less stringent than the Rule’s national performance rates, and failing to authorize States “to take into consideration, among other factors, the remaining useful life” of an existing source.

4. Whether the Rule violates rights reserved to the States by the United States Constitution by reordering the mix of energy generation in such a way that States will have no choice but to carry out EPA’s preferred energy policy, regardless of whether the Rule is implemented through a state or federal plan.

STATUTES AND REGULATIONS

The Rule is codified in 40 C.F.R. Part 60, Subpart UUUU. The Statutory and Regulatory Addendum reproduces pertinent portions of cited statutes and regulations.

INTRODUCTION

Relying on an obscure provision of the Clean Air Act, EPA’s Rule seeks to effect an “aggressive transformation”² of the mix of electricity generation in nearly every State by systematically “decarboniz[ing]” power generation and ushering in a

² State Pet’rs’ Mot. for Stay (Oct. 23, 2015), Ex. B, White House Fact Sheet, ECF 1579999 (“White House Fact Sheet”), JA5711.

new “clean energy” economy.³ Although Congress has debated a number of bills designed to achieve that very result, it has not adopted any such legislation. Frustrated with Congress, EPA now purports to have discovered sweeping authority in section 111(d) of the Clean Air Act—a provision that has been used only five times in 45 years—to issue a “Power Plan” that forces States to fundamentally alter electricity generation throughout the country.

But as the Supreme Court recently said, courts should “greet ... with a measure of skepticism” claims by EPA to have “discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy” and make “decisions of vast economic and political significance,” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“UARG”) (internal quotation marks omitted), especially in areas outside an agency’s “expertise,” *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). That skepticism is doubly warranted here where EPA’s Rule intrudes on an “area[] of traditional state responsibility,” *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014)—namely, the States’ “traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like,” *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212 (1983) (“PG&E”).

³ *President Obama’s Clean Power Plan is a Strong Signal of International Leadership* (Aug. 5, 2015), <https://climate.america.gov/clean-power-plan-strong-signal-international-leadership/>.

EPA's audacious assertion of authority in this Rule is more far-reaching than any previous effort by the agency. According to EPA, section 111(d) authorizes it to use the States to impose on fossil fuel-fired power plants emission reduction requirements that are premised not just on pollution control measures at the regulated plants, but also (and predominantly) on reducing or eliminating operations at those plants and shifting their electricity generation to competitors, including those not regulated by the Rule. Those reduction requirements far exceed what EPA has found may be achieved individually by even a new plant with the agency's state-of-the-art "best system of emission reduction." Rather, the reduction requirements can be met *only* by shutting down hundreds of coal-fired plants, limiting the use of others, and requiring the construction and operation of other types of facilities preferred by EPA—a directive EPA euphemistically calls "generation shifting."

EPA's legal theory is at odds with the plain language of section 111 and certainly is not "clearly" authorized by that provision. *UARG*, 134 S. Ct. at 2444. Section 111(d) authorizes EPA to establish "procedure[s]" under which States set "standards of performance for any existing source," i.e., standards that are "appl[icable] ... to a[] particular source" within a regulated "source category." CAA § 111(a)(1), (d)(1). Those standards must reflect the "application of the best system of emission reduction" to that "source," i.e., to a "building, structure, facility, or installation." *Id.* § 111(a)(1), (3). In other words, EPA may seek to reduce emissions only through measures that can be implemented by individual facilities. Indeed, for 45

years, EPA has consistently interpreted section 111 standards of performance in this way—not only in the five instances in which it has addressed existing sources, but also in the more than one hundred rulemakings in which it has adopted standards for new sources.

The Rule is further barred by the fact that coal-fired electric generating units are already regulated under section 112 of the Clean Air Act. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012). Section 111(d) expressly prohibits EPA’s use of that section to require States to regulate “any air pollutant ... emitted from a source category which is regulated under section [1]12.” CAA § 111(d)(1)(A).

Additionally, even if EPA were permitted to regulate in this instance, the Rule is unlawful because it prevents States from exercising the authority granted to them under section 111 to establish standards of performance and to take into consideration the remaining useful life of an existing source when applying a standard to that source.

Finally, the Rule violates the Constitution. In order to pass constitutional muster, cooperative federalism programs must provide States with a meaningful opportunity to decline implementation. But the Rule does not do so; States that decline to take legislative or regulatory action to ensure increased generation by EPA’s preferred power sources face the threat of insufficient electricity to meet demand. The Rule is thus an act of commandeering that leaves States no choice but to alter their

laws and programs governing electricity generation and delivery to accord with federal policy.

If upheld, the Rule would lead to a breathtaking expansion of the agency's authority. The Rule's restructuring of nearly every State's electric grid would exceed even the authority that Congress gave to the Federal Energy Regulatory Commission ("FERC"), the federal agency responsible for electricity regulation. But EPA's theory of "generation shifting"—which is not about making regulated sources reduce their emissions while operating but rather about preventing many sources from operating at all—does not stop with the power sector. EPA's newly-discovered authority threatens to enable the agency to mandate that any existing source's owners in *any* industry reduce their source's production, shutter the existing source entirely, and even subsidize their non-regulated competitors. Section 111(d) would be transformed from a limited provision into the most powerful part of the Clean Air Act, making the agency a central planner for every single industry that emits carbon dioxide. Congress did not intend and could not have imagined such a result when it passed the provision more than 45 years ago.

The Rule must be vacated.

STATEMENT OF THE CASE

I. Section 111 of the Clean Air Act

Enacted in 1970, section 111 authorizes the regulation of air pollutants emitted by stationary sources. Under section 111, EPA is directed to "list" categories of

“stationary sources”—defined as “any building, structure, facility, or installation which emits or may emit any air pollutant,” CAA § 111(a)(3)—whose pollutants endanger public health or welfare, *id.* § 111(b)(1)(A). EPA must establish nationally-applicable “standards of performance” for new stationary sources within that category. *Id.* § 111(b)(1)(B). EPA also may, in limited circumstances, call upon States to submit plans containing State-established standards of performance for the same pollutant from *existing* sources within the same source category. *Id.* § 111(d)(1).

A. The Definition of “Standard of Performance”

Under section 111(d), a “standard of performance” must be “for” and “appl[icable] ... to a[] particular source” within a regulated source category. *Id.* § 111(d), (d)(1)(B); *accord id.* § 111(b)(1)(B) (discussing standards of performance “which will be applicable to” individual new sources); *id.* § 111(a)(2). Section 111(a)(1) defines the phrase to mean, for both new and existing sources:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

The term “emission limitation” means a “requirement ... which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis” *Id.* § 302(k). Thus, a “standard of performance” must reflect the emission limitation that can be achieved by “the application of the best system of emission reduction” that has

been “demonstrated” to limit emissions from an individual source in the listed source category on a “continuous basis,” after considering cost and other factors.

Since 1970, every performance standard has adhered to the requirement of this plain text. Each has been based upon a best system of emission reduction involving technological controls or low-polluting production processes that: (i) are capable of being implemented at the source, (ii) limit the individual source’s emissions while it operates, and (iii) do not limit the individual source’s level of production. *See generally* 40 C.F.R. pt. 60, subpts. Cb-OOOO.

B. Standards of Performance for Existing Sources

Though section 111’s primary focus—as reflected in its title, “Standards of performance for new stationary sources”—is the regulation of new sources, EPA has on a few occasions called upon States to establish standards of performance for *existing* sources under section 111(d) in a category for which EPA has issued a national new source standard. Compared to the roughly one hundred new source performance standards under section 111(b), EPA has promulgated only five rules under section 111(d).

Section 111(d)’s infrequent use stems partly from an important limitation on EPA’s authority contained in that provision itself: the Section 112 Exclusion. In the 1990 CAA Amendments, Congress broadly expanded the stringency and reach of

section 112,⁴ and at the same time limited the reach of section 111(d) for the purpose of prohibiting double regulation of sources also regulated under section 112. Since the 1990 Amendments, section 111(d) has expressly prohibited EPA from requiring States to regulate “any air pollutant ... emitted from a source category which is regulated under section [1]12.” CAA § 111(d)(1)(A). This means “EPA may not employ § [1]11(d) if existing stationary sources of the pollutant in question are regulated under ... § [1]12.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011) (“*AEP*”).

In contrast to the standard-setting authority granted to *EPA* for new sources under section 111(b), section 111(d) grants to the States the authority to set performance standards for existing sources. Section 111(d) permits EPA only to prescribe regulations “establish[ing] a procedure” under which “each State shall submit” to EPA “a plan which ... establishes standards of performance for any existing source” meeting the statutory criteria. CAA § 111(d)(1). It further directs that EPA’s regulations “shall permit the State in applying a standard of performance to any particular source” to “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” *Id.* “[I]n cases where

⁴ Compare Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2531-74 (1990) (amending CAA § 312), JA4191-234, with Clean Air Amendments of 1970, Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685-86 (1970), JA4059-60.

the State fails to submit a satisfactory plan,” EPA has the authority to “prescribe a plan for a State.” *Id.* § 111(d)(2)(A).

EPA’s 1975 regulations reflect these statutory directives. Establishing the procedure for section 111(d) state plans, 40 C.F.R. pt. 60, subpt. B, those regulations provide that EPA will issue under section 111(d) only a “guideline document” containing an “emission guideline” “for the development of State plans.” 40 C.F.R. § 60.22(a), (b). Each individual State then submits a plan establishing standards of performance, *id.* § 60.22(b), which may be less stringent than the EPA emission guidelines if the State makes certain demonstrations, including infeasibility or unreasonable cost given a plant’s age, *id.* § 60.24(f).

No previous section 111(d) regulation has identified emission guidelines for existing sources that are more stringent than the corresponding section 111(b) standards for new sources in that category. *See infra* pp. 58-59 & n.30. This is consistent with the Act’s directive that EPA must take cost and feasibility into account in setting the best system of emission reduction, CAA § 111(a)(1), because retrofitting an existing source with pollution controls will be more expensive and technologically challenging than incorporating controls into a new plant’s design, 40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975), JA4090.

II. The President's Climate Action Plan

After Congress declined to pass legislation authorizing CO₂ reduction programs,⁵ President Obama issued his “Climate Action Plan” in June 2013.⁶ The President ordered EPA to mandate steep reductions in CO₂ emissions from power plants under section 111.⁷ EPA subsequently adopted separate rules under section 111(b) and section 111(d) for new and existing fossil fuel-fired electric generating units, including the Rule at issue here. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015); 80 Fed. Reg. 64,662. It did so even though existing coal-fired units had recently been regulated under section 112. *See* 77 Fed. Reg. 9304.

A. The Section 111(b) New Source Rule

In October 2015, EPA promulgated standards limiting CO₂ emissions from new facilities within two source categories—coal- and natural gas-fired electric generating units. 80 Fed. Reg. 64,510. EPA determined that the best system of emission reduction for newly constructed coal-fired facilities is partial carbon capture and sequestration technology, based on which EPA set a performance standard of

⁵ *See, e.g.*, S. Con. Res. 8, S. Amdt. 646, 113th Cong. (2013) (rejecting carbon tax); Climate Prot. Act of 2013, S. 332, 113th Cong. (2013) (rejecting fees on greenhouse gas emissions); Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009) (rejecting greenhouse gas cap-and-trade program).

⁶ Executive Office of the President, *The President's Climate Action Plan* (June 2013), <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

⁷ *Power Sector Carbon Pollution Standards: Memorandum for the Administrator of the Environmental Protection Agency* (June 25, 2013), 78 Fed. Reg. 39,535, 39,535-36 (July 1, 2013).

1,400 lbs CO₂/megawatt-hour (“MWh”). *Id.* at 64,512-13, Tbl. 1. For modified and reconstructed coal-fired facilities,⁸ EPA rejected carbon capture technology and concluded that improved operational efficiency was the best system of emission reduction. Applying this system, EPA established standards for modified coal-fired facilities of no less than 1,800 to 2,000 lbs CO₂/MWh, to be determined on a case-by-case basis. *Id.* For new and reconstructed gas-fired facilities, the standard is 1,000 lbs CO₂/MWh, based on natural gas combined cycle technology. *Id.*⁹

B. The Section 111(d) Existing Source Rule: “The Clean Power Plan”

Notwithstanding the express prohibition of the Section 112 Exclusion, the same day EPA issued the section 111(b) rule, it separately issued under section 111(d) the Rule at issue to address CO₂ emissions from existing facilities within the coal and gas plant categories. Because EPA concluded that emission controls implementable at individual existing coal plants cannot yield sufficient CO₂ emission reductions to meet the Administration’s policy goals, EPA abandoned the approach it took in every other performance standard rulemaking, including the contemporaneous section 111(b) rule. As EPA recognized, the carbon capture technology that formed the basis for its new source performance standard for new coal units is not feasible for existing coal

⁸ The statute defines modified and reconstructed sources as new sources. CAA § 111(a)(2); *see also* 40 C.F.R. § 60.15.

⁹ EPA’s section 111(b) rule is being challenged in a separate proceeding before this Court. *See North Dakota v. EPA*, No. 15-1381 (and consolidated cases) (D.C. Cir. filed Oct. 23, 2015).

units. 80 Fed. Reg. at 64,756, JA237. And though EPA believed existing coal plants could feasibly make the combustion efficiency improvements that form the basis for the section 111(b) standards for modified coal facilities, those improvements would not achieve sufficient reductions to meet the Administration's goals. *Id.* at 64,748, JA229. The only way to obtain the desired reductions, EPA decided, was to restructure the entire power sector—by reducing the use of existing coal-fired power plants altogether and replacing their generation through increased use of existing natural gas-fired power plants and yet-to-be-built renewable resources. *See generally id.* at 64,717-811, JA198-292.

1. EPA's "Performance Rates" and Compliance Requirements

To achieve this policy outcome, EPA devised national "emission performance rates" for coal and gas power plants based on a best system of emission reduction consisting of three so-called "Building Blocks." *Id.* at 64,719-20, 64,752, JA200-01, JA233.

a. EPA's "Building Blocks" and "Performance Rates"

Building Block 1 (the only element of EPA's rule that resembles its historic practice) is based on improved combustion efficiency at individual coal-fired generating facilities, which can result in lower CO₂ emissions per unit of electric output. *Id.* at 64,745, JA226. As EPA explained, however, Building Block 1 would "yield only a small amount of emission reductions," nowhere near enough to satisfy EPA's policy goals. *Id.* at 64,769, JA250.

Building Block 2 is based on displacing large quantities of existing coal-fired generation with additional generation from existing natural gas generating facilities. *Id.* at 64,745-46, JA226-27. Put another way, existing natural gas generating facilities would be called on to produce much more power than they currently do and coal units much less. *Id.* at 64,795, 64,800, JA276, JA281.¹⁰

Building Block 3 is based on displacing both existing coal- and gas-fired generation with large increases in generation from new renewable energy resources like wind and solar. *Id.* at 64,747-48, JA228-29. Together, Blocks 2 and 3 represent “[t]he amount of reduced generation” from coal- and gas-fired plants by which EPA plans to achieve the bulk of its desired emission reductions. *Id.* at 64,782, JA263; *see also id.* at 64,728 (“[M]ost of the CO₂ controls need to come in the form of those other measures ... that involve, in one form or another, replacement of higher emitting generation with lower- or zero-emitting generation.”), JA209. The fundamental restructuring of the current mix of power generation among regulated and non-regulated entities¹¹ reflected in Building Blocks 2 and 3 is what EPA refers to as “generation shifting.”

¹⁰ To ensure that gas-fired generation is replaced by renewable generation in the long term, the Rule actually forbids the use of *new* natural gas plants to calculate rate reductions. *See* 80 Fed. Reg. at 64,729-30, 64,903, JA210-11, JA384.

¹¹ Non-emitting renewable energy facilities are not regulated “sources” under section 111 because they do not “emit any air pollutant.” CAA § 111(a)(3) (definition of “stationary source”).

Based on these “Building Blocks,” and an assumed decline in demand for electricity,¹² EPA set uniform “emission performance rates” for existing fossil fuel-fired generating facilities nationwide. To do so, EPA determined the theoretical CO₂ emission rates at which existing coal- and gas-fired plants would have to operate to obtain the emission reductions assumed to be achievable through implementation of the three sector-wide Building Blocks. *See generally* CO₂ Emission Performance Rate and Goal Computation Technical Support Document (Aug. 2015) (“Goal Computation TSD”), JA3027-76. The resulting rate for existing coal-fired plants is 1,305 lbs CO₂/MWh, and for existing gas-fired plants is 771 lbs CO₂/MWh. 40 C.F.R. pt. 60, subpt. UUUU, Tbl. 1. These emission rates are the “chief regulatory requirement of th[e] rulemaking”; plants may not emit CO₂ in excess of these rates. 80 Fed. Reg. at 64,823, 64,667, JA304, JA148.

But, as EPA concedes, no existing facility can actually meet these rates. They are not achievable by pollution controls or operational improvements at any individual source, and simply reducing generation at the source does not reduce (and

¹² Despite population and economic growth and the fact that electric demand has *never* fallen over a multi-year period absent a significant economic downturn, EPA assumed that demand for electricity will *fall* between 2020 and 2030. Regulatory Impact Analysis at 3-14, Tbl. 3-2, 3-25, 3-27, Tbl. 3-11 (Aug. 2015) (“RIA”), JA3646, JA3657, JA3659; Demand-Side Energy Efficiency Technical Support Document at 62-64, Tbl. 25 (Aug. 2015), JA2943-45.

may actually increase) the source's emissions rate. *Id.* at 64,754, JA235.¹³ They are even stricter than the emission rates established by EPA for *new* plants using what EPA considers to be the “best” available technology.

Summary of Emission Rates (lbs CO₂/MWh)

	New	Reconstructed	Modified	Existing	2012 Average
Coal	1,400	1,800 - 2,000	1,800-2,000 ¹⁴	1,305	2,217 ¹⁵
Natural Gas	1,000	1,000	N/A	771	905 ¹⁶

b. EPA's Rationale

EPA's legal justification for its “Building Blocks” shifted substantially during the rulemaking. Because pollution controls that could be implemented by fossil fuel-fired generating units “yield only a small amount of emission reductions,” *id.* at 64,769, JA250, EPA's proposed rationale for the rule was not based on what fossil fuel-fired sources themselves could achieve. Instead, attributing a capacious meaning to the word “system,” 79 Fed. Reg. 34,830, 34,885 (June 18, 2014), JA57, EPA claimed that it could “include [within its best system of emission reduction] *anything*

¹³ As EPA acknowledges, coal plants that reduce operations actually are generally *less* efficient, and have *higher* emission rates. Greenhouse Gas Mitigation Measures Technical Support Document at 2-34 (Aug. 3, 2015) (“Mitigation TSD”), JA3942. Conversely, gas plants can have higher emission rates when they *increase* operations. *See* 79 Fed. Reg. 34,960, 34,980 (June 18, 2014) (EPA noting some gas plants “are designed to be highly efficient when operated as load-following units” but are less efficient at baseload), JA5260.

¹⁴ Modified coal-fired units are subject to case-by-case standards that may not be more stringent than these levels.

¹⁵ Mitigation TSD at 3-4, JA3978.

¹⁶ *Id.*

that reduces emissions,” including obligations imposed on entities beyond the regulated sources themselves, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines at 51-52, EPA-HQ-OAR-2013-0602-0419 (“EPA Legal Memo”), JA2790-91 (emphasis added).

But in the final Rule, EPA took a different approach. Retreating from its sweeping assertions in the proposed rule, EPA conceded that a best system of emission reduction must be “*limited to measures that can be implemented—‘appl[ied]’—by the sources themselves.*” 80 Fed. Reg. at 64,720 (emphasis added), JA201. It then provided a new legal theory for nevertheless setting performance rates that are demonstrably not achievable by regulated sources and for including in the best system “actions that may occur off-site and actions that a third party takes.” *Id.* at 64,761, JA242. Specifically, EPA equated a source with its owner or operator: “[a]s a practical matter, the ‘source’ includes the ‘*owner or operator*’ of any building, structure, facility, or installation for which a standard of performance is applicable.” *Id.* at 64,762 (emphasis added), JA243; *see also id.* at 64,720, JA201. An *owner or operator* of a regulated source, EPA said, can “invest in actions at facilities owned by others,” *id.* at 64,733, JA214, including generation from other sources or facilities, in order to generate “emission rate credits,” *id.* at 64,669, JA150, to offset the regulated source’s emission rate, 40 C.F.R. § 60.5740(a)(2)(i); *see also id.* § 60.5790(c). Alternatively, the *owner or operator* of a regulated unit can comply with the performance rate by simply shutting the unit down. 80 Fed. Reg. at 64,750, 64,780 n.590, JA231, JA261. EPA claimed deference

for its interpretation under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). 80 Fed. Reg. at 64,719 n.301, JA200.

The Rule's performance rates thus are based on the availability of tradable "emission rate credits" that implement EPA's "Building Blocks." Because the Rule's performance rates cannot be met by any single regulated source, a source's owner or operator must comply by "calculat[ing] an adjusted CO₂ emission rate" of 1,305 or 771 lbs/MWh using (i) actual stack emissions data, and (ii) proof (in the form of tradable "emission rate credits") that actual lower- or zero-emitting generation elsewhere has occurred. 40 C.F.R. § 60.5790(c)(1). An "emission rate credit" is a "tradable compliance instrument[]" that "represent[s] one MWh of actual energy generated or saved...." *Id.* §§ 60.5880, 60.5790(c)(2)(ii). Implementing the Building Blocks through emissions trading, EPA admits, is "an *integral* part of [the] ... analysis" used to justify the Rule's "performance rates." 80 Fed. Reg. at 64,734, JA215 (emphasis added). According to EPA, "trading allows each affected [unit] to access ... all the building blocks as well as other measures," *id.* at 64,733, JA214, and to do so using "a virtually nationwide emissions trading market for compliance," *id.* at 64,732, JA213. No such nationwide trading market exists at present.

2. State Plans

Under the Rule, States must submit plans establishing CO₂ emission standards for existing coal-fired and gas-fired generating units that will meet EPA's emissions performance rates. 40 C.F.R. § 60.5855(a). Alternatively, the Rule allows States to

impose emission standards that will “collectively meet” EPA-assigned state-wide “goals” derived from an average of the rates for all regulated generating units within a State. *Id.* § 60.5855(b). These goals are expressed either in “rate-based” terms (pounds of CO₂ per megawatt-hour that all regulated sources in a State can emit on average) or “mass-based” terms (total tons of CO₂ that all regulated sources in a State can emit in aggregate). *Id.*

Both types of plans require owners and operators of regulated plants to subsidize alternative generation. In a plan implementing a rate-based State goal, the State must require an owner or operator to “calculate an adjusted CO₂ emission rate” based on stack emissions and any “emission rate credits” from other facilities. 40 C.F.R. § 60.5790(c)(1). Under a mass-based plan, achieving the state-wide CO₂ emissions cap “involve[s], in one form or another, replacement of higher emitting [coal or gas-fired] generation with lower-or zero-emitting generation,” 80 Fed. Reg. at 64,728, JA209. New, more efficient gas-fired plants are restricted from participating in both types of state plans. *See, e.g., id.* at 64,887-91, 64,903, JA368-72, JA384.

3. The Proposed Federal Plan

Because EPA has the authority “to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan,” CAA § 111(d), the agency has separately proposed (but not yet finalized) two approaches to a federal plan. *See* 80 Fed. Reg. 64,966 (Oct. 23, 2015). Both approaches are trading programs. The plants in a rate-based trading program would be required to meet the emission rates established under

the Rule through the use of emission rate credits that could be bought, sold, transferred, or banked for future use under an EPA-administered program. *Id.* at 64,970-71. Under the mass-based approach, EPA would distribute transferrable emissions allowances up to the mass-based goal established for the State under the Rule. *Id.* at 64,971.

Because no regulated unit can achieve the Rule's uniform performance rates, States will be required even under federal plans to facilitate the reordering of each State's mix of electricity generation in order to "ensure that electric system reliability will be maintained" as coal generation is forced to retire and alternative generation must be constructed to take its place. *Id.* at 64,981; *see* 80 Fed. Reg. at 64,678, 64,874, JA159, JA355. As commenters warned, the "emission performance requirements set by EPA necessarily require compliance and enforcement activities that include changing dispatch methodology, efficiency measures, the type of generation to be constructed, and renewable energy considerations, all of which are matters within the [States'] exclusive jurisdiction."¹⁷

¹⁷ Comments of Fla. Pub. Serv. Comm'n, at 8 (Dec. 1, 2014), EPA-HQ-OAR-2013-0602-23650, JA2027; *see also* Comments of Pub. Util. Comm'n of Texas, at 9 (Dec. 1, 2014), EPA-HQ-OAR-2013-0602-23305, JA1610; Comments of North Dakota Pub. Serv. Comm'n, at 14-16 (Nov. 25, 2014), EPA-HQ-OAR-2013-0602-25944, JA2263-65; Comments of Thomas Jefferson Inst. for Public Policy, at 5, 8 (Dec. 1, 2014), EPA-HQ-OAR-2013-0602-23286, JA1576, JA1579; Comments of La. Pub. Serv. Comm'n, at 5-6 (undated), EPA-HQ-OAR-2013-0602-23175, JA1413-14.

4. The Rule's Effects

In the Administration's own words, the Rule is intended to effect through the States an "aggressive transformation" of the electric sector by "decarboniz[ing]" power generation. *Supra* nn. 2, 3. Today, "[g]rid operators dispatch plants—or, call them into service—with the simultaneous goals of providing reliable power at the lowest reasonable cost." FERC, *Energy Primer: A Handbook of Energy Market Basics* at 48 (Nov. 2015), <http://www.ferc.gov/market-oversight/guide/energy-primer.pdf>. But the Rule subordinates the energy diversity, consumer protection, reliability, and other policies in current state dispatch law to the single overarching goal of shifting the generation of electricity to zero- or low-emitting resources. In fact, by setting emission rates that can be met only by a substantial shift in generation to new, renewable facilities, *see supra* pp. 12-19, the Rule *constrains* industry's ability to keep consumer prices low and to guarantee grid reliability through dispatch decisions.¹⁸ In this regard, the Rule also forbids sources from complying by investing in new gas generation facilities. 80 Fed. Reg. at 64,903, JA384.

¹⁸ As EPA recognizes, the nation's fleet of fossil fuel-fired units cannot keep operating at existing levels and meet the Rule's requirements simply by subsidizing additional renewable generation. There is not enough demand for electricity to allow that result. *See* 80 Fed. Reg. at 64,928 (EPA "assumes that overall electric demand will decrease."), JA409; *id.* at 64,677 (Electricity "supply and demand [must] constantly be[] balanced."), JA158. That is why EPA describes the Rule as requiring "generation shifting." *Id.* at 64,729, JA210. Fossil generators must reduce generation while subsidizing renewable replacement generation. *Id.* at 64,749 (Under the Rule, "the volume of coal-fired generation will decrease."), JA230.

The Rule thus would reverse countless decisions made by States and industry throughout the country as to the optimal mix of power generation to reliably satisfy electricity demand. EPA's own data show that coal-fired generating capacity will be cut nearly in half, from over 336,000 MW in 2012, to 183,000 MW in 2030. RIA at 2-3, 3-31, JA3623, JA3663. Conversely, EPA forecasts that the Rule will expand non-hydroelectric renewable generating capacity to a level in 2030—174,000 MW—almost equal to the forecast for coal capacity. *Id.* To achieve this remarkable result, EPA projects that the amount of electricity from wind and solar generation, the principal types of non-hydroelectric renewable generation, will need to triple. Coal Indus. Mot. for Stay (Oct. 23, 2015), Ex. 1, Decl. of Seth Schwartz (Oct. 14, 2015), Attach., Seth Schwartz, Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry at 29 (Oct. 2015), ECF 1580004, JA5804. But even these data understate the Rule's transformative effect on the power sector. Had EPA accounted for increases in electric demand forecasted by the Energy Information Administration, the U.S. Department of Energy agency created by Congress to collect energy data and project energy trends, even greater levels of renewable generation will be necessary to satisfy the Rule's emission rates. *Id.* at 21-29, JA5796-804.

5. The Supreme Court Stay

On February 9, 2016, the Supreme Court stayed the Rule, halting its enforceability and its deadlines pending disposition of the petitions for review in this Court and any petitions for a writ of certiorari or merits determination. Order in

Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016) (*see also* Nos. 15A776, 15A778, 15A787, 15A793), JA6220-24; *see Nken v. Holder*, 556 U.S. 418, 428 (2009).

SUMMARY OF ARGUMENT

I.A. For the Clean Air Act to authorize the Rule’s wholesale transformation of the U.S. energy system, EPA must show that the Act contains a clear statement *compelling* the agency’s reading of section 111(d). Because the Act includes no such congressional authorization (and EPA does not even attempt to argue that it does), the Rule fails two separate clear-statement rules.

First, the Rule’s reliance on section 111(d) to “aggressively transform[] ... the domestic energy industry,” White House Fact Sheet, JA5711, is precisely the kind of “transformative expansion in EPA’s regulatory authority” based on a “long-extant statute” that requires “clear congressional authorization,” *UARG*, 134 S. Ct. at 2444; *see also King*, 135 S. Ct. at 2489. EPA is making “decisions of vast ‘economic and political significance’” based on a rarely used provision of the Clean Air Act without a “clear[]” statement from Congress, *UARG*, 134 S. Ct. at 2444, and in an area where the agency has no claim of expertise, *King*, 135 S. Ct. at 2489. *See infra* Section I.A.1.

Second, “[f]ederal law may not be interpreted to reach” areas traditionally subject to State regulation “unless the language of the federal law compels the intrusion” with “unmistakably clear ... language.” *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 471-72 (D.C. Cir. 2005) (internal quotation marks omitted). The States’ authority over the intrastate

generation and consumption of energy is “one of the most important of the functions traditionally associated with the police power of the States.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983). By arrogating to itself the authority to control each State’s energy mix, EPA undermines the States’ authority to govern the intrastate “[n]eed for new power facilities, their economic feasibility, and rates and services,” *PG&E*, 461 U.S. at 205, with no clear statement of authority. *See infra* Section I.A.2.

I.B. The Rule is unlawful because section 111(d) unambiguously forecloses it.

First, section 111(d) forbids EPA to mandate emission reductions by requiring the owners or operators of existing sources to subsidize lower-emitting generation, including generation entirely outside section 111’s reach. Section 111’s performance standards “appl[y]” to sources themselves, not to the owners and operators of those sources. CAA § 111(a)(1). This is not only EPA’s longstanding interpretation of the statute, it is compelled by the statutory text and by *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), which bars the Rule’s approach of setting emission performance rates that can be achieved only by the electricity sector in aggregate, rather than by individual sources. *See infra* Section I.B.1.

Second, EPA cannot require States to adopt as a “standard of performance” reduction obligations that can be met only through *non*-performance by regulated sources. A “standard of performance” requires *better* emission performance from an individual regulated source, not *less* (or no) performance. The Rule’s “generation-

shifting” mandate does not involve a source improving its emissions performance when it generates, but instead consists of plants *reducing* or *ceasing* work, or *non-performance*, as their production is “shifted” to EPA-preferred facilities. Congress specifically amended the CAA in 1977 to preclude standards of performance set on this basis. *See infra* Section I.B.2.

Third, the Rule contravenes the purpose and design of section 111 by requiring that States adopt existing source standards that are more stringent than the corresponding new source standards. The point of section 111’s division of authority between new and existing sources was to require the most stringent emission reductions when it was most economically sensible to require those stringent reductions—at the time of new construction or modification. The Rule’s disregard for this fundamental aspect of Congress’s statutory design is unlawful and results in a statute that would be “unrecognizable to the Congress that designed” it. *UARG*, 134 S. Ct. at 2437 (internal quotation marks omitted). Indeed, under EPA’s inconsistent reading of section 111, the Rule’s emission reduction requirements cannot be met even if every coal- and natural gas-fired plant is closed and replaced with brand new plants using what EPA has determined to be state-of-the-art technology. *See infra* Section I.B.3.

II. The Rule is categorically foreclosed by the Section 112 Exclusion. Since the 1990 CAA Amendments, section 111(d) has expressly prohibited EPA from using section 111(d) to regulate “a source category which is regulated under [CAA section

112].” CAA § 111(d)(1)(A). Congress enacted this language to prevent the costly double regulation that coal-fired power plants are facing with this Rule, having already sunk billions of dollars to comply with section 112 regulations. Much of this investment will now become stranded as the units are forced to retire. *See infra* Section II.

III. The Clean Air Act is a program of cooperative federalism, which expressly provides States—not EPA—with the right under section 111(d) to “establish” and “apply” performance standards and to “take into consideration, among other factors, the remaining useful life of the existing source to which [a] standard [of performance] applies.” CAA § 111(d)(1). But with this Rule, EPA, not the States, effectively established standards of performance and prohibited States from establishing and applying standards to sources reflecting the statutory considerations, even when applying EPA’s emission rates would force a source to shut down before the end of its useful life. *See infra* Section III.

IV. The U.S. Constitution preserves the sovereignty of the States by barring the federal government from compelling them to implement federal policies. The federal government may not “use the States as implements of regulation”—in other words, to commandeer them to carry out federal law. *New York v. United States*, 505 U.S. 144, 161 (1992). The Rule violates this sovereignty by commandeering and coercing the States to enable EPA’s decarbonization of the U.S. power system. But achieving the Rule’s emissions targets requires States to fundamentally revamp their

regulation of their utility sectors and to undertake a series of regulatory actions, all to satisfy EPA's dictates. *See infra* Section IV.A.

Moreover, States have no "legitimate choice" but to take action to carry out EPA's federal decarbonization policy. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.) (plurality opinion) ("*NFIB*"); *see also id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Because EPA lacks the authority to take all of the regulatory actions necessary to ensure a sufficient supply of power to accommodate the Rule's changes, States face the threat of blackouts and consequent threats to their public safety and economies unless they help implement federal policy. The federal government cannot legitimately put States to that non-choice. *See infra* Section IV.B.

STANDING

Petitioners include States and state agencies that are required by the Rule to implement federal policy, electric utilities that own or operate units regulated by the Rule, coal companies that will have to reduce operations or close mines as a result of the Rule's shift away from coal-fired generation, industries and other consumers affected by higher rates and less reliable electricity produced by the Rule's closure of some of the most affordable and reliable power sources, and labor unions representing workers who will lose jobs as a result of the Rule.¹⁹ Individual Petitioners

¹⁹ Petitioners in Case No. 15-1488, *Competitive Enterprise Institute et al. v. EPA*, are filing pursuant to Circuit Rule 28(a)(7) a separate addendum to support their standing.

have standing because they have suffered an injury-in-fact caused by the Rule that is redressable by the relief they seek. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); see, e.g., *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Trade association Petitioners have standing on behalf of their members. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

STANDARD OF REVIEW

This Court must set aside final EPA action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” CAA § 307(d)(9). Where “decisions of vast economic and political significance” are concerned, the statute must “speak clearly” to authorize the agency’s action, *UARG*, 134 S. Ct. at 2444 (internal quotation marks omitted), “especially” where the agency “has no expertise” in the matter, *King*, 135 S. Ct. at 2489. Likewise, “[f]ederal law may not be interpreted to reach” areas traditionally subject to State regulation absent “unmistakably clear ... language.” *Am. Bar Ass’n*, 430 F.3d at 471-72. Moreover, “the existence of ambiguity is not enough per se to warrant deference to the agency’s interpretation”; *Chevron* deference is warranted only if “[t]he ambiguity [is] such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity.” *Id.* at 469.

ARGUMENT

I. The Rule Transgresses Section 111.

As an executive agency, EPA has “only those authorities conferred upon it by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Where “there is no statute conferring authority, [EPA] has none.” *Id.*; *see also NRDC v. EPA*, 777 F.3d 456, 468 (D.C. Cir. 2014) (“[N]o statutory provision giv[es] [EPA] free-form discretion to set [requirements] based on its own policy assessment”). In some circumstances, that delegation of authority not only must be apparent in the law, it must be stated with “unmistakably clear ... language.” *Am. Bar Ass’n*, 430 F.3d at 471-72.

EPA’s requirement that States adopt standards of performance based on what EPA calls “generation shifting” is foreclosed by section 111’s unambiguous language and structure. *See infra* Section I.B. Under section 111(d), EPA’s role is to establish a “procedure” for States to submit plans “establish[ing] standards of performance *for any existing source*.” CAA § 111(d)(1) (emphasis added). State plans in turn must “apply[] a standard of performance to any *particular source*.” *Id.* (emphasis added). The CAA defines a “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* § 111(a)(3). Thus, section 111(d) permits EPA to call upon States to establish performance standards only for the building, structure, facility, or installation whose emissions are being controlled. *See also Nat’l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 837 n.3 (6th Cir. 1988)

(section 111 performance standards “specif[y] the maximum rate at which an *individual source* may emit pollution”) (emphasis added). Requiring an owner or operator of a fossil fuel-fired source to construct, or to subsidize generation at, other facilities, as the Rule does, is not a standard “for” that source at all.

The Rule violates section 111 in another fundamental respect: it mandates that regulated sources *cease producing* electricity, rather than addressing *how* they produce electricity with fewer emissions. “Performance” is “[t]he accomplishment, execution, carrying out, ... [or] doing of any action or work.” 11 OXFORD ENGLISH DICTIONARY 544 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). A “standard of performance” is thus a principle to judge the execution of work by the source, not an order to stop working. Furthermore, a “standard of performance” must reflect reductions from an “emission limitation,” which in turn must “limit[] the quantity, rate, or concentration of emissions of air pollutants *on a continuous* basis.” CAA § 302(k) (emphasis added); *see also id.* § 111(a)(1). As Congress made clear, the terms “standard of performance” and “emission limitation” are defined to *preclude* performance rates based on “intermittent controls,” such as cutting or shifting production to other facilities. *Id.* §§ 111(a)(1), 302(k); H.R. Rep. No. 95-294, at 92 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1170, JA4110; *see id.* at 81, 86-87, *reprinted in* 1977 U.S.C.C.A.N. 1159-60, 1164-65, JA4102-03, JA4106-07. Yet EPA’s Rule requires exactly that. Most emission reductions that occur result from shifting production to new renewable facilities that do not emit a

regulated pollutant and are not regulated under section 111(d). EPA's Rule is the antithesis of a "standard of performance" for a source.

But as explained immediately below, there is an even simpler reason why the Rule should be vacated. EPA must show that Congress *clearly authorized* the agency to restructure power markets under section 111(d), and nowhere has EPA even attempted to shoulder that burden. *See infra* Section I.A. The Rule's attempt to reorder the power grid is precisely the sort of significant and transformative assertion of authority that, under the Supreme Court's decisions, requires "clear congressional authorization." *UARG*, 134 S. Ct. at 2444. A clear statement of congressional intent is also necessary under cases like *Bond* and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because the Rule intrudes on the States' authority over the intrastate generation of energy. Section 111 cannot be read to "clearly" confer such authority on EPA. In fact, EPA has never attempted to argue as much and effectively conceded the point in stay briefing before the Supreme Court. Mem. for the Fed. Resp'ts in Opp'n at 41, *West Virginia v. EPA*, No. 15A773 (and related cases) (U.S. Feb. 4, 2016) ("EPA Opp'n in 15A773") (section 111 "does not expressly address such measures"), JA6214.

A. Congress Did Not Authorize EPA To Restructure the Power Sector.

Under controlling Supreme Court precedent, the Rule's attempt to radically transform the electric sector and assert EPA authority over traditional State functions

requires a clear statement from Congress. Because there is no such clear statement, the Rule must fail.

1. The Rule Asserts Novel and Vast Authority Over the States' Energy Grids Without Clear Congressional Authorization.

The Supreme Court's recent cases have made clear that an agency cannot exercise transformative power over matters of economic and political significance unless it has clear congressional authorization. Two years ago, in *UARG*, EPA attempted to expand two CAA programs to cover stationary sources based solely on their greenhouse gas emissions. 134 S. Ct. at 2437-38. The Supreme Court rejected that effort, explaining that when an agency seeks to make "decisions of vast 'economic and political significance'" or "bring about an enormous and transformative expansion" in its authority under a "long-extant statute," it must point to a "clear[]" statement from Congress. *Id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Last term, the Court built on *UARG*, holding in *King v. Burwell* that courts are not to presume that Congress would implicitly delegate to agencies "question[s] of deep 'economic and political significance'" because, if "Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489 (citation omitted).

There is no question that the Rule, which garnered 4.3 million comments,²⁰ is of great economic and political significance. As explained above, the Administration has admitted that the Rule is an attempt to “aggressive[ly] transform[]... the domestic energy industry.” *See supra* n.2. EPA claims authority to mandate that States reorder their mixes of electricity generation, to force the closure of coal-fired plants that generate some of America’s most affordable and reliable electricity, to govern how much electricity each source may produce, to require the owners of regulated sources to subsidize and invest in their non-regulated competitors, and to develop a carbon dioxide emissions trading system of the sort Congress has rejected. Under EPA’s logic, the agency could eventually require emission reductions premised on a complete shift of electric generation away from fossil fuel-fired power plants to other resources preferred by EPA. In short, EPA claims the authority to become a central planning authority for the power sector, with unilateral authority to end the use in this country of certain kinds of energy generation. *See Brown & Williamson*, 529 U.S. at 160 (stating that clear statement rule applies to “whether an industry will be entirely, or even substantially,” subjected to a new regulatory regime) (internal quotation marks omitted).

Nor would EPA be confined to the power sector. If the Rule is upheld, EPA could use section 111(d) to force the States to undertake a restructuring of almost any

²⁰ Gina McCarthy, *In 2016, We’re Hitting the Ground Running*, THE EPA BLOG (Jan. 4, 2016), <https://blog.epa.gov/blog/tag/clean-power-plan/>.

industry by claiming that shifting production to other plants (including plants not yet built) will reduce emissions. While EPA claims the power sector is uniquely suitable for such measures due to the interconnected electric grid, 80 Fed. Reg. at 64,677, JA158, many industries likewise involve both sales of interchangeable products or services and the potential to achieve lower emissions if production were shifted to “cleaner” plants. For instance, EPA could require States to reduce pollutant emissions from municipal landfills (the last source category regulated under section 111(d)) by switching to recycling plants.

EPA’s assertion of authority is also an “enormous and transformative expansion” of the agency’s power. *UARG*, 134 S. Ct. at 2444. Section 111 was enacted more than 45 years ago and assumed its current form in 1990. The focus of that provision has always been regulation of new sources. Until the Rule, EPA used section 111(d) to require state regulation of just “four pollutants from five source categories,” 80 Fed. Reg. at 64,703, JA184, with only one of these rulemakings in the last three decades, *see* 61 Fed. Reg. 9905 (Mar. 12, 1996); *see also supra* p. 8. Not once in the history of section 111 has EPA asserted the authority to mandate emission reductions premised on the notion that EPA may force a source to subsidize “cleaner” alternatives that would increase production at the source’s expense. Rather, EPA has consistently promulgated emission limitations achievable only by improved performance of *the individual facilities* in a regulated source category. But under the Rule, section 111(d) now overshadows every other provision of the CAA, for no

other environmental regulation has purported to give EPA such enormous power over the American economy.

The clear-statement requirement is fatal to the Rule. EPA has made no attempt to show clear congressional authorization for the market restructuring required by the Rule, relying instead exclusively on a *Chevron* deference argument to defend its interpretation of section 111. 80 Fed. Reg. at 64,719 n.301, 64,783-85, JA200, JA264-66. The Court can vacate the Rule on this basis alone.

In any event, there is no plausible claim that Congress in section 111(d) authorized EPA—clearly or otherwise—to set emission performance rates on the basis that the owners of fossil fuel-fired sources could subsidize lower-emitting generation that would displace their own generation. If it did, Congress would have had no reason to debate heatedly and then reject legislation enacting a CO₂ “cap-and-trade” program similar to the program the Rule authorizes and encourages. *See supra* pp. 10-11 & n.5; *see also Brown & Williamson*, 529 U.S. at 144. Indeed, EPA has acknowledged in recent filings before the Supreme Court that section 111(d) “does not expressly address” its concept of “generation shifting.” EPA Opp’n in 15A773, at 41, JA6214.

The clear statement rule applies with particular force here, where EPA has “no expertise” in the subject matter. *King*, 135 S. Ct. at 2489. As EPA has acknowledged, “[t]he issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA’s responsibilities for

setting standards under the CAA.”²¹ This Court has agreed: “[G]rid reliability is not a subject of the Clean Air Act and is not the province of EPA.” *Del. Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). For this reason, it is “especially unlikely” that Congress implicitly delegated to EPA the myriad technical and policy judgments needed to reconfigure the entire grid to lower overall emissions while maintaining reliable and low-cost operation. Absent a clear statement, Congress should not be presumed to have entrusted to EPA any more than the authority over pollution control equipment and processes as to which EPA is presumed to have expertise.

2. EPA Seeks To Invade a Traditional State Regulatory Domain Without a Clear Statement From Congress.

Clear congressional authorization is further required here because the Rule raises serious federalism concerns. It is a “well-established principle that it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond*, 134 S. Ct. at 2089 (internal quotation marks omitted). “This principle applies when Congress ‘intends to pre-empt the historic powers of the States’ or when it legislates in ‘traditionally sensitive areas’ that ‘affec[t] the federal balance.’” *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002); *see also Gregory*, 501 U.S. at 460-61.

²¹ Response to Comments on Amendments to Standards for Stationary Internal Combustion Engines, at 50 (Jan. 14, 2013), EPA-HQ-OAR-2008-0708-1491, JA4897.

As this Court has said, “[f]ederal law may not be interpreted to reach” areas traditionally subject to State regulation “unless the language of the federal law compels the intrusion” with “unmistakably clear ... language.” *Am. Bar Ass’n*, 430 F.3d at 471-72 (internal quotation marks omitted). This “plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” *Id.* at 472 (citation omitted). Where “[t]he states have regulated [a sector] throughout the history of the country ... it is not reasonable for an agency to decide that Congress has chosen” to entrust regulation of that sector to a federal agency. *Id.*

“[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States,” *Ark. Elec. Coop. Corp.*, 461 U.S. at 377, which the Supreme Court has specifically recognized should not be “superseded” “unless that was the clear and manifest purpose of Congress.” *PG&E*, 461 U.S. at 206 (internal quotation marks omitted). Particularly relevant here, the “[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States”—indeed, the “franchise to operate a public utility ... is a special privilege which ... may be granted or withheld at the pleasure of the State.” *Id.* at 205 (internal quotation marks omitted); *see also Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). Certain States’ constitutions vest these powers in independent commissions whose

members are elected,²² while other States have exercised sovereign power to deregulate the electric sector.²³

Far from granting EPA authority over power generation with “unmistakably clear ... language,” *Am. Bar Ass’n*, 430 F.3d at 471-72, Congress has clearly *confirmed* the States’ plenary authority in this area and granted to a different agency—FERC—the limited federal jurisdiction in this sphere. In the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, Congress drew “a bright line easily ascertained, between state and federal jurisdiction,” *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). Under the Federal Power Act, “the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.” *PG&E*, 461 U.S. at 205. Congress cabined the power of FERC “to those matters which are not subject to regulation by the States,” 16 U.S.C. § 824(a), and disclaimed federal authority “over facilities used for the generation of electric energy,” *id.* § 824(b)(1); *see also id.* § 824o(i)(2) (“This section

²² For example, the Louisiana Constitution grants its Public Service Commission “broad and independent power and authority to regulate ... public utilities.” *La. Power & Light Co. v. La. Pub. Serv. Comm’n*, 609 So. 2d 797, 800 (La. 1992). The Arizona Constitution provides its Corporation Commission with “‘full power’ to regulate, set rates, and make reasonable rules for public service companies.” *Ariz. Corp. Comm’n v. State ex rel. Woods*, 830 P.2d 807, 811 (Ariz. 1992). Commissioners in both States are elected. LA. CONST. art. IV, § 21(A)(1); ARIZ. CONST. art. XV, § 1. *See also* GA. CONST. art. IV, § 1 (providing for elected Public Service Commission in Georgia).

²³ *See* Opening Br. of Pet’rs on Procedural and Record-Based Issues at Section V.E (Feb. 19, 2016) (noting New Jersey’s deregulation of energy markets).

does not authorize ... [FERC] to order the construction of additional generation or transmission capacity”). Even FERC lacks power to interfere with “state authority in such traditional areas as the ... administration of integrated resource planning and ... utility generation and resource portfolios.” *New York v. FERC*, 535 U.S. 1, 24 (2002). Indeed, the United States recently acknowledged to the Supreme Court that “promot[ion of] new generation facilities” is “an area expressly reserved to state authority.” Pet. for Writ of Cert. at 26, *FERC v. Elec. Power Supply Ass’n*, No. 14-840 (U.S. Jan. 15, 2015).

Nevertheless, EPA seeks to usurp these important traditional State police powers. Until now, the States have determined for themselves the extent to which they should (or should not) mandate particular levels of renewable generation, balancing such generation’s benefits against other considerations, including the risks that energy dependent on weather events (such as wind speed, cloudiness, and snow cover) often pose to the grid’s reliability.²⁴ But as explained *supra*, pp. 12-22, to achieve the Rule’s emission reduction demands, States will be forced to shift vast amounts of generation from fossil fuel-fired plants to new renewable resources. The Rule thus mandates changes to the power generation mix in individual States,

²⁴ U.S. Energy Information Administration, Today In Energy, Most states have Renewable Portfolio Standards (Feb. 3, 2012), <https://www.eia.gov/todayinenergy/detail.cfm?id=4850> (while Congress has rejected federal renewable portfolio standards, “30 States and the District of Columbia had enforceable [renewable portfolio standards] or other mandated renewable capacity policies,” and seven had adopted voluntary renewable energy goals).

supplanting the States' traditional authority in this area. Indeed, the very reason EPA issued the Rule is that to date States have not sought to “decarboniz[e]” their economies to the extent favored by EPA. The Rule thus amounts to a takeover of power generation decisions in the States, despite longstanding exclusive State jurisdiction—reaffirmed by Congress—over this field.

Moreover, to meet EPA's emission reduction demands, States will be forced to undertake many legislative and regulatory actions they would not have otherwise chosen. States will have to enact legislation and regulations restructuring their power systems, decommissioning coal-fired plants, and granting regulatory and siting approval to new renewable energy projects. Okla.'s Mot. for Stay at 18-19, No. 15-1364 (Oct. 28, 2015), ECF 1580577; State Pet'rs' Mot. for Stay at 15-18, No. 15-1363 (Oct. 23, 2015), ECF 1579999 (“State Pet'rs' Mot. for Stay”). In many States, regulatory proceedings will be needed to determine how the costs of prematurely-retired plants must be recovered from ratepayers. State Pet'rs' Mot. for Stay at 20; States' Joint Reply at 14-15, No. 15-1363 (and consolidated cases), ECF 1590286 (Dec. 23, 2015). States may have to incentivize development of renewable resources previously found cost-prohibitive, State Pet'rs' Mot. for Stay at 15-16, while ensuring that the Rule's change in power generation does not adversely impact the grid's reliability, *id.* at 16. Even if the Rule's demand that States take these actions were constitutional (which, as explained below, it is not), EPA may not make these

“decision[s] of the most fundamental sort” for the States without clear authorization from Congress. *Gregory*, 501 U.S. at 460.

B. Section 111 Unambiguously Forecloses EPA’s Requirements Based on “Generation Shifting.”

The text and structure of section 111 unambiguously bar the “generation shifting” the Rule imposes.

1. Section 111 Does Not Authorize EPA To Mandate Emission Reductions That Cannot Be Implemented at Individual Regulated “Stationary Sources.”

The unambiguous requirement that standards of performance must be set “*for*” and be “*applicable ... to*” individual *sources* within a regulated source category forecloses EPA’s claim to authority to reorder grid operations. CAA §§ 111(d)(1), 111(a)(2) (emphases added). What EPA calls “generation shifting” does not entail setting standards that are “for” or “applicable” to regulated sources. Rather, it involves something else entirely—replacing or reducing the operation of the source category with that of entirely different kinds of facilities, selected by EPA based on CO₂ emissions. *See supra* pp. 12-19. That is plainly beyond what the statutory text permits.

Confronted with this plain text, EPA claimed it faced a “dilemma.” 80 Fed. Reg. at 64,769, JA250. EPA conceded that the phrase “best system of emission reduction” may only include “measures that can be implemented—‘*appl[ied]*’—*by the sources themselves.*” *Id.* at 64,720 (emphasis added), JA201. And while EPA sought large reductions in CO₂, it also recognized that emission control measures that can be

applied at coal- and natural gas-fired units either are not commercially or technologically feasible (in the case of carbon capture and sequestration systems) or will not achieve the desired emission reductions (in the case of efficiency improvements). *See supra* pp. 12-13; 80 Fed. Reg. at 64,751, 64,787-90, JA232, JA268-71.

To resolve this purported “dilemma,” EPA redefined “source” to “*include[] the ‘owner or operator’ of any building ... for which a standard of performance is applicable.*” *Id.* at 64,762 (emphasis added), JA243. On this basis, EPA set stringent standards that cannot be met by *any* individual coal or gas-fired generating unit, even if it installs the type of state-of-the-art equipment EPA has required for brand new units. *See supra* pp. 14-16. Instead, to comply with the standard, the owner or operator must invest in lower- or zero-emitting generation, either directly or by purchasing emission allowances or credits, 80 Fed. Reg. at 64,720, 64,725-26, 64,728, 64,731, JA201, JA206-07, JA209, JA212; *see also supra* pp. 18-20, and shift generation to this new lower- or zero-emitting generation, 80 Fed. Reg. at 64,911, JA392; *see also id.* at 64,745-47 (“generation shifts”), JA226-28.

This reading of section 111(d) to permit standards based on “generation shifting” is unambiguously foreclosed by the language of the statute, established case law, and nearly a half century of consistent administrative practice.

a. Section 111(d) provides that standards apply to the “source,” not to owners and operators.

Section 111 could not be clearer: performance standards apply to sources, not owners and operators of sources that might take actions beyond the source itself. Under section 111(d), a State-established performance standard may be set for an existing source that would be regulated under section 111(b) “if such existing *source* were a new *source*.” CAA § 111(d)(1) (emphases added). State plans must “apply[] a standard of performance to any *particular source*.” *Id.* (emphasis added). And EPA’s role is to establish a “procedure” for States to submit plans “establish[ing] standards of performance *for any existing source*.” *Id.* (emphasis added).

The statute also expressly contemplates adjustments to a standard of performance as it applies to individual sources in varying conditions. States must be permitted to take into consideration “the remaining useful life of the existing *source*” when “applying a standard of performance” to “any particular *source*.” *Id.* (emphases added). If EPA promulgates a federal plan in lieu of an unsatisfactory state plan, EPA “shall take into consideration ... [the] remaining useful lives of the *sources* in the category of *sources* to which [the] standard applies.” *Id.* § 111(d)(2) (emphases added).

Finally, EPA cannot regulate existing sources under section 111(d) unless the agency first regulates under section 111(b), and Congress likewise made individual “sources” the focus of new source regulation under that section. To commence section 111(b) regulation, Congress requires EPA first to list categories of “stationary

sources” to be regulated. *Id.* § 111(b)(1)(A) (emphasis added). EPA then sets federal standards for new “*sources* within such [listed] category.” *Id.* § 111(b)(1)(B) (emphasis added); *see also id.* § 111(a)(2) (defining the term “new source” and discussing standards of performance “which will be applicable to such source”).

For all of these section 111 provisions, “source” is defined as an individual physical “building, structure, facility, or installation.” *Id.* § 111(a)(3). It is not defined to include the “owner or operator” of the “building, structure, facility, or installation.”

Indeed, section 111 makes this distinction explicit. Congress differentiated the term “owner or operator” from the term “source” by giving the former a distinct definition: “any person who owns, leases, operates, controls, or supervises a stationary source.” *Id.* § 111(a)(5). If Congress had intended to include a facility’s owner or operator *within* the term “source,” it would not have separately defined those terms. Section 111 further states that it is unlawful “for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.” *Id.* § 111(e).

In sum, Congress adopted distinct definitions of “source” and “owner or operator” as well as a specific provision to hold an “owner or operator” of a new source liable precisely because, contrary to the Rule’s central assumption, the owner or operator of a source is legally distinct from the “source” itself. *See Transbrasil S.A. Linhas Aereas v. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, the court must presume that Congress

intended the terms to have different meanings.”) (internal quotation marks and citation omitted).

Given the lack of textual support for its position, EPA falls back on what it calls the “commonsense” proposition that, because sources are inanimate objects, it is the owner or operator of the source that must take action to comply with any standards, so the Rule is not unusual by requiring action from owners or operators. 80 Fed. Reg. at 64,767, JA248. But EPA overlooks that a standard of performance must be “for” a particular “source.” CAA § 111(d)(1). It is one thing to recognize that the owner or operator must take steps at its source—e.g., installing new equipment or ordering more efficient operations—to implement a standard of performance that was set “for” the source. It is quite another to say that EPA may require a standard that forces owners or operators to construct, or subsidize generation at, other facilities. A rule that requires construction of or generation at a second facility is not a standard “for” the first source at all, even if the first source’s owner or operator can somehow bring about the generation at the second facility. Indeed, section 111(e) makes clear that the “owner or operator of any ... source” may only be held liable for “violation of any standard of performance applicable to *such source*” (emphasis added), not for violating standards that apply to any other facilities (including non-sources) the owner or operator may control or invest in.

b. This Court's precedents foreclose EPA's reading of section 111(d).

This Court's decision in *ASARCO* also squarely forecloses EPA's reading of section 111(d). As interpreted by EPA, the Rule's performance rates force the owner or operator of a source to invest in lower-emitting generation—whether by building a plant, investing in someone else's plant, or buying credits from another plant. This is because the only way a source can comply with the performance rate is to average its actual emissions rate with the rate of the lower-emitting plant. 40 C.F.R.

§ 60.5790(c)(1) (providing formula “to calculate an adjusted CO₂ emission rate to demonstrate compliance”). Thus, the Rule's “generation shifting” mandate demands that two or more facilities *together* achieve the required rate—effectively treating distant and unrelated facilities, some of which may not even be regulated sources at all, as a single “stationary source” for purposes of setting EPA's emission performance rates.

ASARCO, however, holds that EPA may not “embellish[]” the statutory definition of “stationary source” by “rewrit[ing] the definition of a stationary source.” 578 F.2d at 324, 326 n.24. According to the Court, the statute “limit[s] the definition of ‘stationary source’ to one ‘facility’” and not a “‘combination of facilities.’” *Id.* at 324. As a result, EPA cannot “change the basic unit to which the [standards] apply from a *single* building, structure, facility, or installation—the unit prescribed in the statute—to a *combination* of such units.” *Id.* at 327 (emphasis in original). Certainly, EPA cannot treat as a single source separate generating units that may be hundreds of

miles apart, may be owned by different parties, and may not even be section 111 sources at all.

Indeed, EPA concedes that the Rule goes beyond setting reduction requirements on a source-by-source basis; the agency states that it is setting reduction requirements at the level of the entire *source category*. According to EPA, the Rule “focus[es] on the ... overall source category,” 80 Fed. Reg. at 64,725-26, JA206-07; its best system of emission reduction is “for the source category as a whole,” *id.* at 64,727, JA208; *see also id.* at 64,723, JA204; and its “emission limits [are] for the source category as a whole,” *id.* at 64,732, JA213. The Rule is thus indifferent to how much—and even whether—any particular source reduces its emissions; in EPA’s words, “it is the total amount of emissions from the source category that matters, not the specific emissions from any one” source. *Id.* at 64,734, JA215.

EPA, however, lacks authority to address “standards of performance” at the level of an entire source category. Section 111 plainly provides for EPA to “list” source categories and then, where section 111(d) applies, to call on States to set “standards of performance *for any existing source*” within that category. Had Congress wished to base section 111(d) reduction requirements on systems of emission reduction for an entire source category, rather than “for” any sources within the listed category, it would have said so. *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996). In fact, the Rule strays even further afield from what Congress specified in section 111: by basing its emission performance rates on shifting generation from

existing fossil-fuel fired sources to renewable facilities, EPA goes well-beyond even the “source category,” which does not include the renewable generation EPA prefers.

c. The Rule’s reading of section 111(d) is contrary to EPA’s regulations and consistent agency practice.

The Rule departs from 45 years of consistent agency practice, further confirming that EPA’s current interpretation of its section 111(d) authority does not follow that provision’s “plain meaning.” 80 Fed. Reg. at 64,761, JA242. Each of the approximately one hundred new source performance standards that EPA has set in more than 60 source categories has been based on a system of emission reduction that can be achieved with technological or operational measures that the regulated source itself can implement. *See generally* 40 C.F.R. pt. 60, subpts. Cb-OOOO. In promulgating standards of performance for refineries, EPA reiterated its long-standing view that “[t]he standard that the EPA develops [is] based on the [best system of emission reduction] *achievable at that source*.” 79 Fed. Reg. 36,880, 36,885 (June 30, 2014) (emphasis added).

EPA took the same settled approach in promulgating its CO₂ standards of performance for *new* coal and gas plants under section 111(b). EPA based the standards on its examination of the level of emissions performance these plants could achieve by using control technologies and operating practices at the plants themselves, not on the level that could be achieved on some combined basis if their owners also

built or paid for new lower- or zero-emitting resources. 80 Fed. Reg. at 64,512-13, Tbl. 1.

The same focus on setting standards for the source, rather than the source's owner or operator, is central to EPA's 40-year-old Subpart B regulations establishing the section 111(d) "procedure." 40 C.F.R. pt. 60, subpt. B (promulgated by 40 Fed. Reg. 53,340 (Nov. 17, 1975), JA4086). In those regulations, EPA determined that section 111(d) "emissions guideline[s]" must "reflect[] ... the application of the best system of emission reduction ... [that] has been adequately demonstrated *for designated facilities*," 40 C.F.R. § 60.21(e) (emphasis added), defined as the facility within the regulated source category for which the standard is developed, *id.* § 60.21(b).²⁵ And, thus, every other section 111(d) guideline EPA has promulgated has defined the "designated facility"²⁶ and is based on emission reduction systems that the "designated facility" can implement.²⁷ As EPA stated in one of its earliest guidelines,

²⁵ See also 40 C.F.R. § 60.22(b)(3) (guideline document to include "[i]nformation on the ... costs and environmental effects of *applying each system to designated facilities*") (emphasis added); *id.* § 60.24(b)(3) ("[e]missions standards *shall apply to all designated facilities* within the State") (emphasis added).

²⁶ See, e.g., 40 C.F.R. § 60.32c(a) (setting forth "each [municipal solid waste] landfill" constructed before May 30, 1991, as the "designated facility to which the guidelines apply"); 44 Fed. Reg. 29,828, 29,829 (May 22, 1979) ("[T]he guideline document for kraft pulp mills is written in terms of standards of performance for each designated facility.").

²⁷ 61 Fed. Reg. at 9914 (landfill guideline based on "[p]roperly operated gas collection and control systems achieving 98 percent emission reduction"); 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980) (aluminum plant guideline based on "effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by

“[t]he emission guidelines will reflect the degrees of emission reduction attainable with the best adequately demonstrated systems of emission reduction, considering costs[,] as applied to existing facilities.”²⁸

2. Setting Rates Based on “Generation Shifting” Is Inconsistent With the Definition of “Standard of Performance.”

The Rule’s attempt to rearrange the grid also transgresses EPA’s authority under section 111(d) by contravening the term “standard of performance,” which calls for standards based on controls or operating practices that provide emission reductions from regulated sources “on a continuous basis”—and which reflect the inherent capabilities of those controls or operating practices—not “intermittent controls” such as temporarily reducing operations or shifting production to other facilities. Thus, even if a standard of performance were not unambiguously required to be applicable to an individual source, the Rule still would be unlawful.

wet scrubbers”); 44 Fed. Reg. at 29,829 (pulp mill guideline based on digester systems, multiple-effect evaporator systems, and straight kraft recovery furnace systems); 41 Fed. Reg. 48,706, 48,706 (Nov. 4, 1976) (proposed guideline for sulfuric acid production units based on “fiber mist eliminators”); 41 Fed. Reg. 19,585, 19,585 (May 12, 1976) (draft guideline for fertilizer plants based on “spray cross-flow packed scrubbers”).

²⁸ EPA, Primary Aluminum: Guidelines for Control of Fluoride Emissions From Existing Primary Aluminum Plants, at 1-2 (Dec. 1979), <http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000M9HS.pdf> (“Primary Aluminum Guidelines”) (emphasis added).

a. The Rule does not comport with the statutory terms.

As a threshold matter, the Rule gives no meaning to Congress's use of the word "performance" in the phrase "standard of performance." As noted previously, "performance" means "[t]he accomplishment, execution, carrying out, ... [or] working out of anything ordered or undertaken; the doing of any action or work." *See supra* p. 30. "Generation shifting" as used by EPA does not involve a source improving the emission rate at which it performs work, but instead consists of plants *reducing* or *ceasing* work, or *non-performance*. As the Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), courts must give statutory terms meaning, even where they are part of a larger statutorily defined phrase, *id.* at 172 (requiring that the word "navigable" in the Clean Water Act's statutorily defined term "navigable waters" be given "effect").

More specifically, a section 111 "standard of performance" is defined as a "standard for emissions," which reflects the "degree of emission limitation" that a source may "achiev[e]" using the "best system of emission reduction." CAA § 111(a)(1). The Rule, however, does not reflect a "degree of emission limitation" achievable by any source. *See supra* pp. 14-16. In fact, increasing generation at existing gas plants (e.g., under Building Block 2) and reducing generation at existing coal plants (e.g., under Building Blocks 2 and 3) both typically *increase* those plants' CO₂ emission rates, as EPA has acknowledged. 79 Fed. Reg. at 34,980, JA5260; Mitigation TSD at 2-34, JA3942.

Furthermore, the phrase “emission limitation” is defined as a “requirement ... which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*.” CAA § 302(k) (emphasis added). Congress’s intent is clear: the term “continuous” was added to this definition in 1977 to signify that technological or low-polluting processes to achieve pollutant reductions during production are “to be the basis of the standard.” H.R. Rep. No. 95-294, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1088, JA4100. As Congress explained, it used this term to *preclude* “intermittent controls” such as temporarily reducing operations or “shifting” production to other sources. *Id.* at 92, *reprinted in* 1977 U.S.C.C.A.N. 1170, JA4110; *see id.* at 81, 86-87, *reprinted in* 1977 U.S.C.C.A.N. 1159-60, 1164-65, JA4102-03, JA4106-07.²⁹ In this way, Congress required that performance standards reflect new control technology or operational innovations, rather than “load switching from one powerplant ... to another.” *Id.* at 81, 89, 92, *reprinted in* 1977 U.S.C.C.A.N. 1159, 1167, 1170, JA4102, JA4108, JA4110. Thus, a “standard of performance” must be derived from *better* emission performance from an individual regulated source, not *non-performance*.

²⁹ The word “technological” was inserted in the definition of “standard of performance” in 1977 to require certain sources to comply by installing technological controls (e.g., scrubbers) rather than burning low-sulfur fuel without controls. *See, e.g., Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 918-19 (7th Cir. 1990). Congress removed “technological” from section 111(a)(1)’s definition in 1990 to allow sources to comply by using either technological *or* low-polluting operational processes (e.g., low-sulfur fuel). 80 Fed. Reg. at 64,702, JA183.

The Rule's generation-shifting mandate is the antithesis of the definition of "standard of performance" and mandates the very "load switching" that Congress sought to prevent in the development of standards. The Rule's emission rates are based on regulated units collectively reducing operations and producing collective emission reductions; they do not flow from an assessment that "any particular source ... [can] reduce its emissions" 80 Fed. Reg. at 64,779, JA260. The very standards that the Rule defines contemplate that emission reductions vary for each unit in timing, amount, and duration. Units able to purchase enough emission credits to meet the rate can continue operating (and emitting) at past or even higher levels. Other units will have to reduce or cease operations altogether. *See supra* pp. 18-22. As a result, the Rule is not based on "a requirement ... which limits ... emissions [from any individual regulated unit] ... on a continuous basis," as Congress used that term. CAA § 302(k).

As this Court explained in *ASARCO*, the purpose of the section 111 performance standard program is to "enhance air quality by forcing all ... [regulated] buildings, structures, facilities, or installations *to employ pollution control systems* that will limit emissions to the level 'achievable'" by the "'best technological system of continuous emission reduction'" that is "'adequately demonstrated.'" 578 F.2d at 327 (quoting the 1977 CAA) (emphasis added). In defining "standard of performance," Congress never contemplated that such standards could be based on reductions that are impossible to achieve without shifting generation from one type of plant to

another, including to non-emitting facilities, when one source operates while another cuts production. *Id.* at 328. The plain language of the statute and *ASARCO* preclude an approach in which standards of performance are based on achieving emission reductions from groups of multiple sources rather than from application of demonstrated controls on individual regulated sources to achieve continuous emission reductions.

b. EPA's Rule confuses "standards of performance" with other programs.

Section 111(d) reflects a broader programmatic distinction Congress drew between control programs focused on a source's performance and air quality programs focused on the health and welfare impact of a source category's aggregate emissions. For control programs, including section 111(d), Congress required sources to incorporate available, low-emitting production processes or control technologies into their design and operations. *See, e.g.*, CAA § 111 (new source performance standards); *id.* § 112(d) (maximum achievable control technology standards); *id.* § 165(a)(4) (best achievable control technology standards); Clean Water Act § 306, 33 U.S.C. § 1316 (standards of performance for source pollutant discharge). These programs do not limit a source's ability to operate but do require that the source limit emissions during operations.

In air quality-based programs, Congress gave EPA authority to pursue a particular air quality objective by capping overall levels of emissions and by using

mechanisms such as trading that result in aggregate reductions from a category of sources. *See, e.g.*, CAA §§ 108-110 (national ambient air quality standards); *id.* §§ 401 *et seq.* (acid rain cap-and-trade program); *see also Nat'l-Southwire Aluminum Co.*, 838 F.2d at 837 n.3 (“An ambient air quality standard differs from an emission or performance standard An ambient air quality standard specifies a maximum pollutant concentration in the ambient air, while a performance standard specifies the maximum rate at which an individual source may emit pollution.”). Under section 110, for example, state plans implementing ambient air quality standards may include, in addition to “emission limitations” for individual sources, “other control measures,” “means,” or “techniques,” like “marketable permits” to assure attainment and maintenance of ambient air quality standards. CAA § 110(a)(2)(A).

As explained above, the Rule expressly relies upon trading to establish its emission performance rates. *See supra* pp. 17-20. As justification, the Rule points to several trading programs that were adopted as a “control measure[], means or technique[]” under section 110 to meet an air quality goal. 80 Fed. Reg. at 64,696-97, 64,734 n.381, 64,735, JA177-78, JA215, JA216. EPA’s analogy overlooks Congress’s decades-long distinction between those programs and programs limiting emissions from individual sources. Section 110 itself highlights that distinction: It provides for “emission limitations” (like section 111), but also (unlike section 111) “other control measures” including “marketable permits[] and auctions of emissions rights.” CAA §§ 110(a)(2)(A), 111(a)(1). The Rule elides the distinction between “emission

limitations” and “other control measures” by adopting an emission limitation in which “marketable permits” and “auctions of emissions rights,” *id.* § 110(a)(2)(A), are “integral,” 80 Fed. Reg. at 64,734, JA215.

EPA’s reliance on the statutory Title IV cap-and-trade program is similarly misplaced. *Id.* at 64,770, JA251. In Title IV, Congress created a detailed statutory cap-and-trade program after more than a decade of debate. The statute specifically spells out how emission allowances are to be allocated, CAA §§ 403(a), 404-406, restricts how they may be traded, *id.* § 403(b), and sets parameters for the allowance tracking system, *id.* § 403(d), among other features. Title IV underscores that Congress knew how to design a grid-wide cap-and-trade program, and it did not do so when it called for EPA to provide for “standards of performance” under section 111. *See Meghrig*, 516 U.S. at 485.

While EPA may wish that Congress took the same approach in section 111 as it did in authorizing “other measures, means, or techniques” in section 110, or in spelling out a cap-and-trade program under Title IV, EPA’s “preference for symmetry cannot trump an asymmetrical statute.” *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (internal quotation marks omitted).

3. EPA’s Attempt To Use Section 111(d) To Reengineer the Grid Is Inconsistent With Section 111 as a Whole.

The Rule also contravenes the requirement that “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 (internal quotation marks omitted). EPA undermines this basic principle by mandating performance rates for existing sources that are far more stringent than the standards EPA contemporaneously set for existing sources that are “modified” or “reconstructed.” *See supra* pp. 11-12, 15-16. Indeed, the Rule’s performance rates cannot be met even if every coal- and natural gas-fired unit were closed and replaced with brand new units using what EPA has determined to be state-of-the-art technology. *Id.*

Congress could not have intended this bizarre outcome, which stems from a fundamental flaw in statutory construction: EPA’s adoption of a definition of “standard of performance” for section 111(d) that is fundamentally inconsistent with EPA’s understanding of the same statutory term in section 111(b). For both sections, the term “standard of performance” is defined by a *single* sub-section—section 111(a)(1). As noted above, in EPA’s parallel rulemaking to establish standards of performance for *new* units under section 111(b), EPA determined that it could not read the term “best system of emission reduction” in section 111(a)(1) to set standards of performance based on shifts in generation from new plants to other sources with lower emissions but would consider only reductions that those plants could themselves achieve. 80 Fed. Reg. at 64,627. In the Rule, however, EPA gives a radically different reading to “best system of emission reduction” on the grounds that considering only those efficiency reductions that existing sources can achieve would

not produce “enough” reductions to meet EPA’s objectives. 80 Fed. Reg. at 64,729, JA210. As a basic textual matter, EPA cannot reasonably adopt two conflicting interpretations of the very same term. *See Brown v. Gardner*, 513 U.S. 115, 118-20 (1994); *see also Env’tl. Def., Inc. v. EPA*, 509 F.3d 553, 560-61 (D.C. Cir. 2007).

That is particularly true here because EPA’s contrived and inconsistent reading of the phrase “best system of emission reduction” stands section 111 on its head: EPA has unlawfully required States to establish performance standards that are more stringent for *existing* coal and gas plants (which must retrofit controls) than the standards EPA itself established for *new* coal and gas plants (which can incorporate controls into their design). It makes no sense that the “best system of emission reduction,” after consideration of cost and other relevant factors, would lead to a scheme in which existing plants face more stringent regulation than new plants. “[A]n agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole” must be struck down. *UARG*, 134 S. Ct. at 2442 (alteration in original).

EPA recognized as much when it first published its section 111(d) implementing regulations in 1975, explaining that “the degree of control [for existing sources] ... will ordinarily be less stringent than ... required by standards of performance for new sources” based on the fact that “controls cannot be included in the design of an existing facility and ... physical limitations may make installation of particular control systems [at an existing facility] impossible or unreasonably expensive in some cases.” 40 Fed. Reg. at 53,341, 53,344, JA4087, JA4090; *see also*

Robert J. Martineau, Jr. & Michael K. Stagg, *New Source Performance Standards*, in THE CLEAN AIR ACT HANDBOOK 321 (Julie R. Domike & Alec C. Zaccaroli eds., 3d ed. 2011) (Section 111 “reflects the basic notion that it is cheaper and easier to design emissions control equipment into production equipment at the time of initial construction than it is to engage in costly retrofits.”), JA4663. Precisely because new plants can be designed to accommodate new controls while existing plants cannot, EPA determined that carbon capture and storage technology is not the best system of emission reduction for existing coal plants, 80 Fed. Reg. at 64,751, JA232, while at the same time determining that this technology is the best system for new plants, *see* 80 Fed. Reg. at 64,558. Reflecting the structure and purpose of section 111, EPA has never before adopted new source standards that were *less* stringent than the standards its existing source guidelines required States to adopt.³⁰

³⁰ *See* 61 Fed. Reg. at 9907 (same standards for new and existing landfills); 45 Fed. Reg. at 26,294 & Primary Aluminum Guidelines at 8-1 (recommended range of control technologies for existing primary aluminum plants and a maximum emissions rate of fluoride for new plants); 44 Fed. Reg. at 29,828 & EPA, Kraft Pulping: Control of TRS Emissions from Existing Mills, at 1-6 (Mar. 1979), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000ZF3I.TXT> (“the application of the best adequately demonstrated technology for new sources could result in excessive control costs at existing sources”); 42 Fed. Reg. 55,796 (Oct. 18, 1977) (emission guideline for existing sulfuric acid production units established in 1977 less stringent than the standard for new sources issued in 1971, 36 Fed. Reg. 24,876, 24,881 (Dec. 23, 1971)); EPA, Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants at 8-1 to 8-12 (Mar. 1977), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000UNFK.TXT>.

Finally, having effectively upended the section 111 regulatory paradigm, EPA then had to deploy *ad hoc* fixes to address the consequences of doing so. 80 Fed. Reg. at 64,821, JA302. Under the new source and existing source rules, overall emissions in a State could *increase* if the State encouraged construction of new sources to replace older, existing sources, because new sources—even though new coal units are required to use carbon capture and sequestration technology—are subject to less stringent standards than existing sources. *Id.* EPA thus ordered States to take steps to *prevent* shifting generation from older plants to newer plants with more efficient technologies, *id.* at 64,822-23, JA303-04, even though that appears to be exactly what Congress intended.

This “fix” again underscores that the Rule has enacted a regulatory program the *opposite* of what Congress conceived. Whereas Congress sought to ensure that emission reductions would be realized as existing sources were retired and replaced with well-controlled new sources, EPA has told States they must impose measures that will prevent this from happening. *Id.*

EPA’s inconsistent interpretation of the term “best system of emission reduction” contradicts EPA’s own understanding of Congress’s intent. When EPA first adopted regulations interpreting and implementing that provision in 1975, it concluded that, because of the interrelationship of sections 111(b) and 111(d), “the general principle (application of best adequately demonstrated control technology, considering costs) will be the same in both cases.” 40 Fed. Reg. at 53,341, JA4087. As

EPA explained, Congress’s decision to make the existing source performance standard program part of section 111, and not a stand-alone provision, “reflected a decision in conference that a similar approach [to that applied to new sources] (making allowances for the costs of controlling existing sources) was appropriate for the pollutants to be controlled under section 111(d).” *Id.* at 53,342, JA4088. EPA emphasized that both provisions require a “technology-based approach” and that EPA would be able to take advantage of its analysis of the “availability and costs of control technology” for new sources in determining the best “control technology” for existing sources. *Id.* at 53,342, 53,343, JA4088, JA4089.

EPA had it right in its implementing regulations and in all of its prior section 111(d) rulemakings. Reading sections 111(b) and 111(d) as a part of a single program avoids conflicting interpretations of the very same statutory provision and the arbitrary result of standards that are more stringent for existing sources than for new sources—a result Congress could not have intended.

II. The Section 112 Exclusion Unambiguously Prohibits the Rule.

The Section 112 Exclusion invalidates the Rule irrespective of the Rule’s contents. Under EPA’s own longstanding reading of the text in the U.S. Code, the Exclusion prohibits EPA from employing section 111(d) to regulate a source category that is already regulated under section 112. And because it is undisputed that coal-fired generating units are already regulated under section 112, *see* 77 Fed. Reg. 9304

(Feb. 16, 2012), the Exclusion prohibits EPA's attempt in the Rule to invoke section 111(d) to regulate those same plants.

A. EPA May Not Employ Section 111(d) To Regulate a Source Category That It Has Chosen To “Regulate[] Under Section [1]12.”

The Exclusion's prohibition against employing section 111 to regulate “any air pollutant” emitted from a “source category ... regulated under section [1]12” has a straightforward and unambiguous meaning. “Regulated” means “[g]overned by rule, properly controlled or directed, adjusted to some standard, etc.” 13 OXFORD ENGLISH DICTIONARY 524. Thus, if a source category is “governed by [a] rule” under section 112, EPA may not require States to set a standard of performance for sources in that category under section 111(d). Or, as the Supreme Court has said, “EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated under ... § [1]12.” *AEP*, 131 S. Ct. at 2537 n.7.

EPA has repeatedly agreed that this prohibition against regulating under section 111(d) any existing “source category ... regulated under section [1]12” means what it says. In five analyses spanning three different Administrations—in 1995, 2004, 2005, 2007, and 2014—the agency consistently concluded that this text means that “a standard of performance under CAA section 111(d) cannot be established for any air

pollutant ... emitted from a source category regulated under section 112,” *repeatedly* describing this as the text’s “literal” meaning.³¹

This “literal” reading of the Exclusion is, as EPA itself has explained, consistent with the statutory and legislative history of the CAA’s 1990 Amendments. Before 1990, section 112 covered an extremely narrow category of life-threatening pollutants. *See* S. Rep. No. 91-1196, at 20 (1970), *reprinted in* 1 CLEAN AIR ACT AMENDMENTS OF 1970 at i, 20 (Comm. Print 1970), JA4084. But in 1990, Congress greatly expanded the reach of the section 112 program, significantly broadening the definition of pollutants under section 112 to include those “which present, or may present ... a threat of adverse human health effects ... or adverse environmental effects,” and increasing the stringency of regulation on those source categories subject to the section 112 program. CAA § 112(b)(2); *see supra* pp. 8-9. As EPA has said in the past, the House of Representatives (where the current text of the Exclusion originated) responded to this fundamental expansion in section 112 by “chang[ing] the focus of [the Exclusion and] seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112.” 70 Fed. Reg. at 16,031, JA4545. That is, the House determined that

³¹ 69 Fed. Reg. 4652, 4685 (Jan. 30, 2004); *see* EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines at 1-6 (Dec. 1995) (“1995 EPA Analysis”), <http://www3.epa.gov/ttn/atw/landfill/bidfl.pdf>; 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005), JA4545; Final Br. of Resp’t EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007) (“2007 EPA Brief”); EPA Legal Memo at 26, JA2765.

existing sources, which have significant capital investments and sunk costs, should not be burdened by both the expanded section 112 program and performance standards under section 111(d). *Id.* at 16,031-32, JA4545-46.

The House, EPA has also explained, was especially concerned about “duplicative or otherwise inefficient regulation” when it came to existing power plants, the source category at issue here. *Id.* at 15,999, JA4513. In the 1990 Amendments, the House drafted a new provision that—similar to the provision now codified at section 112(n)(1)—gave EPA authority to decline entirely to regulate power plants under section 112. *Id.* at 16,031, JA4545. The House revised the Exclusion also to work in tandem with this new provision, so that EPA had a choice between regulating existing power plants under the national standards of section 112 or under the state-by-state standards of section 111(d). *See id.* (“[W]e believe that the House sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112.”); *id.* (“[T]he House did not want to subject Utility Units to duplicative or overlapping regulation.”).

B. EPA’s Attempts To Escape the Literal Reading of the Exclusion Are Unavailing.

In the Rule, EPA offers two arguments to avoid what it has consistently concluded is the “literal” meaning of the Section 112 Exclusion. *First*, the agency claims for the first time in 20 years that the phrase “regulated under section [1]12” is

ambiguous. *Second*, EPA exhumes an argument it advanced during its unsuccessful Clean Air Mercury Rule rulemaking that a second “version” of the Exclusion exists in the 1990 Statutes at Large. Neither argument withstands scrutiny.

1. EPA’s New Assertions of Ambiguity Lack Merit.

Despite consistency over 20 years and three Administrations, EPA now claims to find ambiguous the phrase “source category ... regulated under section [1]12.” 80 Fed. Reg. at 64,713, JA194. EPA admits it could be read in the way the agency has always read it. *Id.* at 64,714, JA195. But EPA now claims the phrase could also be read “only [to] exclud[e] the regulation of [hazardous air pollutant] emissions under CAA section 111(d) and only when th[e] source category [at issue] is regulated under CAA section 112.” *Id.*

EPA’s belated attempt to “manufacture[] ambiguity” and rewrite the Exclusion is impermissible. *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 592 (D.C. Cir. 2015) (internal quotation marks omitted). There is no ambiguity in the phrase “source category ... regulated under section [1]12.” Clearly, if a source category is subject to section 112’s stringent national hazardous air pollutant standards, that source category is “regulated under” section 112. EPA’s interpretation would read new words into the Exclusion’s plain terms, turning the straightforward prohibition against regulating under section 111(d) any source category “regulated under section [1]12” into a prohibition against the regulation of any “source category which is regulated under

section 112 *only where the air pollutant is included on a list published under section 112(b)(1).*”

Those extra words are not in the statute.

EPA’s new reading of the statute runs afoul of precedent of this Court and the Supreme Court. EPA is attempting to “qualif[y] or restrict[]” the phrase “regulated under section [1]12” when “[n]othing in this language” does so. *W. Minn. Mun. Power Agency*, 806 F.3d at 592. Moreover, EPA’s effort resembles its failed attempt in the *UARG* litigation to evade “a literal reading” of the CAA. 75 Fed. Reg. 31,514, 31,516 (June 3, 2010). In that case, the Supreme Court rebuked the agency for seeking to “rewrite clear statutory terms to suit its own sense of how the statute should operate.” *UARG*, 134 S. Ct. at 2446.

EPA attempts to bolster its statutory rewrite with a plea to legislative history, but this argument cuts against the agency’s position. According to EPA, reading the Exclusion as prohibiting section 111(d) regulation of pollutants not listed under section 112(b)(1) that are emitted from a source category regulated under section 112 would create an impermissible “gap” in the CAA. Such a “gap,” EPA asserts, is contrary to the intent of those who wrote the 1970 version of the Act. 80 Fed. Reg. at 64,714 (discussing legislative history from the 1970 CAA), JA195.

As a threshold matter, *UARG* forecloses such non-textual appeals to purpose or legislative history where a statute’s literal terms are clear and unambiguous. The Supreme Court stated unequivocally that an agency’s authority “does not include a

power to revise clear statutory terms that turn out not to work in practice.” 134 S. Ct. at 2446.

Moreover, EPA ignores the fundamental change in the section 112 program Congress enacted in 1990. As explained above, *supra* pp. 8-9, 63-64, the 1990 Congress expanded section 112 from a program that covered only a small universe of extremely dangerous pollutants into an expansive program that covered 189 listed pollutants. And since 1990, EPA has never identified a single pollutant that the agency believes would meet the definition of pollutant under section 111 but not section 112. *See, e.g.*, 73 Fed. Reg. 44,354, 44,493-95 (July 30, 2008) (considering regulation of carbon dioxide under section 112).³²

In fact, since the 1990 Amendments, EPA has issued only two section 111(d) regulations, and both were consistent with the Exclusion’s plain terms. In the first rule, the Clinton-era EPA expressly acknowledged the Exclusion’s prohibition against regulating a source category under section 111(d) where that source category is already regulated under section 112, but explained that its section 111(d) regulation of municipal solid waste landfills was permissible because the landfills were not “actually being regulated under section 112.” 1995 EPA Analysis at 1-6. The second rule was the Clean Air Mercury Rule, in which EPA sought first to delist power plants entirely

³² Petitioners believe that both section 111 and section 112 are “ill suited to accommodating greenhouse gases”—for both similar and different reasons. *See UARG*, 134 S. Ct. at 2441 n.5.

under section 112 before regulating those plants under section 111(d). 70 Fed. Reg. at 15,994 (delisting), JA4508; 70 Fed. Reg. 28,606 (May 18, 2005) (imposing standards).³³

EPA further ignores that with respect to power plants in particular, the 1990 Amendments gave EPA an explicit choice between regulating existing power plants under the national standards of section 112 or under the state-by-state standards of section 111(d). *See supra* p. 64. What EPA claims to be a regulatory gap is a regulatory regime deliberately designed by Congress to avoid double regulation.

2. The Failed Clerical Amendment Is Entirely Irrelevant.

EPA's alternative avenue for avoiding the "literal" meaning of the Section 112 Exclusion, as it appears in the U.S. Code, is the argument that a second "version" of the Exclusion exists in the 1990 Statutes at Large and creates ambiguity. This theory derives from the fact that in 1990, Congress passed an erroneous "conforming amendment" that appears in the Statutes at Large but was not included in the U.S. Code.³⁴

³³ In the Clean Air Mercury Rule, EPA attempted to use section 111(d) to regulate hazardous air pollutants from coal- and oil-fired electric generating units. In *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), this Court held that EPA violated the CAA in the manner it delisted power plants under section 112, and vacated the section 111(d) regulation of those power plants based on the Section 112 Exclusion, *id.* at 582-83.

³⁴ EPA's claim that the Statutes at Large contains "two versions" of the Section 112 Exclusion can be traced to 2004, when EPA mistook for the Statutes at Large an unofficial compilation of the Clean Air Act littered with errors that was included in the Committee Print of the 1990 Amendments' legislative history. *See* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 46 (Comm. Print 1993), JA4248. This document renders the relevant section using brackets: "any

EPA's contention is that the non-partisan Office of the Law Revision Counsel of the U.S. House of Representatives, *see* 2 U.S.C. §§ 285a-285g, erred in compiling the U.S. Code. By law, the Code "establish[es] prima facie the laws of the United States." 1 U.S.C. § 204(a). It is controlling unless the Law Revision Counsel has made an error, such that the Code is "inconsistent" with the Statutes at Large. *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam). The Law Revision Counsel did not err.

The issue is the Law Revision Counsel's treatment of a "substantive amendment" and a "conforming amendment" that altered the same text in the Exclusion. As explained in Congress's official legislative drafting guides, there are "substantive amendments" and "conforming amendments," the latter of which make clerical adjustments to "table[s] of contents" and corrections to pre-existing cross-references that are "necessitated by the substantive amendments."³⁵ *Cf. Koons Buick*

air pollutant ... which is not included on a list published under section 108(a) [or emitted from a source category which is regulated under section 112] [or 112(b)]." *Id.* In 2004, EPA quoted from this document in the Federal Register, identifying it as the Statutes at Large and, as a result of this error, stated incorrectly that "two amendments are reflected in parentheses in the Statutes at Large." 69 Fed. Reg. at 4685.

³⁵ *See* Office of the Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 126(b) (Feb. 1997), [https://www.law.yale.edu/system/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](https://www.law.yale.edu/system/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf) ("Senate Manual"), JA4300; *accord* Office of the Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 332(b) (Nov. 1995), http://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html ("House Manual"), JA4273-74.

Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60-61 (2004) (relying on drafting manuals);

United States v. O'Brien, 560 U.S. 218, 233-34 (2010) (same).

Consistent with these official drafting manuals, the Law Revision Counsel follows a regular practice of first executing substantive amendments, then executing subsequent conforming amendments and excluding as “could not be executed” conforming amendments rendered unnecessary by previously executed substantive amendments.³⁶ And that is what happened here.

The Law Revision Counsel correctly executed first a substantive amendment that Congress made to the Exclusion in 1990 (the “Substantive Amendment”). Before 1990, the Exclusion prohibited EPA from regulating under section 111(d) any air pollutant “included on a list published under ... [1]08(a) ... or [1]12(b)(1)(A).” 42

³⁶ See, e.g., Revisor’s Note, 11 U.S.C. § 101; Revisor’s Note, 12 U.S.C. § 4520; Revisor’s Note, 15 U.S.C. § 2064; Revisor’s Note, 18 U.S.C. § 2327; Revisor’s Note, 21 U.S.C. § 355; Revisor’s Note, 23 U.S.C. § 104; Revisor’s Note, 26 U.S.C. § 1201; Revisor’s Note, 42 U.S.C. § 1395u; Revisor’s Note, 42 U.S.C. § 1395ww; Revisor’s Note, 42 U.S.C. § 1396b; Revisor’s Note, 42 U.S.C. § 3025; Revisor’s Note, 42 U.S.C. § 9875; see also Revisor’s Note, 7 U.S.C. § 2018; Revisor’s Note, 10 U.S.C. § 869; Revisor’s Note, 10 U.S.C. § 1407; Revisor’s Note, 10 U.S.C. § 2306a; Revisor’s Note, 10 U.S.C. § 2533b; Revisor’s Note, 12 U.S.C. § 1787; Revisor’s Note, 14 U.S.C. ch. 17 Front Matter; Revisor’s Note, 15 U.S.C. § 2081; Revisor’s Note, 16 U.S.C. § 230f; Revisor’s Note, 20 U.S.C. § 1226c; Revisor’s Note, 20 U.S.C. § 1232; Revisor’s Note, 20 U.S.C. § 4014; Revisor’s Note, 22 U.S.C. § 3651; Revisor’s Note, 22 U.S.C. § 3723; Revisor’s Note, 26 U.S.C. § 105; Revisor’s Note, 26 U.S.C. § 219; Revisor’s Note, 26 U.S.C. § 4973; Revisor’s Note, 29 U.S.C. § 1053; Revisor’s Note, 33 U.S.C. § 2736; Revisor’s Note, 37 U.S.C. § 414; Revisor’s Note, 38 U.S.C. § 3015; Revisor’s Note, 40 U.S.C. § 11501; Revisor’s Note, 42 U.S.C. § 218; Revisor’s Note, 42 U.S.C. § 290bb–25; Revisor’s Note, 42 U.S.C. § 300ff–28; Revisor’s Note, 42 U.S.C. § 1395x; Revisor’s Note, 42 U.S.C. § 1396a; Revisor’s Note, 42 U.S.C. § 1396r; Revisor’s Note, 42 U.S.C. § 5776; Revisor’s Note, 42 U.S.C. § 9601.

U.S.C. § 7411(d) (1989). The reference to section 112(b)(1)(A) prohibited EPA from regulating under section 111(d) any listed hazardous air pollutants. The Substantive Amendment instructed:

strike[e] “or 112(b)(1)(A)” and insert[] “or emitted from a source category which is regulated under section 112.”

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (emphasis added), JA4188.

As EPA previously explained to this Court, this amendment substantively “change[d] the focus of” the Exclusion from precluding the double regulation of listed hazardous air pollutants to prohibiting the double regulation of any “source category that is actually regulated under section 112.” 2007 EPA Brief, 2007 WL 2155494. This amendment was appropriately listed, in EPA’s own words, “with a variety of substantive provisions.” *Id.* at n.35.

The Law Revision Counsel then correctly looked to a list of “[c]onforming [a]mendments” to the CAA. Senate Manual, § 126(d), JA4305; House Manual, § 332(b), JA4274. As relevant here, one of those conforming amendments addressed the Exclusion and instructed:

strike[e] “112(b)(1)(A)” and insert[] in lieu thereof “112(b).”

Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574 (“Conforming Amendments”) (emphasis added), JA4234. This clerical update reflected the fact that certain other substantive amendments expanding the section 112 regime had renumbered and

restructured section 112(b), rendering obsolete the pre-1990 cross-reference to “112(b)(1)(A).”

Having already executed the Substantive Amendment, the Law Revision Counsel properly found the Conforming Amendment to be extraneous. Because the Substantive Amendment had already deleted the reference to “112(b)(1)(A),” it was impossible to follow the instructions of the Conforming Amendment to “strik[e] ‘112(b)(1)(A)’ and insert[] in lieu thereof ‘112(b).’” Following its regular practice in such circumstances, the Office of the Law Revision Counsel noted that the Conforming Amendment “could not be executed” and correctly excluded it as a clerical error. *See* Revisor’s Note, 42 U.S.C. § 7411. Writing just five years after the amendments, the Clinton-era EPA agreed, explaining that the Conforming Amendment should be disregarded because it was a clearly erroneous clerical update: “a simple substitution of one subsection citation for another, [made] without consideration of other amendments of the section in which it resides.” 1995 EPA Analysis at 1-5 to 1-6.

EPA contends that the Law Revision Counsel erred in not somehow giving “effect” to both amendments. 80 Fed. Reg. at 64,714 n.294, JA195. But EPA has identified, and Petitioners are aware of, no instances in which the Law Revision Counsel—or any court or even another agency—gave *any* meaning to a conforming amendment that could not be executed as a result of a previously executed substantive amendment. To the contrary, this Court has made clear that these routine errors—

which are common in modern, complex legislation—do not create any statutory “ambiguity.” *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). Indeed, if courts were to adopt EPA’s approach to interpreting un-executable conforming amendments, then every one of the numerous instances of such amendments would become previously unnoticed versions-in-exile, causing severe disruptions throughout the U.S. Code. *See supra* pp. 69-70 & n.36.

There are several other valid justifications for the Law Revision Counsel’s treatment of the Conforming Amendment. To begin, it is well-established that amendments are to be executed in order and that an amendment fails to execute if a prior amendment in the same bill removes or alters the text that the subsequent amendment purports to amend.³⁷ Moreover, even if the amendments were executed in reverse order, the result would be the same, as the Substantive Amendment would still strike out and replace the cross-reference. And finally, the legislative history of the 1990 Amendments shows that the Conforming Amendment, which had originated in the Senate, was passed in error. Records show that the Senate Managers specifically “recede[d]” to seven substantive changes in section 108 of the House bill, expressly including the section 108(g) provision “amending section 111 of the Clean Air Act

³⁷ *See* Senate Manual § 126(d) (“If after a first amendment to a provision is made ... the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed.”), JA4305; House Manual § 332(d) (“The assumption is that the earlier (preceding) amendments have been executed.”), JA4278.

relating to ... existing stationary sources.” 136 CONG. REC. 36,067 (Oct. 27, 1990), JA4184.

In any event, even if this Court agrees with EPA’s “second version” theory, that would not save the Rule. Assuming there are two “versions” of the Exclusion, EPA would need to give “effect” to “every word” of *both* Exclusions, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), by prohibiting EPA from regulating under section 111(d) *both* any “source category which is regulated under Section [1]12” (the text in the U.S. Code), *and* any air pollutant listed pursuant to section 112(b)(1) (EPA’s view of the Conforming Amendment). The Rule would still be unlawful because the prohibition in the U.S. Code against regulating under section 111(d) any “source category which is regulated under Section [1]12” would remain fully intact.³⁸

III. The Rule Unlawfully Abrogates Authority Granted to the States by the Clean Air Act.

Section 111(d) grants the authority to “establish[] standards of performance” for existing sources to the States—*not* EPA. CAA § 111(d)(1). EPA is empowered under section 111(b) to adopt “regulations ... establishing Federal standards of performance for new sources.” In contrast, EPA’s authority under section 111(d) is limited to adopting a “procedure” under which “each State shall submit to [EPA] a plan which ... establishes standards of performance for any existing source,” and to

³⁸ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), on which EPA relies in the Rule, 80 Fed. Reg. at 64,715, JA196, thus provides no support for the agency’s position. That case dealt with a situation where—unlike here—the U.S. Code contained two irreconcilable, substantive commands.

“prescrib[ing] a plan for a State in cases where the State fails to submit a satisfactory plan.” *Id.* § 111(d)(1), (2).

EPA’s 1975 regulations establishing the procedure for section 111(d) state plans, *see* 40 C.F.R. pt. 60, subpt. B, recognize this important division of authority, providing only that EPA will issue a “guideline document” containing an “emission guideline” that “reflects the application of the best system of emission reduction.” 40 C.F.R. § 60.22(a), (b)(5). It is States that are to submit plans establishing standards of performance, which may be less stringent than the EPA emission guidelines if a State makes certain demonstrations, including infeasibility or unreasonable cost given a plant’s age. *Id.* § 60.24(f). As EPA explained in 1975 when promulgating these procedural regulations, “to emphasize that a legally enforceable standard is *not* intended, the term ‘emission limitation’ has been *replaced* with the term ‘emission guideline.’” 40 Fed. Reg. at 53,341, JA4087 (emphases added).³⁹

But under the Rule, EPA assumes for itself the power to establish definitive uniform performance rates. Though EPA uses the term emission “guidelines,” it has in fact promulgated national performance rates that set the minimum stringency for standards of performance imposed by the States. 40 C.F.R. pt. 60, subpt. UUUU, Tbl.

³⁹ EPA has approved numerous state plans containing standards of performance less stringent than EPA’s guidelines. *See, e.g.*, 49 Fed. Reg. 35,771 (Sept. 12, 1984) (approving Arkansas plan for kraft pulp mill total reduced sulfur emissions); 47 Fed. Reg. 50,868 (Nov. 10, 1982) (approving Georgia plan for same); 47 Fed. Reg. 28,099 (June 29, 1982) (approving California plan for phosphate fertilizer plant fluoride emissions).

1. As EPA admits, the Rule forbids the States to impose emission standards that are less stringent than EPA has mandated through the national performance rates. 80 Fed. Reg. at 64,870 (“[C]onsideration of facility-specific factors and in particular, remaining useful life, does not justify a state making further adjustments to the performance rates ... that the guidelines define for affected [units] in a state and that must be achieved by the state plan.”), JA351. By establishing a minimum stringency for emission standards imposed by States and then leaving only the work of implementation for the States, EPA has unlawfully rewritten the statutory text in which Congress expressly gave only to the States the authority to “establish[] standards of performance.” CAA § 111(d)(1).

For similar reasons, the Rule violates section 111(d)’s express grant of authority to States “to take into consideration, among other factors, the remaining useful life of the existing source to which [a] standard [of performance] applies.” *Id.* Consistent with the primacy that section 111(d) affords the States in setting standards of performance, Congress amended the CAA in 1977 to clarify that “the State[s] would be responsible for determining the applicability of ... guidelines [under section 111(d)] to any particular source or sources.” H.R. Rep. No. 95-294, at 195, *reprinted in* 1997 U.S.C.C.A.N. 1274, JA4115. Part of the power thus guaranteed to the States includes authority to grant variances from an otherwise-applicable standard of performance guideline “to take into consideration, among other factors, the remaining useful life of the existing source.” CAA § 111(d).

In amending section 111(d)(1), Congress sought to codify the availability of variances that EPA's implementing regulations already provided. *See* EPA, Legal Memorandum Accompanying Clean Power Plan for Certain Issues at 32 (undated), EPA-HQ-OAR-2013-0602-36872, JA3232. EPA previously had recognized the States' right to grant variances from emission guidelines on the basis of "economic hardship" to regulated sources and other factors, 40 Fed. Reg. at 53,343-44, JA4089-90, and had permitted States to "provide for the application of less stringent emissions standards" on a "case-by-case basis," *id.* at 53,347, JA4093; *see also* 40 C.F.R. § 60.24(d), (f). As a result, "[i]n most if not all cases ... [there] is likely to be substantial variation in the degree of control required for particular sources, rather than identical standards for all sources." 40 Fed. Reg. at 53,343, JA4089. When it enacted the 1977 amendments, Congress codified this right.

Despite the statute's clear language, the Rule forbids States from relaxing the emission rate the agency set, even where applying it would force a source to shut down before the end of its useful life. Many coal plants have made substantial retrofit investments in the past decade to comply with environmental regulations.⁴⁰ Yet the emission rates EPA has established effectively prohibit some States from taking into

⁴⁰ For example, in the last four years, EPA has required the six largest coal-fired power plants in Kansas to invest more than \$3 billion to comply with regional haze, cross-state air pollution, local ozone maintenance, and mercury and air toxics rules. *See* Comments of Kan. Dep't of Health & Env't, at 12-13 (Nov. 17, 2014), EPA-HQ-OAR-2013-0602-23255, JA1549-50; Comments of Kan. Corp. Comm'n, at 30-33 (Oct. 29, 2014), EPA-HQ-OAR-2013-0602-21276, JA490-93.

consideration the remaining useful life of those plants.⁴¹ As a result, these retrofitted plants will have to curtail operations or close long before the financing for these investments is paid off or the benefits of the EPA-required improvements are realized. Congress amended section 111(d)(1) to prevent precisely this situation and this is yet another reason to vacate the Rule.

IV. The Rule Unconstitutionally Commandeers and Coerces States and Their Officials into Carrying Out Federal Energy Policy.

EPA's unprecedented decision to attempt to decarbonize the U.S. energy system through section 111 regulation leaves States no choice but to alter their laws and programs governing electricity generation and delivery to accord with and carry out federal policy. Whether implemented by federal plan or state plan, the Rule will not work unless States facilitate the Rule's changes and exercise their "responsibility to maintain a reliable electric system" in the face of the Rule's disruptions. 80 Fed. Reg. at 64,678, JA159. Where a State declines to administer the Rule and thus has a federal plan imposed on it, it still must take a myriad of actions to ensure that the reductions in coal generation that a federal plan will mandate are matched by increases

⁴¹ For instance, the Rule requires Kansas to achieve a 25.7% CO₂ reduction by 2022 and a 44.2% reduction by 2030 under the rate-based limits, and 18.7% by 2022 and 36.0% by 2030 under the mass-based limits. *See* Goal Computation TSD, App. 5, EPA-HQ-OAR-2013-0602-36849, JA3021-26. As a result, Kansas ratepayers "must continue to pay for coal-fired generation resources (including the recent environmental upgrades) that will either be curtailed or forced to retire early." Comments of Kan. Corp. Comm'n, at 30, JA490.

in more costly forms of EPA-favored generation—leaving States to bear the brunt of citizen complaints about the increased costs and lost jobs.

As a result, the Rule runs roughshod over rights reserved to the States under the Constitution. It commandeers the States’ exclusive authority to regulate the intrastate generation and transmission of electricity. And in the end, the States’ “choice” whether to maintain reliable electric service for their citizens is no choice at all; it is an unconstitutional “gun to the head” given the consequences if they refuse to carry out this federal policy. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion); *see also id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). In States where electricity generation is regulated by constitutionally created bodies, like Louisiana, Georgia, and Arizona, the Rule’s intrusion on state power not only violates the U.S. Constitution, but state constitutions as well.

This commandeering and coercion of States and state officials is unconstitutional and requires that the Rule be vacated. At a minimum, statutory constructions that raise constitutional concerns are to be avoided.⁴² *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

⁴² Other constitutional issues that would be created by EPA’s “generation shifting” interpretation of section 111(d) are developed further in the brief of Petitioner-Intervenors.

A. The Rule Unlawfully Commandeers the States and Their Officials.

At the Rule’s heart is an unprecedented mismatch between what EPA requires—partial decarbonization of the U.S. economy—and what EPA has authority to do under section 111(d)—provide for the application of standards of performance to individual power plants. Whether implemented by the States or the federal government, this mismatch creates a unique situation. States will be required in both instances to facilitate the elimination or reduction of massive quantities of fossil-fuel-fired electric generation as there is no federal means of carrying out the numerous planning and regulatory activities necessary to accommodate the retirement of existing sources and the construction and integration of new capacity. In effect, EPA intends in all events for States to clean up its mess by exercising what EPA calls their “responsibility to maintain a reliable electric system” in the face of the Rule’s disruptions, which amounts to unconstitutional commandeering of the States and their officials.

“Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.” *Alden v. Maine*, 527 U.S. 706, 748 (1999); *see also* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). Among the powers that the Constitution denies to the federal government is the power to “use the States as

implements of regulation”—in other words, to commandeer them to carry out federal law. *New York*, 505 U.S. at 161.

On that basis, the Supreme Court in *New York* struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act that required States either to legislate to provide for the disposal of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal. *Id.* at 153-54. The Court explained that the federal government may “offer States the choice of regulating [an] activity according to federal standards or having state law preempted by federal regulation.” *Id.* at 167. But merely providing States flexibility in how to carry out federal policy is unlawful because it “only underscores the critical alternative a State lacks: A State may not decline to administer the federal program.” *Id.* at 176-77. *Printz v. United States*, 521 U.S. 898 (1997), reaffirmed and extended these principles to the commandeering of state officials, striking down a federal statute that directed state law enforcement officers to conduct background checks on gun buyers and perform related tasks. State officials, it held, may not be “‘dragooned’ ... into administering federal law.” *Id.* at 928 (citation omitted).

The Rule violates this anti-commandeering principle by forcing States and state officials to exercise their sovereign powers by revamping their utility sectors. Under the Rule, state actors will be the ones to account for the Rule’s impact on electric reliability, 40 C.F.R. § 60.5745(a)(7), through such means as “[public utility commission] orders,” 80 Fed. Reg. at 64,848, JA329, and “state measures” that make

unregulated renewable energy generators “responsible for compliance and liable for violations” if they do not fill the gap, 40 C.F.R. § 60.5780(a)(5)(iii).

Indeed, the Rule pushes substantial duties on even those States that “decline” to administer it, just like the low-level nuclear waste program struck down in *New York*. A federal plan’s mandate to retire coal-fired plants or reduce their utilization (including by requiring the purchase of emissions allowances) would force state utility and electricity regulators to respond in the same way as if the State itself had ordered the retirements. Likewise, if EPA orders through a federal plan that power-plant owners construct new electric generating capacity, state officials will be forced to review siting decisions, grant permit applications, and issue certificates of public convenience for EPA’s preferred generation sources and for the associated new transmission lines that EPA’s transformation of the power sector will require. These state officials—which include, in States like Louisiana, Georgia, and Arizona, state constitutional officers elected to sit on public utility commissions—will be “dragooned” ... into administering federal law.” *Printz*, 521 U.S. at 928 (citation omitted).

And political accountability will be frustrated because it is these state officials who “will bear the brunt of public disapproval” for increased costs and lost jobs, because they appear to retain exclusive authority under state law over electricity generation but “cannot regulate in accordance with the views of the local electorate.” *New York*, 505 U.S. at 169. EPA lacks the authority to supplant the States in carrying

out these aspects of the Rule, so it cannot make the essential trade-off—demanding that States adhere to federal policy at the price of exemption from federal preemption—that the Supreme Court has always required for a program to be truly “cooperative.” *See id.* at 176 (“A choice between two unconstitutionally coercive regulatory techniques is no choice at all.”). The result is that States have no choice but to act, and state officials lose their ability to “remain accountable to the people.” *Id.* at 168.

EPA’s response is simply to assert that no State action is required to implement the Rule. 80 Fed. Reg. at 64,881-82, JA362-63. But even under a federal implementation plan, state agencies will have to be involved in decommissioning coal-fired plants, addressing replacement capacity, addressing transmission and integration issues, and undertaking all manner of related regulatory proceedings.⁴³ *See id.* at 64,678, JA159; *supra* pp. 20-21. In fact, EPA’s proposed federal plan expressly relies on state authorities to address reliability issues caused by the Rule. 80 Fed. Reg. at 64,981. In this regard, the Rule fundamentally departs from the statutory scheme upheld in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981), because the mine reclamation program at issue in that case ensured that “the full

⁴³ As noted above, federal law recognizes States’ exclusive jurisdiction “over facilities used for the generation of electric energy.” *See supra* pp. 38-39. That includes States’ “traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like”—the very things the Rule targets. *PG&E*, 461 U.S. at 212.

regulatory burden” of regulation would “be borne by the Federal Government” if a State chose not to regulate. *See also Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (per curiam) (similar). As this Court has said, a federal plan under the Clean Air Act cannot “commandeer the regulatory powers of the states, along with their personnel and resources.” *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975), *vacated on other grounds*, *EPA v. Brown*, 431 U.S. 99 (1977).

In short, while EPA makes much of the purported flexibility States have in implementing the Rule, *see, e.g.*, 80 Fed. Reg. at 64,665, JA146, the Constitution requires the federal government to allow States the choice to “decline to administer the federal program,” *New York*, 505 U.S. at 177, not a multitude of choices of how to administer the federal program. Because that is the one choice the Rule denies to States, it impinges on the States’ sovereign authority and, like the actions under review in *New York* and *Printz*, exceeds the federal government’s power.

B. The Rule Unlawfully Coerces the States.

Just as the federal government may not commandeer States to carry out federal policy, it also may not coerce them to the same end by denying them “a legitimate choice whether to accept the federal conditions.” *NFIB*, 132 S. Ct. at 2602 (Roberts, C.J.) (plurality opinion); *see also id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Rule violates this anti-coercion doctrine by threatening to disrupt the electric systems of States that do not carry out federal policy.

Federal action directed at States “has crossed the line distinguishing encouragement from coercion” when it leverages existing and substantial State entitlements to induce the State to implement federal policy. *Id.* at 2603 (internal quotation marks omitted). When “not merely in theory but in fact,” such threats amount to “economic dragooning that leaves the States with no real option but to acquiesce” to federal demands, they impermissibly “undermine the status of the States as independent sovereigns in our federal system.” *Id.* at 2602, 2604-05 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987)).

That precisely describes the Rule. If a State declines to implement the Rule, EPA will impose a federal plan that does so. 40 C.F.R. § 60.5720. But because the Rule’s aggressive emission rates cannot be achieved by the type of operational efficiency improvements that individual sources can make and that can actually be federally administered, States will have to take regulatory action to administer and facilitate generation-shifting, or face electricity shortfalls and the associated consequences for state services and operations, public health and safety, and economy. *See supra* pp. 12-16, 20-21, 78-83. Indeed, EPA is quite clear that it expects state actors to exercise “responsibility to maintain a reliable electric system” in the face of the Rule’s disruptions. 80 Fed. Reg. at 64,678, JA159. The Rule places States in an untenable position.

The whole point is to force States to do what is necessary to maintain reliable and affordable electric service by taking regulatory actions that are beyond EPA’s

authority. Regardless of whether a State implements its own plan or is subject to the federal plan, in neither instance does the decision to adopt or reject EPA's preferred policies "remain the prerogative of the States." *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (alteration in original) (quoting *Dole*, 483 U.S. at 211); *see also id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Instead, EPA's "inducement' ... is a gun to the head." *Id.* at 2604 (Roberts, C.J.) (plurality opinion). This prospect of requiring state action in order to maintain reliable electricity for its residents leaves States no choice but to carry out EPA's dictates.

The Rule identifies no precedent for this invasion of state sovereignty. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). But, as in *New York* and *NFIB*, the Rule deprives the States of that core aspect of their sovereignty, requiring them to exercise regulatory authority while stripping them of policymaking discretion. This is not cooperative federalism; the "the Federal Government may not compel the States to implement ... federal regulatory programs." *Printz*, 521 U.S. at 925.

CONCLUSION

For the foregoing reasons, the petitions should be granted and the Rule vacated.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing final form Opening Brief of Petitioners on Core Legal Issues contains 21,613 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: April 22, 2016

/s/ Elbert Lin

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of April 2016, a copy of the foregoing final form Opening Brief of Petitioners on Core Legal Issues was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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**ADDENDUM PURSUANT TO FEDERAL RULE OF APPELLATE
PROCEDURE 32.1 AND CIRCUIT RULE 32.1(b)(3)**

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A773 WEST VIRGINIA, ET AL. V EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A776 BASIN ELEC. POWER COOP., ET AL. V. EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A778 MURRAY ENERGY CORP., ET AL. V. EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A787 CHAMBER OF COMMERCE, ET AL. V. EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A793 NORTH DAKOTA V. EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicant's petition for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicant's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363 (and consolidated cases)

**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, *et al.*,

Respondents.

**On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)**

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ity of section 1301(d) of Pub. L. 113-235, set out as a note under section 301 of Title 44, Public Printing and Documents.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-497 effective Apr. 1, 1985, see section 301 of Pub. L. 98-497, set out as a note under section 2102 of Title 44, Public Printing and Documents.

§ 202. Preparation and publication of Codes and Supplements

There shall be prepared and published under the supervision of the Committee on the Judiciary of the House of Representatives—

(a) Cumulative Supplements to Code of Laws of United States for each session of Congress.—A supplement for each session of the Congress to the then current edition of the Code of Laws of the United States, cumulatively embracing the legislation of the then current supplement, and correcting errors in such edition and supplement;

(b) Cumulative Supplement to District of Columbia Code for each session of Congress.—A supplement for each session of the Congress to the then current edition of the Code of the District of Columbia, cumulatively embracing the legislation of the then current supplement, and correcting errors in such edition and supplement;

(c) New editions of Codes and Supplements.—New editions of the Code of Laws of the United States and of the Code of the District of Columbia, correcting errors and incorporating the then current supplement. In the case of each code new editions shall not be published oftener than once in each five years. Copies of each such edition shall be distributed in the same manner as provided in the case of supplements to the code of which it is a new edition. Supplements published after any new edition shall not contain the legislation of supplements published before such new edition.

(July 30, 1947, ch. 388, 61 Stat. 637.)

CROSS REFERENCES

Council of the District of Columbia, functions respecting, see section 2 of Pub. L. 94-386, Aug. 14, 1976, 90 Stat. 1170, set out as a note under section 285b of Title 2, The Congress.

Office of the Law Revision Counsel, functions respecting preparation, revision, publication, etc., see section 285b of Title 2.

§ 203. District of Columbia Code; preparation and publication; cumulative supplements

The Committee on the Judiciary of the House of Representatives is authorized to print bills to codify, revise, and reenact the general and permanent laws relating to the District of Columbia and cumulative supplements thereto, similar in style, respectively, to the Code of Laws of the United States, and supplements thereto, and to so continue until final enactment thereof in both Houses of the Congress of the United States.

(July 30, 1947, ch. 388, 61 Stat. 638.)

COMMISSION ON REVISION OF THE CRIMINAL LAWS OF THE DISTRICT OF COLUMBIA

Pub. L. 90-226, title X, Dec. 27, 1967, 81 Stat. 742, provided for creation and operation of a commission to

study and make recommendations with reference to a revised code of criminal law and procedure for the District of Columbia, prior to repeal by Pub. L. 91-358, title VI, § 601, July 29, 1970, 84 Stat. 667, as amended by Pub. L. 91-530, § 2(b)(1), Dec. 7, 1970, 84 Stat. 1390.

CROSS REFERENCES

Council of the District of Columbia, functions respecting, see section 2 of Pub. L. 94-386, Aug. 14, 1976, 90 Stat. 1170, set out as a note under section 285b of Title 2, The Congress.

Office of the Law Revision Counsel, functions respecting, see section 285b of Title 2.

§ 204. Codes and Supplements as evidence of the laws of United States and District of Columbia; citation of Codes and Supplements

In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(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.

(b) District of Columbia Code.—The matter set forth in the edition of the Code of the District of Columbia current at any time shall, together with the then current supplement, if any, establish prima facie the laws, general and permanent in their nature, relating to or in force in the District of Columbia on the day preceding the commencement of the session following the last session the legislation of which is included, except such laws as are of application in the District of Columbia by reason of being laws of the United States general and permanent in their nature.

(c) District of Columbia Code; citation.—The Code of the District of Columbia may be cited as “D.C. Code”.

(d) Supplements to Codes; citation.—Supplements to the Code of Laws of the United States and to the Code of the District of Columbia may be cited, respectively, as “U.S.C., Sup. ”, and “D.C. Code, Sup. ”, the blank in each case being filled with Roman figures denoting the number of the supplement.

(e) New edition of Codes; citation.—New editions of each of such codes may be cited, respectively, as “U.S.C., ed.”, and “D.C. Code, ed.”, the blank in each case being filled with figures denoting the last year the legislation of which is included in whole or in part.

(July 30, 1947, ch. 388, 61 Stat. 638.)

UNITED STATES CODE TITLES AS POSITIVE LAW

The following titles of the United States Code were enacted into positive law by the acts enumerated below:

Title 1, General Provisions—Act July 30, 1947, ch. 388, § 1, 61 Stat. 633.

Title 3, The President—Act June 25, 1948, ch. 644, §1, 62 Stat. 672.

Title 4, Flag and Seal, Seat of Government, and the States—Act July 30, 1947, ch. 389, §1, 61 Stat. 641.

Title 5, Government Organization and Employees—Pub. L. 89-554, §1, Sept. 6, 1966, 80 Stat. 378.

Title 9, Arbitration—Act July 30, 1947, ch. 392, §1, 61 Stat. 669.

Title 10, Armed Forces—Act Aug. 10, 1956, ch. 1041, §1, 70A Stat. 1.

Title 11, Bankruptcy—Pub. L. 95-598, title I, §101, Nov. 6, 1978, 92 Stat. 2549.

Title 13, Census—Act Aug. 31, 1954, ch. 1158, 68 Stat. 1012.

Title 14, Coast Guard—Act Aug. 4, 1949, ch. 393, §1, 63 Stat. 495.

Title 17, Copyrights—Act July 30, 1947, ch. 391, §1, 61 Stat. 652, as amended Oct. 19, 1976, Pub. L. 94-553, title I, §101, 90 Stat. 2541.

Title 18, Crimes and Criminal Procedure—Act June 25, 1948, ch. 645, §1, 62 Stat. 683.

Title 23, Highways—Pub. L. 85-767, §1, Aug. 27, 1958, 72 Stat. 885.

Title 28, Judiciary and Judicial Procedure—Act June 25, 1948, ch. 646, §1, 62 Stat. 869.

Title 31, Money and Finance—Pub. L. 97-258, §1, Sept. 13, 1982, 96 Stat. 877.

Title 32, National Guard—Act Aug. 10, 1956, ch. 1041, §2, 70A Stat. 596.

Title 34, Navy—See Title 10, Armed Forces.

Title 35, Patents—Act July 19, 1952, ch. 950, §1, 66 Stat. 792.

Title 36, Patriotic and National Observances, Ceremonies, and Organizations—Pub. L. 105-225, §1, Aug. 12, 1998, 112 Stat. 1253.

Title 37, Pay and Allowances of the Uniformed Services—Pub. L. 87-649, §1, Sept. 7, 1962, 76 Stat. 451.

Title 38, Veterans' Benefits—Pub. L. 85-857, §1, Sept. 2, 1958, 72 Stat. 1105.

Title 39, Postal Service—Pub. L. 86-682, §1, Sept. 2, 1960, 74 Stat. 578, as revised Pub. L. 91-375, §2, Aug. 12, 1970, 84 Stat. 719.

Title 40, Public Buildings, Property, and Works—Pub. L. 107-217, §1, Aug. 21, 2002, 116 Stat. 1062.

Title 41, Public Contracts—Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3677.

Title 44, Public Printing and Documents—Pub. L. 90-620, §1, Oct. 22, 1968, 82 Stat. 1238.

Title 46, Shipping—Pub. L. 98-89, §1, Aug. 26, 1983, 97 Stat. 500; Pub. L. 99-509, title V, subtitle B, §5101, Oct. 21, 1986, 100 Stat. 1913; Pub. L. 100-424, §6, Sept. 9, 1988, 102 Stat. 1591; Pub. L. 100-710, title I, §102, Nov. 23, 1988, 102 Stat. 4738; Pub. L. 109-304, Oct. 6, 2006, 120 Stat. 1485.

Title 49, Transportation—Pub. L. 95-473, §1, Oct. 17, 1978, 92 Stat. 1337; Pub. L. 97-449, §1, Jan. 12, 1983, 96 Stat. 2413; Pub. L. 103-272, §1, July 5, 1994, 108 Stat. 745.

Title 51, National and Commercial Space Programs—Pub. L. 111-314, §3, Dec. 18, 2010, 124 Stat. 3328.

Title 54, National Park Service and Related Programs—Pub. L. 113-287, §3, Dec. 19, 2014, 128 Stat. 3094.

TITLE 26, INTERNAL REVENUE CODE

The Internal Revenue Code of 1954 was enacted in the form of a separate code by act Aug. 16, 1954, ch. 736, 68A Stat. 1. Pub. L. 99-514, §2(a), Oct. 22, 1986, 100 Stat. 2095, provided that the Internal Revenue Title enacted Aug. 16, 1954, as heretofore, hereby, or hereafter amended, may be cited as the "Internal Revenue Code of 1986". The sections of Title 26, United States Code, are identical to the sections of the Internal Revenue Code.

§ 205. Codes and Supplement; where printed; form and style; ancillaries

The publications provided for in sections 202, 203 of this title shall be printed at the Government Publishing Office and shall be in such form and style and with such ancillaries as may be prescribed by the Committee on the Judiciary of

the House of Representatives. The Librarian of Congress is directed to cooperate with such committee in the preparation of such ancillaries. Such publications shall be furnished with such thumb insets and other devices to distinguish parts, with such facilities for the insertion of additional matter, and with such explanatory and advertising slips, and shall be printed on such paper and bound in such material, as may be prescribed by such committee.

(July 30, 1947, ch. 388, 61 Stat. 639; Pub. L. 113-235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537.)

CHANGE OF NAME

"Government Publishing Office" substituted for "Government Printing Office" in text on authority of section 1301(b) of Pub. L. 113-235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 206. Bills and resolutions of Committee on the Judiciary of House of Representatives; form and style; ancillaries; curtailment of copies

All bills and resolutions relating to the revision of the laws referred to or reported by the Committee on the Judiciary of the House of Representatives shall be printed in such form and style, and with such ancillaries, as such committee may prescribe as being economical and suitable, to so continue until final enactment thereof in both Houses of Congress; and such committee may also curtail the number of copies of such bills to be printed in the various parliamentary stages in the House of Representatives.

(July 30, 1947, ch. 388, 61 Stat. 639.)

§ 207. Copies of acts and resolutions in slip form; additional number printed for Committee on the Judiciary of House of Representatives

The Director of the Government Publishing Office is directed to print, in addition to the number provided by existing law, and, as soon as printed, to distribute in such manner as the Committee on the Judiciary of the House of Representatives shall determine, twenty copies in slip form of each public Act and joint resolution.

(July 30, 1947, ch. 388, 61 Stat. 639; Pub. L. 113-235, div. H, title I, §1301(d), Dec. 16, 2014, 128 Stat. 2537.)

CHANGE OF NAME

"Director of the Government Publishing Office" substituted for "Public Printer" in text on authority of section 1301(d) of Pub. L. 113-235, set out as a note under section 301 of Title 44, Public Printing and Documents.

§ 208. Delegation of function of Committee on the Judiciary to other agencies; printing, and so forth, under direction of Joint Committee on Printing

The functions vested by sections 201, 202, 204-207 of this title in the Committee on the Judiciary of the House of Representatives may from time to time be vested in such other agency as the Congress may by concurrent resolution provide: *Provided*, That the printing, binding,

AMENDMENTS

1971—Pub. L. 92-51 substituted provision for Legislative Counsel to send official mail matter of the Office as franked mail under section 3210 of title 39, for former provision granting the Office the same privilege of free transmission of official mail matter as other offices of the United States Government.

§ 282e. Authorization of appropriations

There are authorized to be appropriated, for the fiscal year ending June 30, 1971, and for each fiscal year thereafter, such sums as may be necessary to carry out this subchapter and to increase the efficiency of the Office and the quality of the services which it provides.

(Pub. L. 91-510, title V, § 526, Oct. 26, 1970, 84 Stat. 1203.)

CHAPTER 9A—OFFICE OF LAW REVISION COUNSEL

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285.	Establishment.
285a.	Purpose and policy.
285b.	Functions.
285c.	Law Revision Counsel.
285d.	Staff; Deputy Law Revision Counsel; delegation of functions.
285e.	Compensation.
285f.	Expenditures.
285g.	Availability of applicable accounts of House.

§ 285. Establishment

There is established in the House of Representatives an office to be known as the Office of the Law Revision Counsel, referred to hereinafter in this chapter as the "Office".

(Pub. L. 93-554, title I, ch. III, § 101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(a) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

EFFECTIVE DATE

Pub. L. 93-554, title I, ch. III, Dec. 27, 1974, 88 Stat. 1777, provided that the enactment of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, into permanent law is effective on Jan. 2, 1975. This chapter is derived from enactment into permanent law of section 205 of House Resolution No. 988.

§ 285a. Purpose and policy

The principal purpose of the Office shall be to develop and keep current an official and positive codification of the laws of the United States. The Office shall maintain impartiality as to issues of legislative policy to be determined by the House.

(Pub. L. 93-554, title I, ch. III, § 101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(b) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

§ 285b. Functions

The functions of the Office shall be as follows:

(1) To prepare, and submit to the Committee on the Judiciary one title at a time, a com-

plete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law.

(2) To examine periodically all of the public laws enacted by the Congress and submit to the Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions contained therein.

(3) To prepare and publish periodically a new edition of the United States Code (including those titles which are not yet enacted into positive law as well as those titles which have been so enacted), with annual cumulative supplements reflecting newly enacted laws.

(4) To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.

(5) To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current.

(6) To prepare and publish periodically new editions of the District of Columbia Code, with annual cumulative supplements reflecting newly enacted laws, through publication of the fifth annual cumulative supplement to the 1973 edition of such Code.

(7) To provide the Committee on the Judiciary with such advice and assistance as the committee may request in carrying out its functions with respect to the revision and codification of the Federal statutes.

(Pub. L. 93-554, title I, ch. III, § 101, Dec. 27, 1974, 88 Stat. 1777; Pub. L. 94-386, § 1, Aug. 14, 1976, 90 Stat. 1170.)

CODIFICATION

Section is based on section 205(c) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

AMENDMENTS

1976—Par. (6). Pub. L. 94-386 substituted "through publication of the fifth annual cumulative supplement to the 1973 edition of such Code" for "until such time as the District of Columbia Self-Government and Governmental Reorganization Act becomes effective".

PREPARATION AND PUBLICATION OF DISTRICT OF COLUMBIA CODE UNDER DIRECTION OF COUNCIL OF THE DISTRICT OF COLUMBIA

Pub. L. 94-386, § 2, Aug. 14, 1976, 90 Stat. 1170, provided that:

"(a) After publication by the Law Revision Counsel of the fifth annual cumulative supplement to the 1973 edition of the District of Columbia Code, new editions of the District of Columbia Code (and annual cumulative supplements thereto) shall be prepared and published under the direction of the Council of the District of Columbia and shall set forth the general and permanent laws relating to or in force in the District of Columbia, whether enacted by the Congress or by the Council of the District of Columbia, except such laws as are of application in the District of Columbia by reason of being laws of the United States general and permanent in nature.

“(b) After completion of the printing of the fifth annual cumulative supplement to the 1973 edition of the District of Columbia Code, the Public Printer [now Director of the Government Publishing Office] shall, as the Council of the District of Columbia may request, either—

“(1) furnish to the Council of the District of Columbia, on such terms as the Public Printer [now Director of the Government Publishing Office] (in consultation with the Joint Committee on Printing) deems appropriate, the type used in preparing the 1973 edition of the District of Columbia Code and the fifth annual cumulative supplement to such edition; or

“(2) make such arrangements with the Council of the District of Columbia as the Public Printer [now Director of the Government Publishing Office] (in consultation with the Joint Committee on Printing) deems appropriate for the printing by the Government Printing Office [now Government Publishing Office] of future editions of the District of Columbia Code, and annual cumulative supplements thereto, prepared under the direction of the Council of the District of Columbia.”

§ 285c. Law Revision Counsel

The management, supervision, and administration of the Office are vested in the Law Revision Counsel, who shall be appointed by the Speaker without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person so appointed shall serve at the pleasure of the Speaker.

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(d) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

§ 285d. Staff; Deputy Law Revision Counsel; delegation of functions

(1) With the approval of the Speaker, or in accordance with policies and procedures approved by the Speaker, the Law Revision Counsel shall appoint such employees as may be necessary for the prompt and efficient performance of the functions of the Office. Any such appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person so appointed may be removed by the Law Revision Counsel with the approval of the Speaker, or in accordance with policies and procedures approved by the Speaker.

(2)(A) One of the employees appointed under paragraph (1) shall be designated by the Law Revision Counsel as Deputy Law Revision Counsel. During the absence or disability of the Law Revision Counsel, or when the office is vacant, the Deputy Law Revision Counsel shall perform the functions of the Law Revision Counsel.

(B) The Law Revision Counsel may delegate to the Deputy Law Revision Counsel and to other employees appointed under paragraph (1) such of his or her functions as he or she considers necessary or appropriate.

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(e) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

§ 285e. Compensation

The Law Revision Counsel shall be paid at a per annum gross rate not to exceed level IV of the Executive Schedule of section 5315 of title 5; and members of the staff of the Office other than the Law Revision Counsel shall be paid at per annum gross rates fixed by the Law Revision Counsel with the approval of the Speaker or in accordance with policies approved by the Speaker, but not in excess of a per annum gross rate equal to level V of such schedule.

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(f) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

INCREASES IN COMPENSATION

Increases in compensation for House officers and employees under authority of Federal Salary Act of 1967 (Pub. L. 90-206), Federal Pay Comparability Act of 1970 (Pub. L. 91-656), and Legislative Branch Appropriations Act, 1988 (Pub. L. 100-202), see sections 4531 and 4532 of this title, and Salary Directives of Speaker of the House, set out as notes under those sections.

§ 285f. Expenditures

In accordance with policies and procedures approved by the Speaker, the Law Revision Counsel is authorized to make such expenditures as may be necessary or appropriate for the functioning of the Office.

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777.)

CODIFICATION

Section is based on section 205(g) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

§ 285g. Availability of applicable accounts of House

Until such time as funds are appropriated by law to carry out the purpose of this chapter, the applicable accounts of the House of Representatives shall be available for such purpose.

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777; Pub. L. 104-186, title II, §207, Aug. 20, 1996, 110 Stat. 1742.)

CODIFICATION

Section is based on section 205(h) of House Resolution No. 988, Ninety-third Congress, Oct. 8, 1974, which was enacted into permanent law by Pub. L. 93-554.

AMENDMENTS

1996—Pub. L. 104-186 substituted “applicable accounts of the House of Representatives” for “contingent fund of the House”.

CHAPTER 9B—LEGISLATIVE CLASSIFICATION OFFICE

§§ 286 to 286g. Repealed. Pub. L. 104-186, title II, § 208, Aug. 20, 1996, 110 Stat. 1742

Section 286, based on H. Res. No. 988, §203(a), Ninety-third Congress, Oct. 8, 1974, enacted into permanent law by Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777, established Legislative Classification Office in House of Representatives.

(Aug. 15, 1914, ch. 253, § 3, 38 Stat. 692.)

§ 784. Jurisdiction of prosecutions

Any violation of the provisions of this chapter shall be prosecuted in the district court of the United States of the district wherein the offender is found or into which he is first brought.

(Aug. 15, 1914, ch. 253, § 4, 38 Stat. 692.)

§ 785. Enforcement of law prohibiting taking of sponges of specified sizes; employment of Coast Guard vessels and Customs Service employees

The Secretary of Commerce shall enforce the provisions of this chapter, and he is authorized to empower such officers and employees of the Department of Commerce as he may designate, or such officers and employees of other departments as may be detailed for the purpose, to make arrests and seize vessels and sponges, and upon his request the Secretary of the Treasury may employ the vessels of the Coast Guard or the employees of the Customs Service to that end.

(Aug. 15, 1914, ch. 253, § 5, 38 Stat. 692; Jan. 28, 1915, ch. 20, § 1, 38 Stat. 800; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1431; Aug. 4, 1949, ch. 393, § 1, 20, 63 Stat. 495, 561; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

For transfer of functions, personnel, assets, and liabilities of the United States Customs Service of the Department of the Treasury, including functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 203(l), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

“Secretary of Commerce” and “Department of Commerce” substituted in text for “Secretary of the Interior” and “Department of the Interior” in view of: creation of National Oceanic and Atmospheric Administration in Department of Commerce and Office of Administrator of such Administration; abolition of Bureau of Commercial Fisheries in Department of the Interior and Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in Secretary of the Interior or Department of the Interior which were administered through Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in the Appendix to Title 5, Government Organization and Employees.

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with cer-

tain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5.

“Coast Guard” substituted in text for “Revenue Cutter Service” on authority of act Jan. 28, 1915, which combined Revenue Cutter Service and Life-Saving Service to form Coast Guard. That act was repealed by section 20 of act Aug. 4, 1949, section 1 of which reestablished Coast Guard by enacting Title 14, Coast Guard.

Coast Guard transferred to Department of Transportation and all functions, powers, and duties, relating to Coast Guard, of Secretary of the Treasury and of other offices and officers of Department of the Treasury transferred to Secretary of Transportation by section 6(b)(1) of Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 938. See section 108 of Title 49, Transportation.

Functions of all officers of Department of the Treasury, and functions of all agencies and employees of such Department, transferred, with certain exceptions, to Secretary of the Treasury, with power vested in him to authorize their performance or performance of any of his functions, by any of such officers, agencies, and employees, by Reorg. Plan No. 26 of 1950, §§ 1, 2, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 1281, set out in the Appendix to Title 5. Customs Service, referred to in this section, was a service under Department of the Treasury, and Coast Guard, also referred to in this section, was generally a service under such Department, but such Plan excepted, from transfer, functions of Coast Guard, and of Commandant thereof, when Coast Guard was operating as a part of the Navy under sections 1 and 3 of Title 14, Coast Guard.

Reorg. Plan No. III of 1940, § 3, eff. June 30, 1940, 5 F.R. 2108, 54 Stat. 1232, set out in the Appendix to Title 5, Government Organization and Employees, consolidated Bureau of Fisheries and Bureau of Biological Survey with their respective functions into one agency in Department of the Interior to be known as Fish and Wildlife Service, and provided that functions of the consolidated agency shall be administered under direction and supervision of Secretary of the Interior.

Reorg. Plan No. II of 1930, set out in the Appendix to Title 5, transferred Bureau of Fisheries in Department of Commerce and its functions to Department of the Interior, to be administered under direction and supervision of Secretary of the Interior.

CHAPTER 12—FEDERAL REGULATION AND DEVELOPMENT OF POWER

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		828.	Facilitation of development and construction of water conservation facilities; exemption from certain Federal requirements.

- Sec.
828a. Definitions.
828b. Exemption from formula, books and records,
and project cost statement requirements;
annual charges.
828c. Applicability of this subchapter.

FINDINGS

Pub. L. 113–23, § 2, Aug. 9, 2013, 127 Stat. 493, provided that: “Congress finds that—

“(1) the hydropower industry currently employs approximately 300,000 workers across the United States;
“(2) hydropower is the largest source of clean, renewable electricity in the United States;

“(3) as of the date of enactment of this Act [Aug. 9, 2013], hydropower resources, including pumped storage facilities, provide—

“(A) nearly 7 percent of the electricity generated in the United States; and

“(B) approximately 100,000 megawatts of electric capacity in the United States;

“(4) only 3 percent of the 80,000 dams in the United States generate electricity, so there is substantial potential for adding hydropower generation to non-powered dams; and

“(5) according to one study, by utilizing currently untapped resources, the United States could add approximately 60,000 megawatts of new hydropower capacity by 2025, which could create 700,000 new jobs over the next 13 years.”

SUBCHAPTER I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

CODIFICATION

Section 212 of act of Aug. 26, 1935, ch. 687, 49 Stat. 847, provided that sections 1 to 29 of the Federal Water Power Act, as amended (sections 792, 793, 794 to 797, 798 to 818, 819, and 820 to 823 of this title) shall constitute part I of the act. Said section 212 also repealed sections 25 and 30 of the act (sections 819, 791 of this title). It also contained a proviso as follows: “That nothing in that Act, as amended, shall be construed to repeal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1921 (41 Stat. 1353 [section 797a of this title]), or the provisions of any other Act relating to national parks and national monuments.”

§ 791. Repealed. Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847

Section, act June 10, 1920, ch. 285, § 30, 41 Stat. 1077, designated the act as The Federal Water Power Act.

§ 791a. Short title

This chapter may be cited as the “Federal Power Act”.

(June 10, 1920, ch. 285, pt. III, § 321, formerly § 320, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 863; renumbered Pub. L. 95–617, title II, § 212, Nov. 9, 1978, 92 Stat. 3148.)

CODIFICATION

Section was enacted as part of part III of the Federal Power Act, and not as part of part I of that Act which comprises this subchapter.

SHORT TITLE OF 2013 AMENDMENT

Pub. L. 113–23, § 1(a), Aug. 9, 2013, 127 Stat. 493, provided that: “This Act [amending sections 798, 823a, and 2705 of this title and enacting provisions set out as notes preceding section 791 and under section 797 of this title] may be cited as the ‘Hydropower Regulatory Efficiency Act of 2013’.”

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–575, § 1, Nov. 15, 1990, 104 Stat. 2834, provided that: “This Act [enacting section 2243 of Title 42,

The Public Health and Welfare, amending sections 796 and 824a–3 of this title and sections 2014, 2061, 2201, and 2284 of Title 42, and enacting provisions set out as a note under section 796 of this title] may be cited as the ‘Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990’.”

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–473, § 1, Oct. 6, 1988, 102 Stat. 2299, provided that: “This Act [amending section 824e of this title and enacting provisions set out as notes under section 824e of this title] may be cited as the ‘Regulatory Fairness Act’.”

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–495, § 1(a), Oct. 16, 1986, 100 Stat. 1243, provided that: “This Act [enacting sections 797b and 823b of this title, amending sections 797, 800, 802, 803, 807, 808, 817, 823a, 824a–3, and 824j of this title, and enacting provisions set out as notes under sections 797, 803, 823a, 824a–3, and 825h of this title] may be cited as the ‘Electric Consumers Protection Act of 1986’.”

§ 792. Federal Power Commission; creation; number; appointment; term; qualifications; vacancies; quorum; chairman; salary; place of holding sessions

A commission is created and established to be known as the Federal Power Commission (hereinafter referred to as the “commission”) which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

The commissioners first appointed under this section, as amended, shall continue in office for terms of one, two, three, four, and five years, respectively, from June 23, 1930, the term of each to be designated by the President at the time of nomination. Their successors shall be appointed each for a term of five years from the date of the expiration of the term for which his predecessor was appointed and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioners. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. Three members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal of which judicial notice shall be taken. The

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109-58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),¹ 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

¹ So in original. Section 824e of this title does not contain a subsec. (f).

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”, “holding company”, “subsidiary company”, and “exempt wholesale generator” shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95-617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted “Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title” for “The provisions of sections 824i, 824j, and 824k of this title” and “Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “Compliance with any order of the Commission under the provisions of section 824i or 824j of this title”.

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted “section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “section 824i, 824j, or 824k of this title”.

Subsec. (f). Pub. L. 109-58, §1291(c), which directed amendment of subsec. (f) by substituting “political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,” for “political subdivision of a state,” was executed by making the substitution for “political subdivision of a State,” to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109-58, §1277(b)(1), substituted “2005” for “1935”.

1992—Subsec. (g). Pub. L. 102-486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95-617, §204(b)(1), designated existing provisions as par. (1), inserted “except as provided in paragraph (2)” after “in interstate commerce, but”, and added par. (2).

Subsec. (e). Pub. L. 95-617, §204(b)(2), inserted “(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)” after “under this subchapter”.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109-58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109-58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95-617, title II, §214, Nov. 9, 1978, 92 Stat. 3149, provided that:

“(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

“(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a-1 to 824a-3 and 825q-1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.”

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

garding formation and operation of regional transmission organizations.

§ 824o. Electric reliability

(a) Definitions

For purposes of this section:

- (1) The term “bulk-power system” means—
 - (A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and
 - (B) electric energy from generation facilities needed to maintain transmission system reliability.

The term does not include facilities used in the local distribution of electric energy.

(2) The terms “Electric Reliability Organization” and “ERO” mean the organization certified by the Commission under subsection (c) of this section the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.

(3) The term “reliability standard” means a requirement, approved by the Commission under this section, to provide for reliable operation of the bulk-power system. The term includes requirements for the operation of existing bulk-power system facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

(4) The term “reliable operation” means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.

(5) The term “Interconnection” means a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control.

(6) The term “transmission organization” means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(7) The term “regional entity” means an entity having enforcement authority pursuant to subsection (e)(4) of this section.

(8) The term “cybersecurity incident” means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communication networks including hardware, software and data that are essential to the reliable operation of the bulk power system.

(b) Jurisdiction and applicability

(1) The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824(f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

(2) The Commission shall issue a final rule to implement the requirements of this section not later than 180 days after August 8, 2005.

(c) Certification

Following the issuance of a Commission rule under subsection (b)(2) of this section, any person may submit an application to the Commission for certification as the Electric Reliability Organization. The Commission may certify one such ERO if the Commission determines that such ERO—

- (1) has the ability to develop and enforce, subject to subsection (e)(2) of this section, reliability standards that provide for an adequate level of reliability of the bulk-power system; and

- (2) has established rules that—

- (A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;

- (B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;

- (C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section (including limitations on activities, functions, or operations, or other appropriate sanctions);

- (D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and

- (E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

(d) Reliability standards

(1) The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.

(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reli-

ability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.

(3) The Electric Reliability Organization shall rebuttably presume that a proposal from a regional entity organized on an Interconnection-wide basis for a reliability standard or modification to a reliability standard to be applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.

(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.

(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

(6) The final rule adopted under subsection (b)(2) of this section shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted, approved, or ordered by the Commission until—

(A) the Commission finds a conflict exists between a reliability standard and any such provision;

(B) the Commission orders a change to such provision pursuant to section 824e of this title; and

(C) the ordered change becomes effective under this subchapter.

If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

(e) Enforcement

(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—

(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and

(B) files notice and the record of the proceeding with the Commission.

(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the ERO files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the ERO for further proceedings. The Commission shall implement expedited procedures for such hearings.

(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

(4) The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2) of this section; and

(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

(f) Changes in Electric Reliability Organization rules

The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico

The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.

(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have

more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.

(June 10, 1920, ch. 285, pt. II, §215, as added Pub. L. 109-58, title XII, §1211(a), Aug. 8, 2005, 119 Stat. 941.)

STATUS OF ERO

Pub. L. 109-58, title XII, §1211(b), Aug. 8, 2005, 119 Stat. 946, provided that: "The Electric Reliability Organization certified by the Federal Energy Regulatory Commission under section 215(c) of the Federal Power Act [16 U.S.C. 824o(c)] and any regional entity delegated enforcement authority pursuant to section 215(e)(4) of that Act [16 U.S.C. 824o(e)(4)] are not departments, agencies, or instrumentalities of the United States Government."

ACCESS APPROVALS BY FEDERAL AGENCIES

Pub. L. 109-58, title XII, §1211(c), Aug. 8, 2005, 119 Stat. 946, provided that: "Federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any Federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with any reliability standard, approved by the [Federal Energy Regulatory] Commission under section 215 of the Federal Power Act [16 U.S.C. 824o], that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities."

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the "Secretary"), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that

(2) The Administrator shall transmit such State reports, together with an analysis thereof, to Congress on or before October 1, 1975, and October 1, 1976, and biennially thereafter.

(June 30, 1948, ch. 758, title III, §305, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 853; amended Pub. L. 95-217, §52, Dec. 27, 1977, 91 Stat. 1589.)

CODIFICATION

Subsec. (a) authorized the Administrator, in cooperation with the States and Federal agencies, to prepare a report describing the specific quality, during 1973, of all navigable waters and waters of the contiguous zone, including an inventory of all point sources of discharge of pollutants into these waters, and identifying those navigable waters capable of supporting fish and wildlife populations and allowing recreational activities, those which could reasonably be expected to attain this level by 1977 or 1983, and those which could attain this level sooner, and submit this report to Congress on or before Jan. 1, 1974.

AMENDMENTS

1977—Subsec. (b)(1). Pub. L. 95-217, §52(1), substituted “April 1, 1975, and shall bring up to date by April 1, 1976, and biennially thereafter” for “January 1, 1975, and shall bring up to date each year thereafter” in provisions preceding subpar. (A).

Subsec. (b)(2). Pub. L. 95-217, §52(2), substituted “on or before October 1, 1975, and October 1, 1976, and biennially thereafter” for “on or before October 1, 1975, and annually thereafter”.

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term “standard of performance” means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term “new source” means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term “source” means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a source.

(5) The term “construction” means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
 paperboard, builders paper and board mills;
 meat product and rendering processing;
 dairy product processing;
 grain mills;
 canned and preserved fruits and vegetables processing;
 canned and preserved seafood processing;
 sugar processing;
 textile mills;
 cement manufacturing;
 feedlots;
 electroplating;
 organic chemicals manufacturing;
 inorganic chemicals manufacturing;
 plastic and synthetic materials manufacturing;
 soap and detergent manufacturing;
 fertilizer manufacturing;
 petroleum refining;
 iron and steel manufacturing;
 nonferrous metals manufacturing;
 phosphate manufacturing;
 steam electric powerplants;
 ferroalloy manufacturing;
 leather tanning and finishing;
 glass and asbestos manufacturing;
 rubber processing; and
 timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish 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 hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

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

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law

of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(June 30, 1948, ch. 758, title III, §306, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 854.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES
VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF
RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98-67, set out as a note under section 1311 of this title.

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the

Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

SAVINGS PROVISION

Section 16 of Pub. L. 91-604 provided that:

"(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91-604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

"(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

"(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter]."

FEDERAL ENERGY ADMINISTRATOR

The "Federal Energy Administrator", for purposes of this chapter, to mean the Administrator of the Federal Energy Administration established by Pub. L. 93-275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until the Federal Energy Administrator takes office and after the Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

The Federal Energy Administration was terminated and functions vested by law in the Administrator thereof were transferred to the Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6211, 6215, 7405, 7407, 7411, 7413, 7414, 7415, 7419, 7420, 7425, 7426, 7475, 7476, 7491, 7501, 7502, 7504, 7506, 7545, 7607, 7613, 7619, 7625-1, 8374, 9601 of this title.

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means—

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard—

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) of this section applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) of this section applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2) of this section) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

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

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

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supercedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(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 120 days 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 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(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.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(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 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.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of

any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations listing under subsection (b)(1)(A) of this section the categories of major stationary sources which are not on August 7, 1977, included on the list required under subsection (b)(1)(A) of this section. The Administrator shall promulgate regulations establishing standards of performance for the percentage of such categories of sources set forth in the following table before the expiration of the corresponding period set forth in such table:

Percentage of source categories required to be listed for which standards must be established:	Period by which standards must be promulgated after date list is required to be promulgated:
25	2 years.
75	3 years.
100	4 years.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.

(7) Unless later deadlines for action of the Administrator are otherwise prescribed under this section or section 7412 of this title, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(8) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demon-

strated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduc-

tion than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or op-

erator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

(July 14, 1955, ch. 360, title I, § 111, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1683, and amended Nov. 18, 1971, Pub. L. 92-157, title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, Pub. L. 95-95, title I, § 109(a)-(d)(1), (e), (f), title IV, § 401(b), 91 Stat. 697-703, 791; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(7)-(9), 91 Stat. 1399; Nov. 9, 1978, Pub. L. 95-623, § 13(a), 92 Stat. 3457.)

REFERENCES IN TEXT

Such Act, referred to in subsec. (a)(8), means Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

CODIFICATION

Section was formerly classified to section 1857c-6 of this title.

PRIOR PROVISIONS

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91-604, and is classified to section 7418 of this title.

AMENDMENTS

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95-623, § 13(a)(2), substituted “under this section” for “under subsection (b) of this section”.

Subsec. (h)(5). Pub. L. 95-623, § 13(a)(1), added par. (5).

Subsec. (j). Pub. L. 95-623, § 13(a)(3), substituted in pars. (1)(A) and (2)(A) “standards under this section” and “under this section” for “standards under subsection (b) of this section” and “under subsection (b) of this section”, respectively.

1977—Subsec. (a)(1). Pub. L. 95-95, § 109(c)(1)(A), added subpars. (A), (B), and (C), substituted “For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect” for “a standard for emissions of air pollutants which reflects”, “and the percentage reduction achievable” for “achievable”, and “technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)” for “system of emission reduction which (taking into account the cost of achieving such reduction)” in existing provisions, and inserted provision that, for the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

Subsec. (a)(7). Pub. L. 95-95, § 109(c)(1)(B), added par. (7) defining “technological system of continuous emission reduction”.

Pub. L. 95-95, § 109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95-190, § 14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95-95, § 401(b), substituted “such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger” for “such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of”.

Subsec. (b)(1)(B). Pub. L. 95-95, § 109(c)(2), substituted “shall, at least every four years, review and, if appropriate,” for “may, from time to time,”.

Subsec. (b)(5), (6). Pub. L. 95-95, § 109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-95, § 109(d)(1), struck out “(except with respect to new sources owned or operated by the United States)” after “implement and enforce such standards”.

Subsec. (d)(1). Pub. L. 95-95, § 109(b)(1), substituted “standards of performance” for “emission standards” and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95-95, § 109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95-95, § 109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95-190, § 14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted "(B)" for "(8)" as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95-95, § 109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95-95, § 109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence "publish proposed" for "propose".

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in the Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§ 102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7410, 7412, 7413, 7414, 7416, 7417, 7418, 7420, 7422, 7425, 7475, 7479, 7501, 7604, 7607, 7608, 7616, 7617, 7618, 7625-1, 9601 of this title.

§ 7412. National emission standards for hazardous air pollutants

(a) Definitions

For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may

reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

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

(3) The terms "stationary source", "modification", "owner or operator" and "existing source" shall have the same meaning as such terms have under section 7411(a) of this title.

(b) List of hazardous air pollutants; emission standards; pollution control techniques

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutant subject to the provisions of this section.

(c) Prohibited acts; exemption

(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

“(4) submit a report on the study and responsibilities of the Administrator under paragraphs (1) through (3) to—

“(A) the Committee on Energy and Commerce of the House of Representatives; and

“(B) the Committee on Environment and Public Works of the Senate.

“SEC. 6103. OZONE DESIGNATION REQUIREMENTS.

“(a) The Governors shall be required to submit the designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] within 2 years following the promulgation of the July 1997 ozone national ambient air quality standards.

“(b) The Administrator shall promulgate final designations no later than 1 year after the designations required under subsection (a) are required to be submitted.

“SEC. 6104. ADDITIONAL PROVISIONS.

“Nothing in sections 6101 through 6103 shall be construed by the Administrator of Environmental Protection Agency or any court, State, or person to affect any pending litigation or to be a ratification of the ozone or PM_{2.5} standards.”

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO₂ over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitroamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

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 November 15, 1990,¹ 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. Such guidelines shall include information on—

- (1) methods to identify and evaluate alternative planning and control activities;
- (2) methods of reviewing plans on a regular basis as conditions change or new information is presented;
- (3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;
- (4) methods to assure participation by the public in all phases of the planning process; and
- (5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 1990, and from time to time thereafter—

(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;
- (vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;

(xi) programs to control extended idling of vehicles;

(xii) programs to reduce motor vehicle emissions, consistent with subchapter II of this chapter, which are caused by extreme cold start conditions;

(xiii) employer-sponsored programs to permit flexible work schedules;

(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;

(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and

(xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.²

(B) information on additional methods or strategies that will contribute to the reduction of mobile source related pollutants during periods in which any primary ambient air quality standard will be exceeded and during episodes for which an air pollution alert, warning, or emergency has been declared;

(C) information on other measures which may be employed to reduce the impact on public health or protect the health of sensitive or susceptible individuals or groups; and

(D) information on the extent to which any process, procedure, or method to reduce or control such air pollutant may cause an increase in the emissions or formation of any other pollutant.

(2) In publishing such information the Administrator shall also include an assessment of—

(A) the relative effectiveness of such processes, procedures, and methods;

(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

¹ See Codification note below.

² So in original. The period probably should be a semicolon.

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(h) RACT/BACT/LAER clearinghouse

The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.

(July 14, 1955, ch. 360, title I, § 108, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1678; amended Pub. L. 95-95, title I, §§ 104, 105, title IV, § 401(a), Aug. 7, 1977, 91 Stat. 689, 790; Pub. L. 101-549, title I, §§ 108(a)-(c), (o), 111, Nov. 15, 1990, 104 Stat. 2465, 2466, 2469, 2470; Pub. L. 105-362, title XV, § 1501(b), Nov. 10, 1998, 112 Stat. 3294.)

CODIFICATION

November 15, 1990, referred to in subsec. (e), was in the original "enactment of the Clean Air Act Amendments of 1989", and was translated as meaning the date of the enactment of Pub. L. 101-549, popularly known as the Clean Air Act Amendments of 1990, to reflect the probable intent of Congress.

Section was formerly classified to section 1857c-3 of this title.

PRIOR PROVISIONS

A prior section 108 of act July 14, 1955, was renumbered section 115 by Pub. L. 91-604 and is classified to section 7415 of this title.

AMENDMENTS

1998—Subsec. (f)(3), (4). Pub. L. 105-362 struck out par. (3), which required reports by the Secretary of Transportation and the Administrator to be submitted to Congress by Jan. 1, 1993, and every 3 years thereafter, reviewing and analyzing existing State and local air quality related transportation programs, evaluating achievement of goals, and recommending changes to existing programs, and par. (4), which required that in each report after the first report the Secretary of Transportation include a description of the actions taken to implement the changes recommended in the preceding report.

1990—Subsec. (e). Pub. L. 101-549, § 108(a), inserted first sentence and struck out former first sentence which read as follows: "The Administrator shall, after consultation with the Secretary of Transportation and the Secretary of Housing and Urban Development and State and local officials and within 180 days after August 7, 1977, and from time to time thereafter, publish guidelines on the basic program elements for the planning process assisted under section 7505 of this title."

Subsec. (f)(1). Pub. L. 101-549, § 108(b), in introductory provisions, substituted present provisions for provisions relating to Federal agencies, States, and air pollution control agencies within either 6 months or one year after Aug. 7, 1977.

Subsec. (f)(1)(A). Pub. L. 101-549, § 108(b), substituted present provisions for provisions relating to information prepared in cooperation with Secretary of Transportation, regarding processes, procedures, and methods to reduce certain pollutants.

Subsec. (f)(3), (4). Pub. L. 101-549, § 111, added pars. (3) and (4).

Subsec. (g). Pub. L. 101-549, § 108(o), added subsec. (g). Subsec. (h). Pub. L. 101-549, § 108(c), added subsec. (h). 1977—Subsec. (a)(1)(A). Pub. L. 95-95, § 401(a), substituted "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" for "which in his judgment has an adverse effect on public health or welfare".

Subsec. (b)(1). Pub. L. 95-95, § 104(a), substituted "cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology" for "technology and costs of emission control".

Subsec. (c). Pub. L. 95-95, § 104(b), inserted provision directing the Administrator, not later than six months after Aug. 7, 1977, to revise and reissue criteria relating to concentrations of NO₂ over such period (not more than three hours) as he deems appropriate, with the criteria to include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

Subsecs. (e), (f). Pub. L. 95-95, § 105, added subsecs. (e) and (f).

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO₂ concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

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

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy

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

(July 14, 1955, ch. 360, title I, §109, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1679; amended Pub. L. 95-95, title I, §106, Aug. 7, 1977, 91 Stat. 691.)

CODIFICATION

Section was formerly classified to section 1857c-4 of this title.

PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91-604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95-95, §106(b), added subsec. (c).

Subsec. (d). Pub. L. 95-95, §106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101-549, title VIII, §817, Nov. 15, 1990, 104 Stat. 2697, provided that:

“(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

“(1) include information on the effects on welfare and the environment which are caused by ambient

concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

“(2) estimate welfare and environmental costs incurred as a result of such effects;

“(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

“(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

“(5) estimate the costs and other impacts of meeting secondary standards; and

“(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

“(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

“(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

“(3) There are authorized to be appropriated such sums as are necessary to carry out this section.”

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations

or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental

Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)¹ of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)¹ of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

¹ See References in Text note below.

(C) For purposes of this paragraph, the term “indirect source” means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term “indirect source review program” means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term “transportation control measure” does not include any measure which is an “indirect source review program”.

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)¹ of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term “parking surcharge regulation” means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term “management of parking supply” shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term “preferential bus/carpool lane” shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall in-

clude a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

- (i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and
- (ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101-549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

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

- (A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and
- (B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

- (A) there exists in the vicinity of such source a temporary energy emergency involv-

ing high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10² of this title, as in effect before August 7, 1977, or section 7413(d)² of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

- (A) meets the requirements of this section, and
- (B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if

² See References in Text note below.

he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10² of this title as in effect before August 7, 1977, or under section 7413(d)² of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)² of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must

meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(I) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect

to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses**(1) Existing plan provisions**

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section

7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development³ effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

(July 14, 1955, ch. 360, title I, § 110, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1680; amended Pub. L. 93-319, § 4, June 22, 1974, 88 Stat. 256; Pub. L. 95-95, title I, §§ 107, 108, Aug. 7, 1977, 91 Stat. 691, 693; Pub. L. 95-190, § 14(a)(1)–(6), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 97-23, § 3, July 17, 1981, 95 Stat. 142; Pub. L. 101-549, title I, §§ 101(b)–(d), 102(h), 107(c), 108(d), title IV, § 412, Nov. 15, 1990, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a)(3)(B), is Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsecs. (a)(3)(C), (6), (f)(5), (g)(3), and (i), was amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsecs. (d) and (e) of section 7413 no longer relates to final compliance orders and steel industry compliance extension, respectively.

Section 1857c-10 of this title, as in effect before August 7, 1977, referred to in subsecs. (f)(5) and (g)(3), was in the original “section 119, as in effect before the date of the enactment of this paragraph”, meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, § 3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of subsecs. (f)(5) and (g)(3) of this section by Pub. L. 95-95, § 107, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to section 7413(d)(5) of this title. Section 7413 of this title was subsequently amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, see note above. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

³ So in original. Probably should be followed by a comma.

CODIFICATION

Section was formerly classified to section 1857c-5 of this title.

PRIOR PROVISIONS

A prior section 110 of act July 14, 1955, was renumbered section 117 by Pub. L. 91-604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, § 101(d)(8), substituted “3 years (or such shorter period as the Administrator may prescribe)” for “nine months” in two places.

Subsec. (a)(2). Pub. L. 101-549, § 101(b), amended par. (2) generally, substituting present provisions for provisions setting the time within which the Administrator was to approve or disapprove a plan or portion thereof and listing the conditions under which the plan or portion thereof was to be approved after reasonable notice and hearing.

Subsec. (a)(3)(A). Pub. L. 101-549, § 101(d)(1), struck out subpar. (A) which directed Administrator to approve any revision of an implementation plan if it met certain requirements and had been adopted by the State after reasonable notice and public hearings.

Subsec. (a)(3)(D). Pub. L. 101-549, § 101(d)(1), struck out subpar. (D) which directed that certain implementation plans be revised to include comprehensive measures and requirements.

Subsec. (a)(4). Pub. L. 101-549, § 101(d)(2), struck out par. (4) which set forth requirements for review procedure.

Subsec. (c)(1). Pub. L. 101-549, § 102(h), amended par. (1) generally, substituting present provisions for provisions relating to preparation and publication of regulations setting forth an implementation plan, after opportunity for a hearing, upon failure of a State to make required submission or revision.

Subsec. (c)(2)(A). Pub. L. 101-549, § 101(d)(3)(A), struck out subpar. (A) which required a study and report on necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations to achieve and maintain national primary ambient air quality standards.

Subsec. (c)(2)(C). Pub. L. 101-549, § 101(d)(3)(B), struck out subpar. (C) which authorized suspension of certain regulations and requirements relating to management of parking supply.

Subsec. (c)(4). Pub. L. 101-549, § 101(d)(3)(C), struck out par. (4) which permitted Governors to temporarily suspend measures in implementation plans relating to retrofits, gas rationing, and reduction of on-street parking.

Subsec. (c)(5)(B). Pub. L. 101-549, § 101(d)(3)(D), struck out “(including the written evidence required by part D),” after “include comprehensive measures”.

Subsec. (d). Pub. L. 101-549, § 101(d)(4), struck out subsec. (d) which defined an applicable implementation plan for purposes of this chapter.

Subsec. (e). Pub. L. 101-549, § 101(d)(5), struck out subsec. (e) which permitted an extension of time for attainment of a national primary ambient air quality standard.

Subsec. (f)(1). Pub. L. 101-549, § 412, inserted “or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets)” in subpar. (A) and in last sentence.

Subsec. (g)(1). Pub. L. 101-549, § 101(d)(6), substituted “12 months of submission of the proposed plan revision” for “the required four month period” in closing provisions.

Subsec. (h)(1). Pub. L. 101-549, § 101(d)(7), substituted “5 years after November 15, 1990, and every three years thereafter” for “one year after August 7, 1977, and annually thereafter” and struck out at end “Each such document shall be revised as frequently as practicable but not less often than annually.”

Subsecs. (k) to (n). Pub. L. 101-549, § 101(c), added subsecs. (k) to (n).

Subsec. (o). Pub. L. 101-549, §107(c), added subsec. (o).
Subsec. (p). Pub. L. 101-549, §108(d), added subsec. (p).
1981—Subsec. (a)(3)(C). Pub. L. 97-23 inserted reference to extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations).

1977—Subsec. (a)(2)(A). Pub. L. 95-95, §108(a)(1), substituted “(A) except as may be provided in subparagraph (I)(i) in the case of a plan” for “(A)(i) in the case of a plan”.

Subsec. (a)(2)(B). Pub. L. 95-95, §108(a)(2), substituted “transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)” for “land use and transportation controls”.

Subsec. (a)(2)(D). Pub. L. 95-95, §108(a)(3), substituted “it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure” for “it includes a procedure”.

Subsec. (a)(2)(E). Pub. L. 95-95, §108(a)(4), substituted “it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement” for “it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region”.

Subsec. (a)(2)(F). Pub. L. 95-95, §108(a)(5), added cl. (vi).

Subsec. (a)(2)(H). Pub. L. 95-190, §14(a)(1), substituted “1977;” for “1977”.

Pub. L. 95-95, §108(a)(6), inserted “except as provided in paragraph (3)(C),” after “or (ii)” and “or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977” after “to achieve the national ambient air quality primary or secondary standard which it implements”.

Subsec. (a)(2)(I). Pub. L. 95-95, §108(b), added subpar. (I).

Subsec. (a)(2)(J). Pub. L. 95-190, §14(a)(2), substituted “; and” for “, and”.

Pub. L. 95-95, §108(b), added subpar. (J).

Subsec. (a)(2)(K). Pub. L. 95-95, §108(b) added subpar. (K).

Subsec. (a)(3)(C). Pub. L. 95-95, §108(c), added subpar. (C).

Subsec. (a)(3)(D). Pub. L. 95-190, §14(a)(4), added subpar. (D).

Subsec. (a)(5). Pub. L. 95-95, §108(e), added par. (5).

Subsec. (a)(5)(D). Pub. L. 95-190, §14(a)(3), struck out “preconstruction or premodification” before “review”.

Subsec. (a)(6). Pub. L. 95-95, §108(e), added par. (6).

Subsec. (c)(1). Pub. L. 95-95, §108(d)(1), (2), substituted “plan which meets the requirements of this section” for “plan for any national ambient air quality primary or secondary standard within the time prescribed” in subpar. (A) and, in provisions following subpar. (C), directed that any portion of a plan relating to any measure described in first sentence of 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title not be required to be promulgated before the date eight months after such date required for submission.

Subsec. (c)(3) to (5). Pub. L. 95-95, §108(d)(3), added pars. (3) to (5).

Subsec. (d). Pub. L. 95-95, §108(f), substituted “and which implements the requirements of this section” for “and which implements a national primary or secondary ambient air quality standard in a State”.

Subsec. (f). Pub. L. 95-95, §107(a), substituted provisions relating to the handling of national or regional energy emergencies for provisions relating to the postponement of compliance by stationary sources or classes of moving sources with any requirement of applicable implementation plans.

Subsec. (g). Pub. L. 95-95, §108(g), added subsec. (g) relating to publication of comprehensive document.

Pub. L. 95-95, §107(b), added subsec. (g) relating to Governor’s authority to issue temporary emergency suspensions.

Subsec. (h). Pub. L. 95-190, §14(a)(5), redesignated subsec. (g), added by Pub. L. 95-95, §108(g), as (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 95-190, §14(a)(5), redesignated subsec. (h), added by Pub. L. 95-95, §108(g), as (i). Former subsec. (i) redesignated (j) and amended.

Subsec. (j). Pub. L. 95-190 §14(a)(5), (6), redesignated subsec. (i), added by Pub. L. 95-95, §108(g), as (j) and in subsec. (j) as so redesignated, substituted “will enable such source” for “at such source will enable it”.

1974—Subsec. (a)(3). Pub. L. 93-319, §4(a), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (c). Pub. L. 93-319, §4(b), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C), respectively, of such redesignated par. (1), and added par. (2).

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

MODIFICATION OR RESCISSION OF IMPLEMENTATION PLANS APPROVED AND IN EFFECT PRIOR TO AUG. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub. L. 95-95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SAVINGS PROVISION

Pub. L. 91-604, §16, Dec. 31, 1970, 84 Stat. 1713, provided that:

“(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91-604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

“(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

“(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter].”

FEDERAL ENERGY ADMINISTRATOR

“Federal Energy Administrator”, for purposes of this chapter, to mean Administrator of Federal Energy Administration established by Pub. L. 93-275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until Federal Energy Administrator takes office and after Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

Federal Energy Administration terminated and functions vested by law in Administrator thereof transferred to Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term “new source” means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed reg-

ulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term “stationary source” means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term “existing source” means any stationary source other than a new source.

(7) The term “technological system of continuous emission reduction” means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supercedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)¹ of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(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,

¹ See References in Text note below.

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)¹ 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.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(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 cri-

teria 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.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase “not feasible to prescribe or enforce a standard of performance” means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of

this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

(July 14, 1955, ch. 360, title I, § 111, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1683; amended Pub. L. 92-157, title III, § 302(f), Nov. 18, 1971, 85 Stat. 464; Pub. L. 95-95, title I, § 109(a)-(d)(1), (e), (f), title IV, § 401(b), Aug. 7, 1977, 91 Stat. 697-703, 791; Pub. L. 95-190, § 14(a)(7)-(9), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 95-623, § 13(a), Nov. 9, 1978, 92 Stat. 3457; Pub. L.

101-549, title I, §108(e)-(g), title III, §302(a), (b), title IV, §403(a), Nov. 15, 1990, 104 Stat. 2467, 2574, 2631.)

REFERENCES IN TEXT

Such Act, referred to in subsec. (a)(8), means Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsec. (a)(8), was amended generally by Pub. L. 101-549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

Subsection (a)(1) of this section, referred to in subsec. (b)(6), was amended generally by Pub. L. 101-549, title VII, §403(a), Nov. 15, 1990, 104 Stat. 2631, and, as so amended, no longer contains subpars.

CODIFICATION

Section was formerly classified to section 1857c-6 of this title.

PRIOR PROVISIONS

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91-604 and is classified to section 7418 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, §403(a), amended par. (1) generally, substituting provisions defining “standard of performance” with respect to any air pollutant for provisions defining such term with respect to subsec. (b) fossil fuel fired and other stationary sources and subsec. (d) particular sources.

Subsec. (a)(3). Pub. L. 101-549, §108(f), inserted at end “Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.”

Subsec. (b)(1)(B). Pub. L. 101-549, §108(e)(1), substituted “Within one year” for “Within 120 days”, “within one year” for “within 90 days”, and “every 8 years” for “every four years”, inserted before last sentence “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.”, and inserted at end “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.”

Subsec. (d)(1)(A)(i). Pub. L. 101-549, §302(a), which directed the substitution of “7412(b)” for “7412(b)(1)(A)”, could not be executed, because of the prior amendment by Pub. L. 101-549, §108(g), see below.

Pub. L. 101-549, §108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A)”.

Subsec. (f)(1). Pub. L. 101-549, §108(e)(2), amended par. (1) generally, substituting present provisions for provisions requiring the Administrator to promulgate regulations listing the categories of major stationary sources not on the required list by Aug. 7, 1977, and regulations establishing standards of performance for such categories.

Subsec. (g)(5) to (8). Pub. L. 101-549, §302(b), redesignated par. (7) as (5) and struck out “or section 7412 of this title” after “this section”, redesignated par. (8) as (6), and struck out former pars. (5) and (6) which read as follows:

“(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

“(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.”

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95-623, §13(a)(2), substituted “under this section” for “under subsection (b) of this section”.

Subsec. (h)(5). Pub. L. 95-623, §13(a)(1), added par. (5).

Subsec. (j). Pub. L. 95-623, §13(a)(3), substituted in pars. (1)(A) and (2)(A) “standards under this section” and “under this section” for “standards under subsection (b) of this section” and “under subsection (b) of this section”, respectively.

1977—Subsec. (a)(1). Pub. L. 95-95, §109(c)(1)(A), added subpars. (A), (B), and (C), substituted “For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect” for “a standard for emissions of air pollutants which reflects”, “and the percentage reduction achievable” for “achievable”, and “technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)” for “system of emission reduction which (taking into account the cost of achieving such reduction)” in existing provisions, and inserted provision that, for the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

Subsec. (a)(7). Pub. L. 95-95, §109(c)(1)(B), added par. (7) defining “technological system of continuous emission reduction”.

Pub. L. 95-95, §109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95-190, §14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95-95, §401(b), substituted “such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger” for “such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of”.

Subsec. (b)(1)(B). Pub. L. 95-95, §109(c)(2), substituted “shall, at least every four years, review and, if appropriate,” for “may, from time to time.”.

Subsec. (b)(5), (6). Pub. L. 95-95, §109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-95, §109(d)(1), struck out “(except with respect to new sources owned or operated by the United States)” after “implement and enforce such standards”.

Subsec. (d)(1). Pub. L. 95-95, §109(b)(1), substituted “standards of performance” for “emission standards” and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95-95, §109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the

sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95-95, §109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95-190, §14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted “(B)” for “(8)” as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95-95, §109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95-95, §109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence “publish proposed” for “propose”.

EFFECTIVE DATE OF 1977 AMENDMENT

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

REGULATIONS

Pub. L. 101-549, title IV, §403(b), (c), Nov. 15, 1990, 104 Stat. 2631, provided that:

“(b) REVISED REGULATIONS.—Not later than three years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], the Administrator shall promulgate revised regulations for standards of performance for new fossil fuel fired electric utility units commencing construction after the date on which such regulations are proposed that, at a minimum, require any source subject to such revised standards to emit sulfur dioxide at a rate not greater than would have resulted from compliance by such source with the applicable standards of performance under this section [amending sections 7411 and 7479 of this title] prior to such revision.

“(c) APPLICABILITY.—The provisions of subsections (a) [amending this section] and (b) apply only so long as the provisions of section 403(e) of the Clean Air Act [42 U.S.C. 7651b(e)] remain in effect.”

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L.

95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

POWER SECTOR CARBON POLLUTION STANDARDS

Memorandum of President of the United States, June 25, 2013, 78 F.R. 39535, provided:

Memorandum for the Administrator of the Environmental Protection Agency

With every passing day, the urgency of addressing climate change intensifies. I made clear in my State of the Union address that my Administration is committed to reducing carbon pollution that causes climate change, preparing our communities for the consequences of climate change, and speeding the transition to more sustainable sources of energy.

The Environmental Protection Agency (EPA) has already undertaken such action with regard to carbon pollution from the transportation sector, issuing Clean Air Act standards limiting the greenhouse gas emissions of new cars and light trucks through 2025 and heavy duty trucks through 2018. The EPA standards were promulgated in conjunction with the Department of Transportation, which, at the same time, established fuel efficiency standards for cars and trucks as part of a harmonized national program. Both agencies engaged constructively with auto manufacturers, labor unions, States, and other stakeholders, and the resulting standards have received broad support. These standards will reduce the Nation's carbon pollution and dependence on oil, and also lead to greater innovation, economic growth, and cost savings for American families.

The United States now has the opportunity to address carbon pollution from the power sector, which produces nearly 40 percent of such pollution. As a country, we can continue our progress in reducing power plant pollution, thereby improving public health and protecting the environment, while supplying the reliable, affordable power needed for economic growth and advancing cleaner energy technologies, such as efficient natural gas, nuclear power, renewables such as wind and solar energy, and clean coal technology.

Investments in these technologies will also strengthen our economy, as the clean and efficient production and use of electricity will ensure that it remains reliable and affordable for American businesses and families.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce power plant carbon pollution, building on actions already underway in States and the power sector, I hereby direct the following:

SECTION 1. *Flexible Carbon Pollution Standards for Power Plants.* (a) Carbon Pollution Standards for Future Power Plants. On April 13, 2012, the EPA published a Notice of Proposed Rulemaking entitled “Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units,” 77 Fed. Reg. 22392. In light of the information conveyed in more than two million comments on that proposal and ongoing developments in the industry, you have indicated EPA's intention to issue a new proposal. I therefore direct you to issue a new proposal by

no later than September 20, 2013. I further direct you to issue a final rule in a timely fashion after considering all public comments, as appropriate.

(b) *Carbon Pollution Regulation for Modified, Reconstructed, and Existing Power Plants.* To ensure continued progress in reducing harmful carbon pollution, I direct you to use your authority under sections 111(b) and 111(d) of the Clean Air Act to issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector. In addition, I request that you:

(i) issue proposed carbon pollution standards, regulations, or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2014;

(ii) issue final standards, regulations, or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2015; and

(iii) include in the guidelines addressing existing power plants a requirement that States submit to EPA the implementation plans required under section 111(d) of the Clean Air Act and its implementing regulations by no later than June 30, 2016.

(c) *Development of Standards, Regulations, or Guidelines for Power Plants.* In developing standards, regulations, or guidelines pursuant to subsection (b) of this section, and consistent with Executive Orders 12866 of September 30, 1993, as amended, and 13563 of January 18, 2011, you shall ensure, to the greatest extent possible, that you:

(i) launch this effort through direct engagement with States, as they will play a central role in establishing and implementing standards for existing power plants, and, at the same time, with leaders in the power sector, labor leaders, non-governmental organizations, other experts, tribal officials, other stakeholders, and members of the public, on issues informing the design of the program;

(ii) consistent with achieving regulatory objectives and taking into account other relevant environmental regulations and policies that affect the power sector, tailor regulations and guidelines to reduce costs;

(iii) develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities;

(iv) ensure that the standards enable continued reliance on a range of energy sources and technologies;

(v) ensure that the standards are developed and implemented in a manner consistent with the continued provision of reliable and affordable electric power for consumers and businesses; and

(vi) work with the Department of Energy and other Federal and State agencies to promote the reliable and affordable provision of electric power through the continued development and deployment of cleaner technologies and by increasing energy efficiency, including through stronger appliance efficiency standards and other measures.

SEC. 2. *General Provisions.* (a) This memorandum shall be implemented consistent with applicable law, including international trade obligations, and subject to the availability of appropriations.

(b) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to a department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) You are hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 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.¹ 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

¹ See References in Text note below.

CAS number	Chemical name
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-Dichlorobenzidine
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)

CAS number	Chemical name
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	Polycyclic 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.

¹X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or Ca(CN)₂.

²Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-(OCH₂CH₂)_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-(OCH₂CH₂)_n-OH. Polymers are excluded from the glycol category.

³Includes 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.

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

⁵A 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 defects² 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

² So in original. Probably should be "effects".

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 develop-

ments 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. 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.

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that—

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) Priorities

In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider—

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on—

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources,

any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of

this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that—

(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture

such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if—

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a

compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emis-

sions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7414 of this title.

(D) For each source granted an alternative emission limitation under this paragraph there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed—

(A) best available control technology (as defined in section 7479(3) of this title), or

(B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The Administrator may issue such rules and guidance as are necessary to implement this paragraph.

(7) Extension for new sources

A source for which construction or reconstruction is commenced after the date an emission standard applicable to such source is proposed pursuant to subsection (d) of this section but before the date an emission standard applicable to such source is proposed pursuant

to subsection (f) of this section shall not be required to comply with the emission standard under subsection (f) of this section until the date 10 years after the date construction or reconstruction is commenced.

(8) Coke ovens

(A) Any coke oven battery that complies with the emission limitations established under subsection (d)(8)(C) of this section, subparagraph (B), and subparagraph (C), and complies with the provisions of subparagraph (E), shall not be required to achieve emission limitations promulgated under subsection (f) of this section until January 1, 2020.

(B)(i) Not later than December 31, 1992, the Administrator shall promulgate emission limitations for coke oven emissions from coke oven batteries. Notwithstanding paragraph (3) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 1998. Such emission limitations shall reflect the lowest achievable emission rate as defined in section 7501 of this title for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than—

- (I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);
- (II) 1 per centum leaking lids;
- (III) 4 per centum leaking offtakes; and
- (IV) 16 seconds visible emissions per charge,

with an exclusion for emissions during the period after the closing of self-sealing oven doors (or the total mass emissions equivalent). The rulemaking in which such emission limitations are promulgated shall also establish an appropriate measurement methodology for determining compliance with such emission limitations, and shall establish such emission limitations in terms of an equivalent level of mass emissions reduction from a coke oven battery, unless the Administrator finds that such a mass emissions standard would not be practicable or enforceable. Such measurement methodology, to the extent it measures leaking doors, shall take into consideration alternative test methods that reflect the best technology and practices actually applied in the affected industries, and shall assure that the final test methods are consistent with the performance of such best technology and practices.

(ii) If the Administrator fails to promulgate such emission limitations under this subparagraph prior to the effective date of such emission limitations, the emission limitations applicable to coke oven batteries under this subparagraph shall be—

- (I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);
- (II) 1 per centum leaking lids;
- (III) 4 per centum leaking offtakes; and
- (IV) 16 seconds visible emissions per charge,

or the total mass emissions equivalent (if the total mass emissions equivalent is determined to be practicable and enforceable), with no ex-

clusion for emissions during the period after the closing of self-sealing oven doors.

(C) Not later than January 1, 2007, the Administrator shall review the emission limitations promulgated under subparagraph (B) and revise, as necessary, such emission limitations to reflect the lowest achievable emission rate as defined in section 7501 of this title at the time for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than the emission limitations promulgated under subparagraph (B). Notwithstanding paragraph (2) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 2010.

(D) At any time prior to January 1, 1998, the owner or operator of any coke oven battery may elect to comply with emission limitations promulgated under subsection (f) of this section by the date such emission limitations would otherwise apply to such coke oven battery, in lieu of the emission limitations and the compliance dates provided under subparagraphs (B) and (C) of this paragraph. Any such owner or operator shall be legally bound to comply with such emission limitations promulgated under subsection (f) of this section with respect to such coke oven battery as of January 1, 2003. If no such emission limitations have been promulgated for such coke oven battery, the Administrator shall promulgate such emission limitations in accordance with subsection (f) of this section for such coke oven battery.

(E) Coke oven batteries qualifying for an extension under subparagraph (A) shall make available not later than January 1, 2000, to the surrounding communities the results of any risk assessment performed by the Administrator to determine the appropriate level of any emission standard established by the Administrator pursuant to subsection (f) of this section.

(F) Notwithstanding the provisions of this section, reconstruction of any source of coke oven emissions qualifying for an extension under this paragraph shall not subject such source to emission limitations under subsection (f) of this section more stringent than those established under subparagraphs (B) and (C) until January 1, 2020. For the purposes of this subparagraph, the term “reconstruction” includes the replacement of existing coke oven battery capacity with new coke oven batteries of comparable or lower capacity and lower potential emissions.

(j) Equivalent emission limitation by permit

(1) Effective date

The requirements of this subsection shall apply in each State beginning on the effective date of a permit program established pursuant to subchapter V of this chapter in such State, but not prior to the date 42 months after November 15, 1990.

(2) Failure to promulgate a standard

In the event that the Administrator fails to promulgate a standard for a category or sub-

category of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning 18 months after such date (but not prior to the effective date of a permit program under subchapter V of this chapter), the owner or operator of any major source in such category or subcategory shall submit a permit application under paragraph (3) and such owner or operator shall also comply with paragraphs (5) and (6).

(3) Applications

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit. If the owner or operator of a source has submitted a timely and complete application for a permit required by this subsection, any failure to have a permit shall not be a violation of paragraph (2), unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application. The Administrator shall not later than 18 months after November 15, 1990, and after notice and opportunity for comment, establish requirements for applications under this subsection including a standard application form and criteria for determining in a timely manner the completeness of applications.

(4) Review and approval

Permit applications submitted under this subsection shall be reviewed and approved or disapproved according to the provisions of section 7661d of this title. In the event that the Administrator (or the State) disapproves a permit application submitted under this subsection or determines that the application is incomplete, the applicant shall have up to 6 months to revise the application to meet the objections of the Administrator (or the State).

(5) Emission limitation

The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d) of this section. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of subsection (i)(5) of this section. For purposes of the preceding sentence, the reduction required by subsection (i)(5)(A) of this section shall be achieved by the date on which the relevant standard should have been promulgated under subsection (d) of this section. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i) of this section.

(6) Applicability of subsequent standards

If the Administrator promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to paragraph (5), provided that the source shall have the compliance period provided under subsection (i) of this section. If the Administrator promulgates a standard under subsection (d) of this section that would be applicable to the source in lieu of the emission limitation established by permit under this subsection after the date on which the permit has been issued, the Administrator (or the State) shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator providing such source a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the emissions limitation established by paragraph (5), whichever is earlier.

(k) Area source program

(1) Findings and purpose

The Congress finds that emissions of hazardous air pollutants from area sources may individually, or in the aggregate, present significant risks to public health in urban areas. Considering the large number of persons exposed and the risks of carcinogenic and other adverse health effects from hazardous air pollutants, ambient concentrations characteristic of large urban areas should be reduced to levels substantially below those currently experienced. It is the purpose of this subsection to achieve a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources.

(2) Research program

The Administrator shall, after consultation with State and local air pollution control officials, conduct a program of research with respect to sources of hazardous air pollutants in urban areas and shall include within such program—

(A) ambient monitoring for a broad range of hazardous air pollutants (including, but not limited to, volatile organic compounds, metals, pesticides and products of incomplete combustion) in a representative number of urban locations;

(B) analysis to characterize the sources of such pollution with a focus on area sources and the contribution that such sources make to public health risks from hazardous air pollutants; and

(C) consideration of atmospheric transformation and other factors which can elevate public health risks from such pollutants.

Health effects considered under this program shall include, but not be limited to, carcino-

genicity, mutagenicity, teratogenicity, neurotoxicity, reproductive dysfunction and other acute and chronic effects including the role of such pollutants as precursors of ozone or acid aerosol formation. The Administrator shall report the preliminary results of such research not later than 3 years after November 15, 1990.

(3) National strategy

(A) Considering information collected pursuant to the monitoring program authorized by paragraph (2), the Administrator shall, not later than 5 years after November 15, 1990, and after notice and opportunity for public comment, prepare and transmit to the Congress a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas.

(B) The strategy shall—

(i) identify not less than 30 hazardous air pollutants which, as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas and that are or will be listed pursuant to subsection (b) of this section, and

(ii) identify the source categories or subcategories emitting such pollutants that are or will be listed pursuant to subsection (c) of this section. When identifying categories and subcategories of sources under this subparagraph, the Administrator shall assure that sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified hazardous air pollutants are subject to standards pursuant to subsection (d) of this section.

(C) The strategy shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this or other laws (including, but not limited to, the Toxic Substances Control Act [15 U.S.C. 2601 et seq.], the Federal Insecticide, Fungicide and Rodenticide Act [7 U.S.C. 136 et seq.] and the Resource Conservation and Recovery Act [42 U.S.C. 6901 et seq.]) or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants emitted by stationary sources of not less than 75 per centum, considering control of emissions of hazardous air pollutants from all stationary sources and resulting from measures implemented by the Administrator or by the States under this or other laws.

(D) The strategy may also identify research needs in monitoring, analytical methodology, modeling or pollution control techniques and recommendations for changes in law that would further the goals and objectives of this subsection.

(E) Nothing in this subsection shall be interpreted to preclude or delay implementation of actions with respect to area sources of hazardous air pollutants under consideration pursuant to this or any other law and that may be promulgated before the strategy is prepared.

(F) The Administrator shall implement the strategy as expeditiously as practicable assur-

ing that all sources are in compliance with all requirements not later than 9 years after November 15, 1990.

(G) As part of such strategy the Administrator shall provide for ambient monitoring and emissions modeling in urban areas as appropriate to demonstrate that the goals and objectives of the strategy are being met.

(4) Areawide activities

In addition to the national urban air toxics strategy authorized by paragraph (3), the Administrator shall also encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area. From the funds available for grants under this section, the Administrator shall set aside not less than 10 per centum to support areawide strategies addressing hazardous air pollutants emitted by area sources and shall award such funds on a demonstration basis to those States with innovative and effective strategies. At the request of State or local air pollution control officials, the Administrator shall prepare guidelines for control technologies or management practices which may be applicable to various categories or subcategories of area sources.

(5) Report

The Administrator shall report to the Congress at intervals not later than 8 and 12 years after November 15, 1990, on actions taken under this subsection and other parts of this chapter to reduce the risk to public health posed by the release of hazardous air pollutants from area sources. The reports shall also identify specific metropolitan areas that continue to experience high risks to public health as the result of emissions from area sources.

(I) State programs

(1) In general

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

(2) Guidance

Not later than 12 months after November 15, 1990, the Administrator shall publish guidance that would be useful to the States in developing programs for submittal under this subsection. The guidance shall also provide for the registration of all facilities producing, processing, handling or storing any substance listed pursuant to subsection (r) of this section

in amounts greater than the threshold quantity. The Administrator shall include as an element in such guidance an optional program begun in 1986 for the review of high-risk point sources of air pollutants including, but not limited to, hazardous air pollutants listed pursuant to subsection (b) of this section.

(3) Technical assistance

The Administrator shall establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies and, on a cost recovery basis, to others on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring. The Administrator shall use the authority of section 7403 of this title to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Where appropriate, such activity shall be conducted with not-for-profit organizations. The Administrator may conduct research on methods for preventing, measuring and controlling emissions and evaluating associated health and environment risks. All information collected under this paragraph shall be available to the public.

(4) Grants

Upon application of a State, the Administrator may make grants, subject to such terms and conditions as the Administrator deems appropriate, to such State for the purpose of assisting the State in developing and implementing a program for submittal and approval under this subsection. Programs assisted under this paragraph may include program elements addressing air pollutants or extremely hazardous substances other than those specifically subject to this section. Grants under this paragraph may include support for high-risk point source review as provided in paragraph (2) and support for the development and implementation of areawide area source programs pursuant to subsection (k) of this section.

(5) Approval or disapproval

Not later than 180 days after receiving a program submitted by a State, and after notice and opportunity for public comment, the Administrator shall either approve or disapprove such program. The Administrator shall disapprove any program submitted by a State, if the Administrator determines that—

(A) the authorities contained in the program are not adequate to assure compliance by all sources within the State with each applicable standard, regulation or requirement established by the Administrator under this section;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the Administrator under paragraph (2) or is not

likely to satisfy, in whole or in part, the objectives of this chapter.

If the Administrator disapproves a State program, the Administrator shall notify the State of any revisions or modifications necessary to obtain approval. The State may revise and resubmit the proposed program for review and approval pursuant to the provisions of this subsection.

(6) Withdrawal

Whenever the Administrator determines, after public hearing, that a State is not administering and enforcing a program approved pursuant to this subsection in accordance with the guidance published pursuant to paragraph (2) or the requirements of paragraph (5), the Administrator shall so notify the State and, if action which will assure prompt compliance is not taken within 90 days, the Administrator shall withdraw approval of the program. The Administrator shall not withdraw approval of any program unless the State shall have been notified and the reasons for withdrawal shall have been stated in writing and made public.

(7) Authority to enforce

Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section.

(8) Local program

The Administrator may, after notice and opportunity for public comment, approve a program developed and submitted by a local air pollution control agency (after consultation with the State) pursuant to this subsection and any such agency implementing an approved program may take any action authorized to be taken by a State under this section.

(9) Permit authority

Nothing in this subsection shall affect the authorities and obligations of the Administrator or the State under subchapter V of this chapter.

(m) Atmospheric deposition to Great Lakes and coastal waters

(1) Deposition assessment

The Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall conduct a program to identify and assess the extent of atmospheric deposition of hazardous air pollutants (and in the discretion of the Administrator, other air pollutants) to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters. As part of such program, the Administrator shall—

(A) monitor the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters, including monitoring of the Great Lakes through the monitoring network established pursuant to paragraph (2) of this subsection and designing and deploying an atmospheric monitoring network for coastal waters pursuant to paragraph (4);

(B) investigate the sources and deposition rates of atmospheric deposition of air pollutants (and their atmospheric transformation precursors);

(C) conduct research to develop and improve monitoring methods and to determine the relative contribution of atmospheric pollutants to total pollution loadings to the Great Lakes, the Chesapeake Bay, Lake Champlain, and coastal waters;

(D) evaluate any adverse effects to public health or the environment caused by such deposition (including effects resulting from indirect exposure pathways) and assess the contribution of such deposition to violations of water quality standards established pursuant to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] and drinking water standards established pursuant to the Safe Drinking Water Act [42 U.S.C. 300f et seq.]; and

(E) sample for such pollutants in biota, fish, and wildlife of the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters and characterize the sources of such pollutants.

(2) Great Lakes monitoring network

The Administrator shall oversee, in accordance with Annex 15 of the Great Lakes Water Quality Agreement, the establishment and operation of a Great Lakes atmospheric deposition network to monitor atmospheric deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) to the Great Lakes.

(A) As part of the network provided for in this paragraph, and not later than December 31, 1991, the Administrator shall establish in each of the 5 Great Lakes at least 1 facility capable of monitoring the atmospheric deposition of hazardous air pollutants in both dry and wet conditions.

(B) The Administrator shall use the data provided by the network to identify and track the movement of hazardous air pollutants through the Great Lakes, to determine the portion of water pollution loadings attributable to atmospheric deposition of such pollutants, and to support development of remedial action plans and other management plans as required by the Great Lakes Water Quality Agreement.

(C) The Administrator shall assure that the data collected by the Great Lakes atmospheric deposition monitoring network is in a format compatible with databases sponsored by the International Joint Commission, Canada, and the several States of the Great Lakes region.

(3) Monitoring for the Chesapeake Bay and Lake Champlain

The Administrator shall establish at the Chesapeake Bay and Lake Champlain atmospheric deposition stations to monitor deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) within the Chesapeake Bay and Lake Champlain watersheds. The Administrator shall determine the role of air deposition in the pollutant loadings of the Chesapeake Bay and Lake Champlain, investigate the sources of air pollutants deposited in the watersheds, evaluate the health and environmental effects of such pollutant loadings, and shall sample

such pollutants in biota, fish and wildlife within the watersheds, as necessary to characterize such effects.

(4) Monitoring for coastal waters

The Administrator shall design and deploy atmospheric deposition monitoring networks for coastal waters and their watersheds and shall make any information collected through such networks available to the public. As part of this effort, the Administrator shall conduct research to develop and improve deposition monitoring methods, and to determine the relative contribution of atmospheric pollutants to pollutant loadings. For purposes of this subsection, "coastal waters" shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C. 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of—

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal waters cause or contribute to exceedances of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C. 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] or, with respect to the Great Lakes, exceedances of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with at-

mospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements promulgated pursuant to this paragraph with respect to coastal waters shall only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(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. 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 sections³ 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. 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.

(o) National Academy of Sciences study

(1) Request of the Academy

Within 3 months of November 15, 1990, the Administrator shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of—

(A) risk assessment methodology used by the Environmental Protection Agency to de-

termine the carcinogenic risk associated with exposure to hazardous air pollutants from source categories and subcategories subject to the requirements of this section; and

(B) improvements in such methodology.

(2) Elements to be studied

In conducting such review, the National Academy of Sciences should consider, but not be limited to, the following—

(A) the techniques used for estimating and describing the carcinogenic potency to humans of hazardous air pollutants; and

(B) the techniques used for estimating exposure to hazardous air pollutants (for hypothetical and actual maximally exposed individuals as well as other exposed individuals).

(3) Other health effects of concern

To the extent practicable, the Academy shall evaluate and report on the methodology for assessing the risk of adverse human health effects other than cancer for which safe thresholds of exposure may not exist, including, but not limited to, inheritable genetic mutations, birth defects, and reproductive dysfunctions.

(4) Report

A report on the results of such review shall be submitted to the Senate Committee on Environment and Public Works, the House Committee on Energy and Commerce, the Risk Assessment and Management Commission established by section 303 of the Clean Air Act Amendments of 1990 and the Administrator not later than 30 months after November 15, 1990.

(5) Assistance

The Administrator shall assist the Academy in gathering any information the Academy deems necessary to carry out this subsection. The Administrator may use any authority under this chapter to obtain information from any person, and to require any person to conduct tests, keep and produce records, and make reports respecting research or other activities conducted by such person as necessary to carry out this subsection.

(6) Authorization

Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out this subsection.

(7) Guidelines for carcinogenic risk assessment

The Administrator shall consider, but need not adopt, the recommendations contained in the report of the National Academy of Sciences prepared pursuant to this subsection and the views of the Science Advisory Board, with respect to such report. Prior to the promulgation of any standard under subsection (f) of this section, and after notice and opportunity for comment, the Administrator shall publish revised Guidelines for Carcinogenic Risk Assessment or a detailed explanation of the reasons that any recommendations contained in the report of the National Academy of Sciences will not be implemented. The publica-

³ So in original. Probably should be "section".

tion of such revised Guidelines shall be a final Agency action for purposes of section 7607 of this title.

(p) Mickey Leland National Urban Air Toxics Research Center

(1) Establishment

The Administrator shall oversee the establishment of a National Urban Air Toxics Research Center, to be located at a university, a hospital, or other facility capable of undertaking and maintaining similar research capabilities in the areas of epidemiology, oncology, toxicology, pulmonary medicine, pathology, and biostatistics. The center shall be known as the Mickey Leland National Urban Air Toxics Research Center. The geographic site of the National Urban Air Toxics Research Center should be further directed to Harris County, Texas, in order to take full advantage of the well developed scientific community presence on-site at the Texas Medical Center as well as the extensive data previously compiled for the comprehensive monitoring system currently in place.

(2) Board of Directors

The National Urban Air Toxics Research Center shall be governed by a Board of Directors to be comprised of 9 members, the appointment of which shall be allocated pro rata among the Speaker of the House, the Majority Leader of the Senate and the President. The members of the Board of Directors shall be selected based on their respective academic and professional backgrounds and expertise in matters relating to public health, environmental pollution and industrial hygiene. The duties of the Board of Directors shall be to determine policy and research guidelines, submit views from center sponsors and the public and issue periodic reports of center findings and activities.

(3) Scientific Advisory Panel

The Board of Directors shall be advised by a Scientific Advisory Panel, the 13 members of which shall be appointed by the Board, and to include eminent members of the scientific and medical communities. The Panel membership may include scientists with relevant experience from the National Institute of Environmental Health Sciences, the Center for Disease Control, the Environmental Protection Agency, the National Cancer Institute, and others, and the Panel shall conduct peer review and evaluate research results. The Panel shall assist the Board in developing the research agenda, reviewing proposals and applications, and advise on the awarding of research grants.

(4) Funding

The center shall be established and funded with both Federal and private source funds.

(q) Savings provision

(1) Standards previously promulgated

Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990] shall remain in force and effect after such date

unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments. Except as provided in paragraph (4), any standard under this section which has been promulgated, but has not taken effect, before such date shall not be affected by such Amendments unless modified as provided in this section before such date or under such Amendments. Each such standard shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) of this section within 10 years after the date of enactment of the Clean Air Act Amendments of 1990. If a timely petition for review of any such standard under section 7607 of this title is pending on such date of enactment, the standard shall be upheld if it complies with this section as in effect before that date. If any such standard is remanded to the Administrator, the Administrator may in the Administrator's discretion apply either the requirements of this section, or those of this section as in effect before the date of enactment of the Clean Air Act Amendments of 1990.

(2) Special rule

Notwithstanding paragraph (1), no standard shall be established under this section, as amended by the Clean Air Act Amendments of 1990, for radionuclide emissions from (A) elemental phosphorous plants, (B) grate calcination elemental phosphorous plants, (C) phosphogypsum stacks, or (D) any subcategory of the foregoing. This section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from such plants and stacks.

(3) Other categories

Notwithstanding paragraph (1), this section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from non-Department of Energy Federal facilities that are not licensed by the Nuclear Regulatory Commission, coal-fired utility and industrial boilers, underground uranium mines, surface uranium mines, and disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

(4) Medical facilities

Notwithstanding paragraph (1), no standard promulgated under this section prior to November 15, 1990, with respect to medical research or treatment facilities shall take effect for two years following November 15, 1990, unless the Administrator makes a determination pursuant to a rulemaking under subsection (d)(9) of this section. If the Administrator determines that the regulatory program established by the Nuclear Regulatory Commission for such facilities does not provide an ample margin of safety to protect public health, the requirements of this section shall fully apply to such facilities. If the Administrator deter-

mines that such regulatory program does provide an ample margin of safety to protect the public health, the Administrator is not required to promulgate a standard under this section for such facilities, as provided in subsection (d)(9) of this section.

(r) Prevention of accidental releases

(1) Purpose and general duty

It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph. Nothing in this section shall be interpreted, construed, implied or applied to create any liability or basis for suit for compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases of such substances.

(2) Definitions

(A) The term "accidental release" means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

(B) The term "regulated substance" means a substance listed under paragraph (3).

(C) The term "stationary source" means any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.

(D) The term "retail facility" means a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.

(3) List of substances

The Administrator shall promulgate not later than 24 months after November 15, 1990, an initial list of 100 substances which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment. For purposes of promulgating such list, the Administrator shall use, but is not limited to, the list of extremely hazardous substances published under the Emergency Planning and Commu-

nity Right-to-Know⁴ Act of 1986 [42 U.S.C. 11001 et seq.], with such modifications as the Administrator deems appropriate. The initial list shall include chlorine, anhydrous ammonia, methyl chloride, ethylene oxide, vinyl chloride, methyl isocyanate, hydrogen cyanide, ammonia, hydrogen sulfide, toluene diisocyanate, phosgene, bromine, anhydrous hydrogen chloride, hydrogen fluoride, anhydrous sulfur dioxide, and sulfur trioxide. The initial list shall include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases. Regulations establishing the list shall include an explanation of the basis for establishing the list. The list may be revised from time to time by the Administrator on the Administrator's own motion or by petition and shall be reviewed at least every 5 years. No air pollutant for which a national primary ambient air quality standard has been established shall be included on any such list. No substance, practice, process, or activity regulated under subchapter VI of this chapter shall be subject to regulations under this subsection. The Administrator shall establish procedures for the addition and deletion of substances from the list established under this paragraph consistent with those applicable to the list in subsection (b) of this section.

(4) Factors to be considered

In listing substances under paragraph (3), the Administrator—

(A) shall consider—

(i) the severity of any acute adverse health effects associated with accidental releases of the substance;

(ii) the likelihood of accidental releases of the substance; and

(iii) the potential magnitude of human exposure to accidental releases of the substance; and

(B) shall not list a flammable substance when used as a fuel or held for sale as a fuel at a retail facility under this subsection solely because of the explosive or flammable properties of the substance, unless a fire or explosion caused by the substance will result in acute adverse health effects from human exposure to the substance, including the unburned fuel or its combustion byproducts, other than those caused by the heat of the fire or impact of the explosion.

(5) Threshold quantity

At the time any substance is listed pursuant to paragraph (3), the Administrator shall establish by rule, a threshold quantity for the substance, taking into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance and the amount of the substance which, as a result of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health for which the substance was listed. The Administrator is authorized to establish a

⁴So in original. Probably should be "Right-To-Know".

greater threshold quantity for, or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer.

(6) Chemical Safety Board

(A) There is hereby established an independent safety board to be known as the Chemical Safety and Hazard Investigation Board.

(B) The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation. The terms of office of members of the Board shall be 5 years. Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairperson shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.

(C) The Board shall—

(i) investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages;

(ii) issue periodic reports to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible and may include in such reports proposed rules or orders which should be issued by the Administrator under the authority of this section or the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C. 651 et seq.] to prevent or minimize the consequences of any release of substances that may cause death, injury or other serious adverse effects on human health or substantial property damage as the result of an accidental release; and

(iii) establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

(D) The Board may utilize the expertise and experience of other agencies.

(E) The Board shall coordinate its activities with investigations and studies conducted by

other agencies of the United States having a responsibility to protect public health and safety. The Board shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead agency for the investigation of releases which are transportation related. The Board shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate. The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities. In no event shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.

(F) The Board is authorized to conduct research and studies with respect to the potential for accidental releases, whether or not an accidental release has occurred, where there is evidence which indicates the presence of a potential hazard or hazards. To the extent practicable, the Board shall conduct such studies in cooperation with other Federal agencies having emergency response authorities, State and local governmental agencies and associations and organizations from the industrial, commercial, and nonprofit sectors.

(G) No part of the conclusions, findings, or recommendations of the Board relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages arising out of any matter mentioned in such report.

(H) Not later than 18 months after November 15, 1990, the Board shall publish a report accompanied by recommendations to the Administrator on the use of hazard assessments in preventing the occurrence and minimizing the consequences of accidental releases of extremely hazardous substances. The recommendations shall include a list of extremely hazardous substances which are not regulated substances (including threshold quantities for such substances) and categories of stationary sources for which hazard assessments would be an appropriate measure to aid in the prevention of accidental releases and to minimize the consequences of those releases that do occur. The recommendations shall also include a description of the information and analysis which would be appropriate to include in any hazard assessment. The Board shall also make recommendations with respect to the role of risk management plans as required by paragraph (8)(B)⁵ in preventing accidental releases. The Board may from time to time review and revise its recommendations under this subparagraph.

(I) Whenever the Board submits a recommendation with respect to accidental releases to the Administrator, the Administrator shall respond to such recommendation formally and

⁵ So in original. Probably should be paragraph "(7)(B)".

in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Administrator will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;⁶

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Administrator not to implement a recommendation of the Board or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Administrator setting forth the reasons for such determination.

(J) The Board may make recommendations with respect to accidental releases to the Secretary of Labor. Whenever the Board submits such recommendation, the Secretary shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator⁷ shall indicate whether the Secretary will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;⁶

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Secretary not to implement a recommendation or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Secretary setting forth the reasons for such determination.

(K) Within 2 years after November 15, 1990, the Board shall issue a report to the Administrator of the Environmental Protection Agency and to the Administrator of the Occupational Safety and Health Administration recommending the adoption of regulations for the preparation of risk management plans and general requirements for the prevention of accidental releases of regulated substances into the ambient air (including recommendations for listing substances under paragraph (3)) and for the mitigation of the potential adverse effect on human health or the environment as a result of accidental releases which should be applicable to any stationary source handling any regulated substance in more than threshold amounts. The Board may include proposed rules or orders which should be issued by the Administrator under authority of this subsection or by the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C. 651 et seq.]. Any such recommendations shall be specific and shall identify the regulated substance or class of regulated substances (or

other substances) to which the recommendations apply. The Administrator shall consider such recommendations before promulgating regulations required by paragraph (7)(B).

(L) The Board, or upon authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board, may for the purpose of carrying out duties authorized by subparagraph (C)—

(i) hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence and may require by order that any person engaged in the production, processing, handling, or storage of extremely hazardous substances submit written reports and responses to requests and questions within such time and in such form as the Board may require; and

(ii) upon presenting appropriate credentials and a written notice of inspection authority, enter any property where an accidental release causing a fatality, serious injury or substantial property damage has occurred and do all things therein necessary for a proper investigation pursuant to subparagraph (C) and inspect at reasonable times records, files, papers, processes, controls, and facilities and take such samples as are relevant to such investigation.

Whenever the Administrator or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the Occupational Safety and Health Act [29 U.S.C. 651 et seq.].

(M) In addition to that described in subparagraph (L), the Board may use any information gathering authority of the Administrator under this chapter, including the subpoena power provided in section 7607(a)(1) of this title.

(N) The Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties. The Board is authorized without regard to section 6101 of title 41 to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person.

(O) After the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii) it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The Administrator is authorized to enforce any regulation or requirements established by the Board pursuant to subparagraph (C)(iii) using the authorities of sections 7413 and 7414 of this title. Any request for information from the owner or operator of a stationary source made by the Board or by the Administrator under this section shall be treated, for purposes of sections 7413, 7414, 7416, 7420, 7603, 7604 and 7607 of this title and any other enforcement provisions of this chap-

⁶ So in original. The word "or" probably should appear.

⁷ So in original. The word "Administrator" probably should be "Secretary".

ter, as a request made by the Administrator under section 7414 of this title and may be enforced by the Chairperson of the Board or by the Administrator as provided in such section.

(P) The Administrator shall provide to the Board such support and facilities as may be necessary for operation of the Board.

(Q) Consistent with subsection⁸ (G) and section 7414(c) of this title any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person's competitive position, the Board shall consider such record, report, or information or particular portion thereof confidential in accordance with section 1905 of title 18, except that such record, report, or information may be disclosed to other officers, employees, and authorized representatives of the United States concerned with carrying out this chapter or when relevant under any proceeding under this chapter. This subparagraph does not constitute authority to withhold records, reports, or information from the Congress.

(R) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget request, or other budget information, legislative recommendation, prepared testimony for congressional hearings, recommendation or study to the President, the Secretary of Labor, the Administrator, or the Director of the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No report of the Board shall be subject to review by the Administrator or any Federal agency or to judicial review in any court. No officer or agency of the United States shall have authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony, comments, recommendations or reports to any officer or agency of the United States for approval or review prior to the submission of such recommendations, testimony, comments or reports to the Congress. In the performance of their functions as established by this chapter, the members, officers and employees of the Board shall not be responsible to or subject to supervision or direction, in carrying out any duties under this subsection, of any officer or employee or agent of the Environmental Protection Agency, the Department of Labor or any other agency of the United States except that the President may remove any member, officer or employee of the Board for inefficiency, neglect of duty or malfeasance in office. Nothing in this section shall affect the application of title 5 to officers or employees of the Board.

(S) The Board shall submit an annual report to the President and to the Congress which shall include, but not be limited to, information on accidental releases which have been

investigated by or reported to the Board during the previous year, recommendations for legislative or administrative action which the Board has made, the actions which have been taken by the Administrator or the Secretary of Labor or the heads of other agencies to implement such recommendations, an identification of priorities for study and investigation in the succeeding year, progress in the development of risk-reduction technologies and the response to and implementation of significant research findings on chemical safety in the public and private sector.

(7) Accident prevention

(A) In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source. Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.

(B)(i) Within 3 years after November 15, 1990, the Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases. The Administrator shall utilize the expertise of the Secretaries of Transportation and Labor in promulgating such regulations. As appropriate, such regulations shall cover the use, operation, repair, replacement, and maintenance of equipment to monitor, detect, inspect, and control such releases, including training of persons in the use and maintenance of such equipment and in the conduct of periodic inspections. The regulations shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment. The regulations shall cover storage, as well as operations. The regulations shall, as appropriate, recognize differences in size, operations, processes, class and categories of sources and the voluntary actions of such sources to prevent such releases and respond to such releases. The regulations shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later.

(ii) The regulations under this subparagraph shall require the owner or operator of station-

⁸ So in original. Probably should be "subparagraph".

any sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment. Such plan shall provide for compliance with the requirements of this subsection and shall also include each of the following:

(I) a hazard assessment to assess the potential effects of an accidental release of any regulated substance. This assessment shall include an estimate of potential release quantities and a determination of downwind effects, including potential exposures to affected populations. Such assessment shall include a previous release history of the past 5 years, including the size, concentration, and duration of releases, and shall include an evaluation of worst case accidental releases;

(II) a program for preventing accidental releases of regulated substances, including safety precautions and maintenance, monitoring and employee training measures to be used at the source; and

(III) a response program providing for specific actions to be taken in response to an accidental release of a regulated substance so as to protect human health and the environment, including procedures for informing the public and local agencies responsible for responding to accidental releases, emergency health care, and employee training measures.

At the time regulations are promulgated under this subparagraph, the Administrator shall promulgate guidelines to assist stationary sources in the preparation of risk management plans. The guidelines shall, to the extent practicable, include model risk management plans.

(iii) The owner or operator of each stationary source covered by clause (ii) shall register a risk management plan prepared under this subparagraph with the Administrator before the effective date of regulations under clause (i) in such form and manner as the Administrator shall, by rule, require. Plans prepared pursuant to this subparagraph shall also be submitted to the Chemical Safety and Hazard Investigation Board, to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source, and shall be available to the public under section 7414(c) of this title. The Administrator shall establish, by rule, an auditing system to regularly review and, if necessary, require revision in risk management plans to assure that the plans comply with this subparagraph. Each such plan shall be updated periodically as required by the Administrator, by rule.

(C) Any regulations promulgated pursuant to this subsection shall to the maximum extent practicable, consistent with this subsection, be consistent with the recommendations and standards established by the Amer-

ican Society of Mechanical Engineers (ASME), the American National Standards Institute (ANSI) or the American Society of Testing Materials (ASTM). The Administrator shall take into consideration the concerns of small business in promulgating regulations under this subsection.

(D) In carrying out the authority of this paragraph, the Administrator shall consult with the Secretary of Labor and the Secretary of Transportation and shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the Occupational Safety and Health Administration or the Department of Transportation. Nothing in this subsection shall be interpreted, construed or applied to impose requirements affecting, or to grant the Administrator, the Chemical Safety and Hazard Investigation Board, or any other agency any authority to regulate (including requirements for hazard assessment), the accidental release of radionuclides arising from the construction and operation of facilities licensed by the Nuclear Regulatory Commission.

(E) After the effective date of any regulation or requirement imposed under this subsection, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement. Each regulation or requirement under this subsection shall for purposes of sections 7413, 7414, 7416, 7420, 7604, and 7607 of this title and other enforcement provisions of this chapter, be treated as a standard in effect under subsection (d) of this section.

(F) Notwithstanding the provisions of subchapter V of this chapter or this section, no stationary source shall be required to apply for, or operate pursuant to, a permit issued under such subchapter solely because such source is subject to regulations or requirements under this subsection.

(G) In exercising any authority under this subsection, the Administrator shall not, for purposes of section 653(b)(1) of title 29, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(H) PUBLIC ACCESS TO OFF-SITE CONSEQUENCE ANALYSIS INFORMATION.—

(i) DEFINITIONS.—In this subparagraph:

(I) COVERED PERSON.—The term “covered person” means—

(aa) an officer or employee of the United States;

(bb) an officer or employee of an agent or contractor of the Federal Government;

(cc) an officer or employee of a State or local government;

(dd) an officer or employee of an agent or contractor of a State or local government;

(ee) an individual affiliated with an entity that has been given, by a State or local government, responsibility for preventing, planning for, or responding to accidental releases;

(ff) an officer or employee or an agent or contractor of an entity described in item (ee); and

(gg) a qualified researcher under clause (vii).

(II) OFFICIAL USE.—The term “official use” means an action of a Federal, State, or local government agency or an entity referred to in subclause (I)(ee) intended to carry out a function relevant to preventing, planning for, or responding to accidental releases.

(III) OFF-SITE CONSEQUENCE ANALYSIS INFORMATION.—The term “off-site consequence analysis information” means those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios, and any electronic data base created by the Administrator from those portions.

(IV) RISK MANAGEMENT PLAN.—The term “risk management plan” means a risk management plan submitted to the Administrator by an owner or operator of a stationary source under subparagraph (B)(iii).

(ii) REGULATIONS.—Not later than 1 year after August 5, 1999, the President shall—

(I) assess—

(aa) the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet; and

(bb) the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases; and

(II) based on the assessment under subclause (I), promulgate regulations governing the distribution of off-site consequence analysis information in a manner that, in the opinion of the President, minimizes the likelihood of accidental releases and the risk described in subclause (I)(aa) and the likelihood of harm to public health and welfare, and—

(aa) allows access by any member of the public to paper copies of off-site consequence analysis information for a limited number of stationary sources located anywhere in the United States, without any geographical restriction;

(bb) allows other public access to off-site consequence analysis information as appropriate;

(cc) allows access for official use by a covered person described in any of items (cc) through (ff) of clause (i)(I) (referred to in this subclause as a “State or local covered person”) to off-site consequence analysis information relating to stationary sources located in the person’s State;

(dd) allows a State or local covered person to provide, for official use, off-site consequence analysis information relating to stationary sources located in the person’s State to a State or local covered person in a contiguous State; and

(ee) allows a State or local covered person to obtain for official use, by re-

quest to the Administrator, off-site consequence analysis information that is not available to the person under item (cc).

(iii) AVAILABILITY UNDER FREEDOM OF INFORMATION ACT.—

(I) FIRST YEAR.—Off-site consequence analysis information, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of title 5 during the 1-year period beginning on August 5, 1999.

(II) AFTER FIRST YEAR.—If the regulations under clause (ii) are promulgated on or before the end of the period described in subclause (I), off-site consequence analysis information covered by the regulations, and any ranking of stationary sources derived from the information, shall not be made available under section 552 of title 5 after the end of that period.

(III) APPLICABILITY.—Subclauses (I) and (II) apply to off-site consequence analysis information submitted to the Administrator before, on, or after August 5, 1999.

(iv) AVAILABILITY OF INFORMATION DURING TRANSITION PERIOD.—The Administrator shall make off-site consequence analysis information available to covered persons for official use in a manner that meets the requirements of items (cc) through (ee) of clause (ii)(II), and to the public in a form that does not make available any information concerning the identity or location of stationary sources, during the period—

(I) beginning on August 5, 1999; and

(II) ending on the earlier of the date of promulgation of the regulations under clause (ii) or the date that is 1 year after August 5, 1999.

(v) PROHIBITION ON UNAUTHORIZED DISCLOSURE OF INFORMATION BY COVERED PERSONS.—

(I) IN GENERAL.—Beginning on August 5, 1999, a covered person shall not disclose to the public off-site consequence analysis information in any form, or any statewide or national ranking of identified stationary sources derived from such information, except as authorized by this subparagraph (including the regulations promulgated under clause (ii)). After the end of the 1-year period beginning on August 5, 1999, if regulations have not been promulgated under clause (ii), the preceding sentence shall not apply.

(II) CRIMINAL PENALTIES.—Notwithstanding section 7413 of this title, a covered person that willfully violates a restriction or prohibition established by this subparagraph (including the regulations promulgated under clause (ii)) shall, upon conviction, be fined for an infraction under section 3571 of title 18 (but shall not be subject to imprisonment) for each unauthorized disclosure of off-site consequence analysis information, except that subsection (d) of such section 3571 shall not apply to a case in which the offense results in pecuniary loss unless the defendant knew that such loss would occur. The dis-

closure of off-site consequence analysis information for each specific stationary source shall be considered a separate offense. The total of all penalties that may be imposed on a single person or organization under this item shall not exceed \$1,000,000 for violations committed during any 1 calendar year.

(III) APPLICABILITY.—If the owner or operator of a stationary source makes off-site consequence analysis information relating to that stationary source available to the public without restriction—

(aa) subclauses (I) and (II) shall not apply with respect to the information; and

(bb) the owner or operator shall notify the Administrator of the public availability of the information.

(IV) LIST.—The Administrator shall maintain and make publicly available a list of all stationary sources that have provided notification under subclause (III)(bb).

(vi) NOTICE.—The Administrator shall provide notice of the definition of official use as provided in clause (i)(III)⁹ and examples of actions that would and would not meet that definition, and notice of the restrictions on further dissemination and the penalties established by this chapter to each covered person who receives off-site consequence analysis information under clause (iv) and each covered person who receives off-site consequence analysis information for an official use under the regulations promulgated under clause (ii).

(vii) QUALIFIED RESEARCHERS.—

(I) IN GENERAL.—Not later than 180 days after August 5, 1999, the Administrator, in consultation with the Attorney General, shall develop and implement a system for providing off-site consequence analysis information, including facility identification, to any qualified researcher, including a qualified researcher from industry or any public interest group.

(II) LIMITATION ON DISSEMINATION.—The system shall not allow the researcher to disseminate, or make available on the Internet, the off-site consequence analysis information, or any portion of the off-site consequence analysis information, received under this clause.

(viii) READ-ONLY INFORMATION TECHNOLOGY SYSTEM.—In consultation with the Attorney General and the heads of other appropriate Federal agencies, the Administrator shall establish an information technology system that provides for the availability to the public of off-site consequence analysis information by means of a central data base under the control of the Federal Government that contains information that users may read, but that provides no means by which an electronic or mechanical copy of the information may be made.

(ix) VOLUNTARY INDUSTRY ACCIDENT PREVENTION STANDARDS.—The Environmental

Protection Agency, the Department of Justice, and other appropriate agencies may provide technical assistance to owners and operators of stationary sources and participate in the development of voluntary industry standards that will help achieve the objectives set forth in paragraph (1).

(x) EFFECT ON STATE OR LOCAL LAW.—

(I) IN GENERAL.—Subject to subclause (II), this subparagraph (including the regulations promulgated under this subparagraph) shall supersede any provision of State or local law that is inconsistent with this subparagraph (including the regulations).

(II) AVAILABILITY OF INFORMATION UNDER STATE LAW.—Nothing in this subparagraph precludes a State from making available data on the off-site consequences of chemical releases collected in accordance with State law.

(xi) REPORT.—

(I) IN GENERAL.—Not later than 3 years after August 5, 1999, the Attorney General, in consultation with appropriate State, local, and Federal Government agencies, affected industry, and the public, shall submit to Congress a report that describes the extent to which regulations promulgated under this paragraph have resulted in actions, including the design and maintenance of safe facilities, that are effective in detecting, preventing, and minimizing the consequences of releases of regulated substances that may be caused by criminal activity. As part of this report, the Attorney General, using available data to the extent possible, and a sampling of covered stationary sources selected at the discretion of the Attorney General, and in consultation with appropriate State, local, and Federal governmental agencies, affected industry, and the public, shall review the vulnerability of covered stationary sources to criminal and terrorist activity, current industry practices regarding site security, and security of transportation of regulated substances. The Attorney General shall submit this report, containing the results of the review, together with recommendations, if any, for reducing vulnerability of covered stationary sources to criminal and terrorist activity, to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate and other relevant committees of Congress.

(II) INTERIM REPORT.—Not later than 12 months after August 5, 1999, the Attorney General shall submit to the Committee on Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate, and other relevant committees of Congress, an interim report that includes, at a minimum—

(aa) the preliminary findings under subclause (I);

(bb) the methods used to develop the findings; and

⁹ So in original. Probably should be “(i)(II)”.

(cc) an explanation of the activities expected to occur that could cause the findings of the report under subclause (I) to be different than the preliminary findings.

(III) AVAILABILITY OF INFORMATION.—Information that is developed by the Attorney General or requested by the Attorney General and received from a covered stationary source for the purpose of conducting the review under subclauses (I) and (II) shall be exempt from disclosure under section 552 of title 5 if such information would pose a threat to national security.

(xii) SCOPE.—This subparagraph—

(I) applies only to covered persons; and

(II) does not restrict the dissemination of off-site consequence analysis information by any covered person in any manner or form except in the form of a risk management plan or an electronic data base created by the Administrator from off-site consequence analysis information.

(xiii) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Administrator and the Attorney General such sums as are necessary to carry out this subparagraph (including the regulations promulgated under clause (ii)), to remain available until expended.

(8) Research on hazard assessments

The Administrator may collect and publish information on accident scenarios and consequences covering a range of possible events for substances listed under paragraph (3). The Administrator shall establish a program of long-term research to develop and disseminate information on methods and techniques for hazard assessment which may be useful in improving and validating the procedures employed in the preparation of hazard assessments under this subsection.

(9) Order authority

(A) In addition to any other action taken, when the Administrator determines that there may be an imminent and substantial endangerment to the human health or welfare or the environment because of an actual or threatened accidental release of a regulated substance, the Administrator may secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The Administrator may also, after notice to the State in which the stationary source is located, take other action under this paragraph including, but not limited to, issuing such orders as may be necessary to protect human health. The Administrator shall take action under section 7603 of this title rather than this paragraph whenever the authority of such section is adequate to protect human health and the environment.

(B) Orders issued pursuant to this paragraph may be enforced in an action brought in the appropriate United States district court as if

the order were issued under section 7603 of this title.

(C) Within 180 days after November 15, 1990, the Administrator shall publish guidance for using the order authorities established by this paragraph. Such guidance shall provide for the coordinated use of the authorities of this paragraph with other emergency powers authorized by section 9606 of this title, sections 311(c), 308, 309 and 504(a) of the Federal Water Pollution Control Act [33 U.S.C. 1321(c), 1318, 1319, 1364(a)], sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act [42 U.S.C. 6927, 6928, 6934, 6973], sections 1445 and 1431 of the Safe Drinking Water Act [42 U.S.C. 300j-4, 300i], sections 5 and 7 of the Toxic Substances Control Act [15 U.S.C. 2604, 2606], and sections 7413, 7414, and 7603 of this title.

(10) Presidential review

The President shall conduct a review of release prevention, mitigation and response authorities of the various Federal agencies and shall clarify and coordinate agency responsibilities to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources which may exist. The President may utilize the resources and solicit the recommendations of the Chemical Safety and Hazard Investigation Board in conducting such review. At the conclusion of such review, but not later than 24 months after November 15, 1990, the President shall transmit a message to the Congress on the release prevention, mitigation and response activities of the Federal Government making such recommendations for change in law as the President may deem appropriate. Nothing in this paragraph shall be interpreted, construed or applied to authorize the President to modify or reassign release prevention, mitigation or response authorities otherwise established by law.

(11) State authority

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

(s) Periodic report

Not later than January 15, 1993 and every 3 years thereafter, the Administrator shall prepare and transmit to the Congress a comprehensive report on the measures taken by the Agency and by the States to implement the provisions of this section. The Administrator shall maintain a database on pollutants 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) of this section;

(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.

(July 14, 1955, ch. 360, title I, §112, as added Pub. L. 91-604, §4(a), Dec. 31, 1970, 84 Stat. 1685; amended Pub. L. 95-95, title I, §§109(d)(2), 110, title IV, §401(c), Aug. 7, 1977, 91 Stat. 701, 703, 791; Pub. L. 95-623, §13(b), Nov. 9, 1978, 92 Stat. 3458; Pub. L. 101-549, title III, §301, Nov. 15, 1990, 104 Stat. 2531; Pub. L. 102-187, Dec. 4, 1991, 105 Stat. 1285; Pub. L. 105-362, title IV, §402(b), Nov. 10, 1998, 112 Stat. 3283; Pub. L. 106-40, §§2, 3(a), Aug. 5, 1999, 113 Stat. 207, 208.)

REFERENCES IN TEXT

The date of enactment, referred to in subsec. (a)(11), probably means the date of enactment of Pub. L. 101-549, which amended this section generally and was approved Nov. 15, 1990.

The Atomic Energy Act, referred to in subsec. (d)(9), probably means the Atomic Energy Act of 1954, act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 919, which is classified principally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsecs. (e)(5) and (m)(1)(D), (5)(D), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. Title II of the Act is classified generally to subchapter II (§1281 et seq.) of chapter 26 of Title 33. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Toxic Substances Control Act, referred to in subsec. (k)(3)(C), is Pub. L. 94-469, Oct. 11, 1976, 90 Stat. 2003, as amended, which is classified generally to chapter 53 (§2601 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of Title 15 and Tables.

The Federal Insecticide, Fungicide and Rodenticide Act, referred to in subsec. (k)(3)(C), probably means the Federal Insecticide, Fungicide, and Rodenticide Act, act June 25, 1947, ch. 125, as amended generally by Pub. L. 92-516, Oct. 21, 1972, 86 Stat. 973, which is classified generally to subchapter II (§136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

The Resource Conservation and Recovery Act, referred to in subsec. (k)(3)(C), probably means the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, Oct. 21, 1976, 90 Stat. 2796, as amended, which is classified generally to chapter 82 (§6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 6901 of this title and Tables.

The Safe Drinking Water Act, referred to in subsec. (m)(1)(D), (5)(D), is title XIV of act July 1, 1944, as added Dec. 16, 1974, Pub. L. 93-523, §2(a), 88 Stat. 1660, as amended, which is classified generally to subchapter XII (§300f et seq.) of chapter 6A of this title. For complete classification of this Act to the Code, see Short Title note set out under section 201 of this title and Tables.

The Solid Waste Disposal Act, referred to in subsec. (n)(7), is title II of Pub. L. 89-272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2795. Subtitle C of the Act is classified generally to subchapter III (§6921 et seq.) of chapter 82 of this title. For complete classification of this Act to

the Code, see Short Title note set out under section 6901 of this title and Tables.

Section 303 of the Clean Air Act Amendments of 1990, referred to in subsec. (o)(4), probably means section 303 of Pub. L. 101-549, which is set out below.

The Clean Air Act Amendments of 1990, referred to in subsec. (q)(1)-(3), probably means Pub. L. 101-549, Nov. 15, 1990, 104 Stat. 2399. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Emergency Planning and Community Right-To-Know Act of 1986, referred to in subsec. (r)(3), is title III of Pub. L. 99-499, Oct. 17, 1986, 100 Stat. 1728, which is classified generally to chapter 116 (§11001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 11001 of this title and Tables.

The Occupational Safety and Health Act, referred to in subsec. (r)(6)(C)(ii), (K), (L), probably means the Occupational Safety and Health Act of 1970, Pub. L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended, which is classified principally to chapter 15 (§651 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 651 of Title 29 and Tables.

CODIFICATION

In subsec. (r)(6)(N), "section 6101 of title 41" substituted for "section 5 of title 41 of the United States Code" on authority of Pub. L. 111-350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

Section was formerly classified to section 1857c-7 of this title.

AMENDMENTS

1999—Subsec. (r)(2)(D). Pub. L. 106-40, §2(5), added subpar. (D).

Subsec. (r)(4). Pub. L. 106-40, §2, substituted "Administrator—"

"(A) shall consider—"

for "Administrator shall consider each of the following criteria—" in introductory provisions, redesignated subpars. (A) to (C) as cls. (i) to (iii), respectively, of subpar. (A) and added subpar. (B).

Subsec. (r)(7)(H). Pub. L. 106-40, §3(a), added subpar. (H).

1998—Subsec. (n)(2)(C). Pub. L. 105-362 substituted "On completion of the study, the Secretary shall submit to Congress a report on the results of the study and" for "The Secretary shall prepare annual reports to Congress on the status of the research program and at the completion of the study".

1991—Subsec. (b)(1). Pub. L. 102-187 struck out "7783064 Hydrogen sulfide" from list of pollutants.

1990—Pub. L. 101-549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), definitions; in subsec. (b), list of hazardous air pollutants, emission standards, and pollution control techniques; in subsec. (c), prohibited acts and exemption; in subsec. (d), State implementation and enforcement; and in subsec. (e), design, equipment, work practice, and operational standards.

1978—Subsec. (e)(5). Pub. L. 95-623 added par. (5).

1977—Subsec. (a)(1). Pub. L. 95-95, §401(c), substituted "causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness" for "may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness".

Subsec. (d)(1). Pub. L. 95-95, §109(d)(2), struck out "(except with respect to stationary sources owned or operated by the United States)" after "implement and enforce such standards".

Subsec. (e). Pub. L. 95-95, §110, added subsec. (e).

CHANGE OF NAME

Committee on Energy and Commerce of House of Representatives treated as referring to Committee on

Commerce of House of Representatives by section 1(a) of Pub. L. 104-14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

EFFECTIVE DATE OF 1977 AMENDMENT

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

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which reports required under subsecs. (m)(5), (r)(6)(C)(ii), and (s) of this section are listed, respectively, as the 8th item on page 162, the 9th item on page 198, and the 9th item on page 162), see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

DELEGATION OF AUTHORITY

Memorandum of President of the United States, Aug. 19, 1993, 58 F.R. 52397, provided:

Memorandum for the Administrator of the Environmental Protection Agency

WHEREAS, the Environmental Protection Agency, the agencies and departments that are members of the National Response Team (authorized under Executive Order No. 12580, 52 Fed. Reg. 2923 (1987) [42 U.S.C. 9615 note]), and other Federal agencies and departments undertake emergency release prevention, mitigation, and response activities pursuant to various authorities;

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 112(r)(10) of the Clean Air Act (the "Act") (section 7412(r)(10) of title 42 of the United States Code) and section 301 of title 3 of the United States Code, and in order to provide for the delegation of certain functions under the Act [42 U.S.C. 7401 et seq.], I hereby:

(1) Authorize you, in coordination with agencies and departments that are members of the National Response Team and other appropriate agencies and de-

partments, to conduct a review of release prevention, mitigation, and response authorities of Federal agencies in order to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources that may exist, to the extent such review is required by section 112(r)(10) of the Act; and

(2) Authorize you, in coordination with agencies and departments that are members of the National Response Team and other appropriate agencies and departments, to prepare and transmit a message to the Congress concerning the release prevention, mitigation, and response activities of the Federal Government with such recommendations for change in law as you deem appropriate, to the extent such message is required by section 112(r)(10) of the Act.

The authority delegated by this memorandum may be further redelegated within the Environmental Protection Agency.

You are hereby authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

Memorandum of President of the United States, Jan. 27, 2000, 65 F.R. 8631, provided:

Memorandum for the Attorney General[,] the Administrator of the Environmental Protection Agency[, and] the Director of the Office of Management and Budget

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 112(r)(7)(H) of the Clean Air Act ("Act") (42 U.S.C. 7412(r)(7)(H)), as added by section 3 of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (Public Law 106-40), and section 301 of title 3, United States Code, I hereby delegate to:

(1) the Attorney General the authority vested in the President under section 112(r)(7)(H)(ii)(I)(aa) of the Act to assess the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet;

(2) the Administrator of the Environmental Protection Agency (EPA) the authority vested in the President under section 112(r)(7)(H)(ii)(I)(bb) of the Act to assess the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases; and

(3) the Attorney General and the Administrator of EPA, jointly, the authority vested in the President under section 112(r)(7)(H)(ii)(II) of the Act to promulgate regulations, based on these assessments, governing the distribution of off-site consequence analysis information. These regulations, in proposed and final form, shall be subject to review and approval by the Director of the Office of Management and Budget.

The Administrator of EPA is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

REPORTS

Pub. L. 106-40, §3(b), Aug. 5, 1999, 113 Stat. 213, provided that:

"(1) DEFINITION OF ACCIDENTAL RELEASE.—In this subsection, the term 'accidental release' has the meaning given the term in section 112(r)(2) of the Clean Air Act (42 U.S.C. 7412(r)(2)).

"(2) REPORT ON STATUS OF CERTAIN AMENDMENTS.—Not later than 2 years after the date of enactment of this Act [Aug. 5, 1999], the Comptroller General of the United States shall submit to Congress a report on the status of the development of amendments to the National Fire Protection Association Code for Liquefied Petroleum Gas that will result in the provision of information to local emergency response personnel concerning the off-site effects of accidental releases of substances exempted from listing under section 112(r)(4)(B) of the Clean Air Act (as added by section 3).

"(3) REPORT ON COMPLIANCE WITH CERTAIN INFORMATION SUBMISSION REQUIREMENTS.—Not later than 3 years after the date of enactment of this Act, the Comptrol-

ler General of the United States shall submit to Congress a report that—

“(A) describes the level of compliance with Federal and State requirements relating to the submission to local emergency response personnel of information intended to help the local emergency response personnel respond to chemical accidents or related environmental or public health threats; and

“(B) contains an analysis of the adequacy of the information required to be submitted and the efficacy of the methods for delivering the information to local emergency response personnel.”

REEVALUATION OF REGULATIONS

Pub. L. 106-40, §3(c), Aug. 5, 1999, 113 Stat. 213, provided that: “The President shall reevaluate the regulations promulgated under this section within 6 years after the enactment of this Act [Aug. 5, 1999]. If the President determines not to modify such regulations, the President shall publish a notice in the Federal Register stating that such reevaluation has been completed and that a determination has been made not to modify the regulations. Such notice shall include an explanation of the basis of such decision.”

PUBLIC MEETING DURING MORATORIUM PERIOD

Pub. L. 106-40, §4, Aug. 5, 1999, 113 Stat. 214, provided that:

“(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act [Aug. 5, 1999], each owner or operator of a stationary source covered by section 112(r)(7)(B)(ii) of the Clean Air Act [42 U.S.C. 7412(r)(7)(B)(ii)] shall convene a public meeting, after reasonable public notice, in order to describe and discuss the local implications of the risk management plan submitted by the stationary source pursuant to section 112(r)(7)(B)(iii) of the Clean Air Act, including a summary of the off-site consequence analysis portion of the plan. Two or more stationary sources may conduct a joint meeting. In lieu of conducting such a meeting, small business stationary sources as defined in section 507(c)(1) of the Clean Air Act [42 U.S.C. 7661f(c)(1)] may comply with this section by publicly posting a summary of the off-site consequence analysis information for their facility not later than 180 days after the enactment of this Act. Not later than 10 months after the date of enactment of this Act, each such owner or operator shall send a certification to the director of the Federal Bureau of Investigation stating that such meeting has been held, or that such summary has been posted, within 1 year prior to, or within 6 months after, the date of the enactment of this Act. This section shall not apply to sources that employ only Program 1 processes within the meaning of regulations promulgated under section 112(r)(7)(B)(i) of the Clean Air Act.

“(b) ENFORCEMENT.—The Administrator of the Environmental Protection Agency may bring an action in the appropriate United States district court against any person who fails or refuses to comply with the requirements of this section, and such court may issue such orders, and take such other actions, as may be necessary to require compliance with such requirements.”

RISK ASSESSMENT AND MANAGEMENT COMMISSION

Pub. L. 101-549, title III, §303, Nov. 15, 1990, 104 Stat. 2574, provided that:

“(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 [Nov. 15, 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 [42 U.S.C. 7412(o)], 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 or other chronic health effects and the suitability of risk assessment for such purposes;

“(2) the most appropriate methods for measuring and describing cancer risks or risks of other chronic health effects from exposure to hazardous substances considering such alternative approaches as the lifetime risk of cancer or other effects to the individual or individuals most exposed to emissions from a source or sources on both an actual and worst case basis, the range of such risks, the total number of health effects avoided by exposure reductions, effluent standards, ambient standards, exposures standards, acceptable concentration levels, tolerances and other environmental criteria, reductions in the number of persons exposed at various levels of risk, the incidence of cancer, and other public health factors;

“(3) methods to reflect uncertainties in measurement and estimation techniques, the existence of synergistic or antagonistic effects among hazardous substances, the accuracy of extrapolating human health risks from animal exposure data, and the existence of unquantified direct or indirect effects on human health in risk assessment studies;

“(4) risk management policy issues including the use of lifetime cancer risks to individuals most exposed, incidence of cancer, the cost and technical feasibility of exposure reduction measures and the use of site-specific actual exposure information in setting emissions standards and other limitations applicable to sources of exposure to hazardous substances; and

“(5) and comment on the degree to which it is possible or desirable to develop a consistent risk assessment methodology, or a consistent standard of acceptable risk, among various Federal programs.

“(c) MEMBERSHIP.—Such Commission shall be composed of ten members who shall have knowledge or experience in fields of risk assessment or risk management, including three members to be appointed by the President, two members to be appointed by the Speaker of the House of Representatives, one member to be appointed by the Minority Leader of the House of Representatives, two members to be appointed by the Majority Leader of the Senate, one member to be appointed by the Minority Leader of the Senate, and one member to be appointed by the President of the National Academy of Sciences. Appointments shall be made not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

“(d) ASSISTANCE FROM AGENCIES.—The Administrator of the Environmental Protection Agency and the heads of all other departments, agencies, and instrumentalities of the executive branch of the Federal Government shall, to the maximum extent practicable, assist the Commission in gathering such information as the Commission deems necessary to carry out this section subject to other provisions of law.

“(e) STAFF AND CONTRACTS.—

“(1) In the conduct of the study required by this section, the Commission is authorized to contract (in accordance with Federal contract law) with non-governmental entities that are competent to perform research or investigations within the Commission's mandate, and to hold public hearings, forums, and workshops to enable full public participation.

“(2) The Commission may appoint and fix the pay of such staff as it deems necessary in accordance with the provisions of title 5, United States Code. The Commission may request the temporary assignment of personnel from the Environmental Protection Agency or other Federal agencies.

“(3) The members of the Commission who are not officers or employees of the United States, while attending conferences or meetings of the Commission or while otherwise serving at the request of the Chair, shall be entitled to receive compensation at a rate not in excess of the maximum rate of pay for Grade GS-18, as provided in the General Schedule under section 5332 of title 5 of the United States Code, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence as authorized by law for persons in the Government service employed intermittently.

“(f) REPORT.—A report containing the results of all Commission studies and investigations under this section, together with any appropriate legislative recommendations or administrative recommendations, shall be made available to the public for comment not later than 42 months after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990] and shall be submitted to the President and to the Congress not later than 48 months after such date of enactment. In the report, the Commission shall make recommendations with respect to the appropriate use of risk assessment and risk management in Federal regulatory programs to prevent cancer or other chronic health effects which may result from exposure to hazardous substances. The Commission shall cease to exist upon the date determined by the Commission, but not later than 9 months after the submission of such report.

“(g) AUTHORIZATION.—There are authorized to be appropriated such sums as are necessary to carry out the activities of the Commission established by this section.”

[References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.]

FLEXIBLE IMPLEMENTATION OF THE MERCURY AND AIR TOXICS STANDARDS RULE

Memorandum of President of the United States, Dec. 21, 2011, 76 F.R. 80727, provided:

Memorandum for the Administrator of the Environmental Protection Agency

Today's issuance, by the Environmental Protection Agency (EPA), of the final Mercury and Air Toxics Standards rule for power plants (the “MATS Rule”) represents a major step forward in my Administration's efforts to protect public health and the environment.

This rule, issued after careful consideration of public comments, prescribes standards under section 112 of the Clean Air Act to control emissions of mercury and other toxic air pollutants from power plants, which collectively are among the largest sources of such pollution in the United States. The EPA estimates that by substantially reducing emissions of pollutants that contribute to neurological damage, cancer, respiratory illnesses, and other health risks, the MATS Rule will produce major health benefits for millions of Americans—including children, older Americans, and other vulnerable populations. Consistent with Executive Order 13563 (Improving Regulation and Regulatory Review), the estimated benefits of the MATS Rule far exceed the estimated costs.

The MATS Rule can be implemented through the use of demonstrated, existing pollution control technologies. The United States is a global market leader in the design and manufacture of these technologies, and it is anticipated that U.S. firms and workers will provide much of the equipment and labor needed to meet the substantial investments in pollution control that the standards are expected to spur.

These new standards will promote the transition to a cleaner and more efficient U.S. electric power system. This system as a whole is critical infrastructure that plays a key role in the functioning of all facets of the

U.S. economy, and maintaining its stability and reliability is of critical importance. It is therefore crucial that implementation of the MATS Rule proceed in a cost-effective manner that ensures electric reliability.

Analyses conducted by the EPA and the Department of Energy (DOE) indicate that the MATS Rule is not anticipated to compromise electric generating resource adequacy in any region of the country. The Clean Air Act offers a number of implementation flexibilities, and the EPA has a long and successful history of using those flexibilities to ensure a smooth transition to cleaner technologies.

The Clean Air Act provides 3 years from the effective date of the MATS Rule for sources to comply with its requirements. In addition, section 112(i)(3)(B) of the Act allows the issuance of a permit granting a source up to one additional year where necessary for the installation of controls. As you stated in the preamble to the MATS Rule, this additional fourth year should be broadly available to sources, consistent with the requirements of the law.

The EPA has concluded that 4 years should generally be sufficient to install the necessary emission control equipment, and DOE has issued analysis consistent with that conclusion. While more time is generally not expected to be needed, the Clean Air Act offers other important flexibilities as well. For example, section 113(a) of the Act provides the EPA with flexibility to bring sources into compliance over the course of an additional year, should unusual circumstances arise that warrant such flexibility.

To address any concerns with respect to electric reliability while assuring MATS' public health benefits, I direct you to take the following actions:

1. Building on the information and guidance that you have provided to the public, relevant stakeholders, and permitting authorities in the preamble of the MATS Rule, work with State and local permitting authorities to make the additional year for compliance with the MATS Rule provided under section 112(i)(3)(B) of the Clean Air Act broadly available to sources, consistent with law, and to invoke this flexibility expeditiously where justified.

2. Promote early, coordinated, and orderly planning and execution of the measures needed to implement the MATS Rule while maintaining the reliability of the electric power system. Consistent with Executive Order 13563, this process should be designed to “promote predictability and reduce uncertainty,” and should include engagement and coordination with DOE, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations, the North American Electric Reliability Corporation and regional electric reliability organizations, other grid planning authorities, electric utilities, and other stakeholders, as appropriate.

3. Make available to the public, including relevant stakeholders, information concerning any anticipated use of authorities: (a) under section 112(i)(3)(B) of the Clean Air Act in the event that additional time to comply with the MATS Rule is necessary for the installation of technology; and (b) under section 113(a) of the Clean Air Act in the event that additional time to comply with the MATS Rule is necessary to address a specific and documented electric reliability issue. This information should describe the process for working with entities with relevant expertise to identify circumstances where electric reliability concerns might justify allowing additional time to comply.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

You are hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within² supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

(July 14, 1955, ch. 360, title I, § 164, as added Pub. L. 95-95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 733;

² So in original. Probably should be "with".

amended Pub. L. 95-190, § 14(a)(42), (43), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101-549, title I, § 108(n), Nov. 15, 1990, 104 Stat. 2469.)

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, which directed the insertion of "The extent of the areas referred to in paragraph (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990." before "Any area (other than an area referred to in paragraph (1) or (2))", was executed by making the insertion before "Any area (other than an area referred to in paragraph (1) or (2))", to reflect the probable intent of Congress.

1977—Subsec. (b)(2). Pub. L. 95-190, § 14(a)(42), inserted "or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section" after "this section".

Subsec. (e). Pub. L. 95-190, § 14(a)(43), inserted "an" after "If any State affected by the redesignation of".

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting fa-

cility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent

State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from

such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE (In micrograms per cubic meter)		
Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this

part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

(July 14, 1955, ch. 360, title I, § 165, as added Pub. L. 95-95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 735; amended Pub. L. 95-190, § 14(a)(44)-(51), Nov. 16, 1977, 91 Stat. 1402.)

AMENDMENTS

1977—Subsec. (a)(1). Pub. L. 95-190, § 14(a)(44), substituted "part;" for "part:".

Subsec. (a)(3). Pub. L. 95-190, § 14(a)(45), inserted provision making applicable requirement of section 7410(j) of this title.

Subsec. (b). Pub. L. 95-190, § 14(a)(46), inserted "cause or" before "contribute" and struck out "actual" before "allowable emissions".

Subsec. (d)(2)(C). Pub. L. 95-190, § 14(a)(47)-(49), in cl. (ii) substituted "contribute" for "contribute", in cl. (iii) substituted "quality-related" for "quality related" and "concentrations which" for "concentrations, which", and in cl. (iv) substituted "such facility" for "such sources" and "will not cause or contribute to concentrations of such pollutant which exceed" for "together with all other sources, will not exceed".

Subsec. (d)(2)(D). Pub. L. 95-190, § 14(a)(50), (51), in cl. (iii) substituted provisions relating to determinations of amounts of emissions of sulfur oxides from facilities,

for provisions relating to determinations of amounts of emissions of sulfur oxides from sources operating under permits issued pursuant to this subpar., together with all other sources, and added cl. (iv).

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or¹ promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

¹ So in original. Probably should be "of".

(f) PM-10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter specified in section 7473(b) of this title and section 7475(d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in concentrations of particulate matter shall remain in effect.

(July 14, 1955, ch. 360, title I, § 166, as added Pub. L. 95-95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 739; amended Pub. L. 101-549, title I, § 105(b), Nov. 15, 1990, 104 Stat. 2462.)

AMENDMENTS

1990—Subsec. (f). Pub. L. 101-549 added subsec. (f).

§ 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

(July 14, 1955, ch. 360, title I, § 167, as added Pub. L. 95-95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 101-549, title I, § 110(3), title VII, § 708, Nov. 15, 1990, 104 Stat. 2470, 2684.)

AMENDMENTS

1990—Pub. L. 101-549, § 708, substituted "construction or modification of a major emitting facility" for "construction of a major emitting facility".

Pub. L. 101-549, § 110(3), substituted "designated pursuant to section 7407(d) as attainment or unclassifiable" for "included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of section 7407 of this title".

§ 7478. Period before plan approval

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a), section 7473(b) or sec-

in the case of a concern which is a publicly traded company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

- “(I) Black Americans.
- “(II) Hispanic Americans.
- “(III) Native Americans.
- “(IV) Asian Americans.
- “(V) Women.
- “(VI) Disabled Americans.

“(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual’s identification as a member of a group specified in that clause.

“(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

“(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

“(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

“(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

“(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

“(i) a party to the joint venture is a disadvantaged business concern; and

“(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

“(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

“SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.”

§ 7602. Definitions

When used in this chapter—

(a) The term “Administrator” means the Administrator of the Environmental Protection Agency.

(b) The term “air pollution control agency” means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term “interstate air pollution control agency” means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term “person” includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term “municipality” means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term “Federal land manager” means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms “emission limitation” and “emission standard” mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design,

equipment, work practice or operational standard promulgated under this chapter.¹

(l) The term “standard of performance” means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term “means of emission limitation” means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term “primary standard attainment date” means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term “delayed compliance order” means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term “schedule and timetable of compliance” means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term “applicable implementation plan” means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) INDIAN TRIBE.—The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.—The term “VOC” means volatile organic compound, as defined by the Administrator.

(t) PM-10.—The term “PM-10” means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS AND CTG.—The term “NAAQS” means national ambient air quality standard. The term “CTG” means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.—The term “NO_x” means oxides of nitrogen.

(w) CO.—The term “CO” means carbon monoxide.

(x) SMALL SOURCE.—The term “small source” means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) FEDERAL IMPLEMENTATION PLAN.—The term “Federal implementation plan” means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) STATIONARY SOURCE.—The term “stationary source” means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, §302, formerly §9, as added Pub. L. 88-206, §1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89-272, title I, §101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90-148, §2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91-604, §15(a)(1), (c)(1), Dec. 31, 1970, 84 Stat. 1710, 1713; Pub. L. 95-95, title II, §218(c), title III, §301, Aug. 7, 1977, 91 Stat. 761, 769; Pub. L. 95-190, §14(a)(76), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§101(d)(4), 107(a), (b), 108(j), 109(b), title III, §302(e), title VII, §709, Nov. 15, 1990, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

CODIFICATION

Section was formerly classified to section 1857h of this title.

PRIOR PROVISIONS

Provisions similar to those in subsecs. (b) and (d) of this section were contained in a section 1857e of this title, act July 14, 1955, ch. 360, §6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88-206.

AMENDMENTS

1990—Subsec. (b)(1) to (3). Pub. L. 101-549, §107(a)(1), (2), struck out “or” at end of par. (3) and substituted periods for semicolons at end of pars. (1) to (3).

Subsec. (b)(5). Pub. L. 101-549, §107(a)(3), added par. (5).

Subsec. (g). Pub. L. 101-549, §108(j)(2), inserted at end “Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ‘air pollutant’ is used.”

Subsec. (h). Pub. L. 101-549, §109(b), inserted before period at end “, whether caused by transformation, conversion, or combination with other air pollutants”.

Subsec. (k). Pub. L. 101-549, §303(e), inserted before period at end “, and any design, equipment, work practice or operational standard promulgated under this chapter.”

Subsec. (q). Pub. L. 101-549, §101(d)(4), added subsec. (q).

Subsec. (r). Pub. L. 101-549, §107(b), added subsec. (r). Subsecs. (s) to (y). Pub. L. 101-549, §108(j)(1), added subsecs. (s) to (y).

Subsec. (z). Pub. L. 101-549, §709, added subsec. (z). 1977—Subsec. (d). Pub. L. 95-95, §218(c), inserted “and includes the Commonwealth of the Northern Mariana Islands” after “American Samoa”.

Subsec. (e). Pub. L. 95-190 substituted “individual, corporation” for “individual corporation”.

Pub. L. 95-95, §301(b), expanded definition of “person” to include agencies, departments, and instrumentalities of the United States and officers, agents, and employees thereof.

¹ So in original.

Subsec. (g). Pub. L. 95-95, §301(c), expanded definition of “air pollutant” so as, expressly, to include physical, chemical, biological, and radioactive substances or matter emitted into or otherwise entering the ambient air.

Subsecs. (i) to (p). Pub. L. 95-95, §301(a), added subsecs. (i) to (p).

1970—Subsec. (a). Pub. L. 91-604, §15(c)(1), substituted definition of “Administrator” as meaning Administrator of the Environmental Protection Agency for definition of “Secretary” as meaning Secretary of Health, Education, and Welfare.

Subsecs. (g), (h). Pub. L. 91-604, §15(a)(1), added subsec. (g) defining “air pollutant”, redesignated former subsec. (g) as (h) and substituted references to effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate for references to injury to agricultural crops and livestock, and inserted references to effects on economic values and on personal comfort and well being.

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

EFFECTIVE DATE OF 1977 AMENDMENT

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

§ 7603. Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

(July 14, 1955, ch. 360, title III, §303, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1705; amended Pub. L. 95-95, title III, §302(a), Aug. 7, 1977, 91 Stat. 770; Pub. L. 101-549, title VII, §704, Nov. 15, 1990, 104 Stat. 2681.)

CODIFICATION

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

PRIOR PROVISIONS

A prior section 303 of act July 14, 1955, was renumbered section 310 by Pub. L. 91-604 and is classified to section 7610 of this title.

AMENDMENTS

1990—Pub. L. 101-549, §704(2)-(5), struck out subsec. (a) designation before “Notwithstanding any other”, struck out subsec. (b) which related to violation of or failure or refusal to comply with subsec. (a) orders, and substituted new provisions for provisions following first sentence which read as follows: “If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter.”

Pub. L. 101-549, §704(1), which directed that “public health or welfare, or the environment” be substituted for “the health of persons and that appropriate State or local authorities have not acted to abate such sources”, was executed by making the substitution for “the health of persons, and that appropriate State or local authorities have not acted to abate such sources” to reflect the probable intent of Congress.

1977—Pub. L. 95-95 designated existing provisions as subsec. (a), inserted provisions that, if it is not practicable to assure prompt protection of the health of persons solely by commencement of a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources), that, prior to taking any action under this section, the Administrator consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking, that the order be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period, and that, whenever the Administrator brings such an action within such period, such order be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter, and added subsec. (b).

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L.

SEC. 2. *Designation of Facilities.* (a) The Administrator of the Environmental Protection Agency (hereinafter referred to as "the Administrator") shall be responsible for the attainment of the purposes and objectives of this Order.

(b) In carrying out his responsibilities under this Order, the Administrator shall, in conformity with all applicable requirements of law, designate facilities which have given rise to a conviction for an offense under section 113(c)(1) of the Air Act [42 U.S.C. 7413(c)(1)] or section 309(c) of the Water Act [33 U.S.C. 1319(c)]. The Administrator shall, from time to time, publish and circulate to all Federal agencies lists of those facilities, together with the names and addresses of the persons who have been convicted of such offenses. Whenever the Administrator determines that the condition which gave rise to a conviction has been corrected, he shall promptly remove the facility and the name and address of the person concerned from the list.

SEC. 3. *Contracts, Grants, or Loans.* (a) Except as provided in section 8 of this Order, no Federal agency shall enter into any contract for the procurement of goods, materials, or services which is to be performed in whole or in part in a facility then designated by the Administrator pursuant to section 2.

(b) Except as provided in section 8 of this Order, no Federal agency authorized to extend Federal assistance by way of grant, loan, or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

SEC. 4. *Procurement, Grant, and Loan Regulations.* The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the Executive Branch shall, following consultation with the Administrator, be amended to require, as a condition of entering into, renewing, or extending any contract for the procurement of goods, materials, or services or extending any assistance by way of grant, loan, or contract, inclusion of a provision requiring compliance with the Air Act, the Water Act, and standards issued pursuant thereto in the facilities in which the contract is to be performed, or which are involved in the activity or program to receive assistance.

SEC. 5. *Rules and Regulations.* The Administrator shall issue such rules, regulations, standards, and guidelines as he may deem necessary or appropriate to carry out the purposes of this Order.

SEC. 6. *Cooperation and Assistance.* The head of each Federal agency shall take such steps as may be necessary to insure that all officers and employees of this agency whose duties entail compliance or comparable functions with respect to contracts, grants, and loans are familiar with the provisions of this Order. In addition to any other appropriate action, such officers and employees shall report promptly any condition in a facility which may involve noncompliance with the Air Act or the Water Act or any rules, regulations, standards, or guidelines issued pursuant to this Order to the head of the agency, who shall transmit such reports to the Administrator.

SEC. 7. *Enforcement.* The Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever he becomes aware of a breach of any provision required, under the amendments issued pursuant to section 4 of this Order, to be included in a contract or other agreement.

SEC. 8. *Exemptions—Reports to Congress.* (a) Upon a determination that the paramount interest of the United States so requires—

(1) The head of a Federal agency may exempt any contract, grant, or loan, and, following consultation with the Administrator, any class of contracts, grants or loans from the provisions of this Order. In any such case, the head of the Federal agency granting such ex-

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions.* The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability.* This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity.* Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded.* Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph,⁴ the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(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,⁵ 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)¹ 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 pub-

lishes 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).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁵ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(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,

⁴ So in original. Probably should be "subsection,".

⁵ So in original. The word "to" probably should not appear.

(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.

(f) Costs

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

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section⁶ 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92-157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93-319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95-95, title III, §§303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95-190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681-2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101-549, title II, §230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101-549, title II, §230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original “section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)”, meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, §3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101-549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original “subtitle C of title I”, and was translated as reading “part C of title I” to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), “subchapter II of chapter 5 of title 5” was substituted for “the Administrative Procedures Act” on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h-5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91-604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89-272, renumbered section 310 by Pub. L. 90-148, and renumbered section 317 by Pub. L. 91-604, and is set out as a Short Title note under section 7401 of this title.

⁶ So in original. Probably should be “sections”.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, §703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out “or section 7521(b)(5)” after “section 7410(f)”.

Subsec. (b)(1). Pub. L. 101-549, §706(2), which directed amendment of second sentence by striking “under section 7413(d) of this title” immediately before “under section 7419 of this title”, was executed by striking “under section 7413(d) of this title,” before “under section 7419 of this title”, to reflect the probable intent of Congress.

Pub. L. 101-549, §706(1), inserted at end: “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.”

Pub. L. 101-549, §702(c), inserted “or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title,” before “or any other final action of the Administrator”.

Pub. L. 101-549, §302(g), substituted “section 7412” for “section 7412(c)”.

Subsec. (b)(2). Pub. L. 101-549, §707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101-549, §110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title.”.

Subsec. (d)(1)(D), (E). Pub. L. 101-549, §302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101-549, §302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101-549, §110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: “promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders)”.

Subsec. (d)(1)(G), (H). Pub. L. 101-549, §302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101-549, §710(b), which directed that subpar. (H) be amended by substituting “subchapter VI of this chapter” for “part B of subchapter I of this chapter”, was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, §302(h), see below.

Pub. L. 101-549, §302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101-549, §302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101-549, §302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101-549, §110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101-549, §302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101-549, §110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101-549, §302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101-549, §110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101-549, §302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101-549, §108(p), added subsec. (h). 1977—Subsec. (b)(1). Pub. L. 95-190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c-10(c)(2)(A), (B), or (C) to the period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95-95, §305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to noncompliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95-95, §305(a), added subsec. (d).

Subsec. (e). Pub. L. 95-95, §303(d), added subsec. (e).

Subsec. (f). Pub. L. 95-95, §305(f), added subsec. (f).

Subsec. (g). Pub. L. 95-95, §305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93-319 inserted reference to the Administrator's action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92-157 substituted reference to section "7545(c)(3)" for "7545(c)(4)" of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

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

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other

officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7608. Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, §308, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1708.)

CODIFICATION

Section was formerly classified to section 1857h-6 of this title.

PRIOR PROVISIONS

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91-604 and is classified to section 7615 of this title.

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

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect

(F) effect of sonic booms on property (including values); and
(G) such other matters as may be of interest in the public welfare.

(b) Investigation techniques; report and recommendations

In conducting such investigation, the Administrator shall hold public hearings, conduct research, experiments, demonstrations, and studies. The Administrator shall report the results of such investigation and study, together with his recommendations for legislation or other action, to the President and the Congress not later than one year after December 31, 1970.

(c) Abatement of noise from Federal activities

In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.

(July 14, 1955, ch. 360, title IV, §402, as added Pub. L. 91-604, §14, Dec. 31, 1970, 84 Stat. 1709.)

CODIFICATION

Another section 402 of act July 14, 1955, as added by Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2585, is classified to section 7651a of this title.

Section was formerly classified to section 1858 of this title.

§ 7642. Authorization of appropriations

There is authorized to be appropriated such amount, not to exceed \$30,000,000, as may be necessary for the purposes of this subchapter.

(July 14, 1955, ch. 360, title IV, §403, as added Pub. L. 91-604, §14, Dec. 31, 1970, 84 Stat. 1710.)

CODIFICATION

Another section 403 of act July 14, 1955, as added by Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2589, is classified to section 7651b of this title.

Section was formerly classified to section 1858a of this title.

SUBCHAPTER IV—A—ACID DEPOSITION CONTROL

CODIFICATION

Another title IV of act July 14, 1955, as added by Pub. L. 91-604, §14, Dec. 31, 1970, 84 Stat. 1709, is classified principally to subchapter IV (§7641 et seq.) of this chapter.

§ 7651. Findings and purposes

(a) Findings

The Congress finds that—

(1) the presence of acidic compounds and their precursors in the atmosphere and in deposition from the atmosphere represents a threat to natural resources, ecosystems, materials, visibility, and public health;

(2) the principal sources of the acidic compounds and their precursors in the atmosphere are emissions of sulfur and nitrogen oxides from the combustion of fossil fuels;

(3) the problem of acid deposition is of national and international significance;

(4) strategies and technologies for the control of precursors to acid deposition exist now

that are economically feasible, and improved methods are expected to become increasingly available over the next decade;

(5) current and future generations of Americans will be adversely affected by delaying measures to remedy the problem;

(6) reduction of total atmospheric loading of sulfur dioxide and nitrogen oxides will enhance protection of the public health and welfare and the environment; and

(7) control measures to reduce precursor emissions from steam-electric generating units should be initiated without delay.

(b) Purposes

The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emission levels, and, in combination with other provisions of this chapter, of nitrogen oxides emissions of approximately two million tons from 1980 emission levels, in the forty-eight contiguous States and the District of Columbia. It is the intent of this subchapter to effectuate such reductions by requiring compliance by affected sources with prescribed emission limitations by specified deadlines, which limitations may be met through alternative methods of compliance provided by an emission allocation and transfer system. It is also the purpose of this subchapter to encourage energy conservation, use of renewable and clean alternative technologies, and pollution prevention as a long-range strategy, consistent with the provisions of this subchapter, for reducing air pollution and other adverse impacts of energy production and use.

(July 14, 1955, ch. 360, title IV, §401, as added Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2584.)

CODIFICATION

Another section 401 of act July 14, 1955, as added by Pub. L. 91-604, §14, Dec. 31, 1970, 84 Stat. 1709, is set out as a Short Title note under section 7401 of this title.

ACID DEPOSITION STANDARDS

Pub. L. 101-549, title IV, §404, Nov. 15, 1990, 104 Stat. 2632, directed Administrator of Environmental Protection Agency, not later than 36 months after Nov. 15, 1990, to transmit to Congress a report on the feasibility and effectiveness of an acid deposition standard or standards to protect sensitive and critically sensitive aquatic and terrestrial resources.

INDUSTRIAL SO₂ EMISSIONS

Pub. L. 101-549, title IV, §406, Nov. 15, 1990, 104 Stat. 2632, provided that:

“(a) REPORT.—Not later than January 1, 1995 and every 5 years thereafter, the Administrator of the Environmental Protection Agency shall transmit to the Congress a report containing an inventory of national annual sulfur dioxide emissions from industrial sources (as defined in title IV of the Act [42 U.S.C. 7651 et seq.]), including units subject to section 405(g)(6) of the Clean Air Act [42 U.S.C. 7651d(g)(6)], for all years for which data are available, as well as the likely trend in such emissions over the following twenty-year period. The reports shall also contain estimates of the actual emission reduction in each year resulting from promulgation of the diesel fuel desulfurization regulations under section 214 [42 U.S.C. 7548].

“(b) 5.60 MILLION TON CAP.—Whenever the inventory required by this section indicates that sulfur dioxide

emissions from industrial sources, including units subject to section 405(g)(5) of the Clean Air Act [42 U.S.C. 7651d(g)(5)], may reasonably be expected to reach levels greater than 5.60 million tons per year, the Administrator of the Environmental Protection Agency shall take such actions under the Clean Air Act [42 U.S.C. 7401 et seq.] as may be appropriate to ensure that such emissions do not exceed 5.60 million tons per year. Such actions may include the promulgation of new and revised standards of performance for new sources, including units subject to section 405(g)(5) of the Clean Air Act, under section 111(b) of the Clean Air Act [42 U.S.C. 7411(b)], as well as promulgation of standards of performance for existing sources, including units subject to section 405(g)(5) of the Clean Air Act, under authority of this section. For an existing source regulated under this section, 'standard of performance' means a standard which the Administrator determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

"(c) ELECTION.—Regulations promulgated under section 405(b) of the Clean Air Act [42 U.S.C. 7651d(b)] shall not prohibit a source from electing to become an affected unit under section 410 of the Clean Air Act [42 U.S.C. 7651i]."

[For termination, effective May 15, 2000, of reporting provisions in section 406(a) of Pub. L. 101-549, set out above, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the 10th item on page 162 of House Document No. 103-7.]

SENSE OF CONGRESS ON EMISSION REDUCTIONS COSTS

Pub. L. 101-549, title IV, § 407, Nov. 15, 1990, 104 Stat. 2633, provided that: "It is the sense of the Congress that the Clean Air Act Amendments of 1990 [Pub. L. 101-549, see Tables for classification], through the allowance program, allocates the costs of achieving the required reductions in emissions of sulfur dioxide and oxides of nitrogen among sources in the United States. Broad based taxes and emissions fees that would provide for payment of the costs of achieving required emissions reductions by any party or parties other than the sources required to achieve the reductions are undesirable."

MONITORING OF ACID RAIN PROGRAM IN CANADA

Pub. L. 101-549, title IV, § 408, Nov. 15, 1990, 104 Stat. 2633, provided that:

"(a) REPORTS TO CONGRESS.—The Administrator of the Environmental Protection Agency, in consultation with the Secretary of State, the Secretary of Energy, and other persons the Administrator deems appropriate, shall prepare and submit a report to Congress on January 1, 1994, January 1, 1999, and January 1, 2005.

"(b) CONTENTS.—The report to Congress shall analyze the current emission levels of sulfur dioxide and nitrogen oxides in each of the provinces participating in Canada's acid rain control program, the amount of emission reductions of sulfur dioxide and oxides of nitrogen achieved by each province, the methods utilized by each province in making those reductions, the costs to each province and the employment impacts in each province of making and maintaining those reductions.

"(c) COMPLIANCE.—Beginning on January 1, 1999, the reports shall also assess the degree to which each province is complying with its stated emissions cap."

§ 7651a. Definitions

As used in this subchapter:

(1) The term "affected source" means a source that includes one or more affected units.

(2) The term "affected unit" means a unit that is subject to emission reduction requirements or limitations under this subchapter.

(3) The term "allowance" means an authorization, allocated to an affected unit by the Administrator under this subchapter, to emit, during or after a specified calendar year, one ton of sulfur dioxide.

(4) The term "baseline" means the annual quantity of fossil fuel consumed by an affected unit, measured in millions of British Thermal Units ("mmBtu's"), calculated as follows:

(A) For each utility unit that was in commercial operation prior to January 1, 1985, the baseline shall be the annual average quantity of mmBtu's consumed in fuel during calendar years 1985, 1986, and 1987, as recorded by the Department of Energy pursuant to Form 767. For any utility unit for which such form was not filed, the baseline shall be the level specified for such unit in the 1985 National Acid Precipitation Assessment Program (NAPAP) Emissions Inventory, Version 2, National Utility Reference File (NURF) or in a corrected data base as established by the Administrator pursuant to paragraph (3).¹ For nonutility units, the baseline is the NAPAP Emissions Inventory, Version 2. The Administrator, in the Administrator's sole discretion, may exclude periods during which a unit is shutdown for a continuous period of four calendar months or longer, and make appropriate adjustments under this paragraph. Upon petition of the owner or operator of any unit, the Administrator may make appropriate baseline adjustments for accidents that caused prolonged outages.

(B) For any other nonutility unit that is not included in the NAPAP Emissions Inventory, Version 2, or a corrected data base as established by the Administrator pursuant to paragraph (3),¹ the baseline shall be the annual average quantity, in mmBtu consumed in fuel by that unit, as calculated pursuant to a method which the administrator shall prescribe by regulation to be promulgated not later than eighteen months after November 15, 1990.

(C) The Administrator shall, upon application or on his own motion, by December 31, 1991, supplement data needed in support of this subchapter and correct any factual errors in data from which affected Phase II units' baselines or actual 1985 emission rates have been calculated. Corrected data shall be used for purposes of issuing allowances under the² subchapter. Such corrections shall not be subject to judicial review, nor shall the failure of the Administrator to correct an alleged factual error in such reports be subject to judicial review.

(5) The term "capacity factor" means the ratio between the actual electric output from a unit and the potential electric output from that unit.

¹So in original. The reference to "paragraph (3)" probably should be to "subparagraph (C)".

²So in original. Probably should be "this".

(6) The term “compliance plan” means, for purposes of the requirements of this subchapter, either—

(A) a statement that the source will comply with all applicable requirements under this subchapter, or

(B) where applicable, a schedule and description of the method or methods for compliance and certification by the owner or operator that the source is in compliance with the requirements of this subchapter.

(7) The term “continuous emission monitoring system” (CEMS) means the equipment as required by section 7651k of this title, used to sample, analyze, measure, and provide on a continuous basis a permanent record of emissions and flow (expressed in pounds per million British thermal units (lbs/mmBtu), pounds per hour (lbs/hr) or such other form as the Administrator may prescribe by regulations under section 7651k of this title).

(8) The term “existing unit” means a unit (including units subject to section 7411 of this title) that commenced commercial operation before November 15, 1990. Any unit that commenced commercial operation before November 15, 1990, which is modified, reconstructed, or repowered after November 15, 1990, shall continue to be an existing unit for the purposes of this subchapter. For the purposes of this subchapter, existing units shall not include simple combustion turbines, or units which serve a generator with a nameplate capacity of 25MWe or less.

(9) The term “generator” means a device that produces electricity and which is reported as a generating unit pursuant to Department of Energy Form 860.

(10) The term “new unit” means a unit that commences commercial operation on or after November 15, 1990.

(11) The term “permitting authority” means the Administrator, or the State or local air pollution control agency, with an approved permitting program under part B³ of title III of the Act.

(12) The term “repowering” means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990. Notwithstanding the provisions of section 7651h(a) of this title, for the purpose of this subchapter, the term “repowering” shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration fund-

ing as of January 1, 1991, by the Department of Energy.

(13) The term “reserve” means any bank of allowances established by the Administrator under this subchapter.

(14) The term “State” means one of the 48 contiguous States and the District of Columbia.

(15) The term “unit” means a fossil fuel-fired combustion device.

(16) The term “actual 1985 emission rate”, for electric utility units means the annual sulfur dioxide or nitrogen oxides emission rate in pounds per million Btu as reported in the NAPAP Emissions Inventory, Version 2, National Utility Reference File. For nonutility units, the term “actual 1985 emission rate” means the annual sulfur dioxide or nitrogen oxides emission rate in pounds per million Btu as reported in the NAPAP Emission Inventory, Version 2.

(17)(A) The term “utility unit” means—

(i) a unit that serves a generator in any State that produces electricity for sale, or

(ii) a unit that, during 1985, served a generator in any State that produced electricity for sale.

(B) Notwithstanding subparagraph (A), a unit described in subparagraph (A) that—

(i) was in commercial operation during 1985, but

(ii) did not, during 1985, serve a generator in any State that produced electricity for sale shall not be a utility unit for purposes of this subchapter.

(C) A unit that cogenerates steam and electricity is not a “utility unit” for purposes of this subchapter unless the unit is constructed for the purpose of supplying, or commences construction after November 15, 1990, 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.

(18) The term “allowable 1985 emissions rate” means a federally enforceable emissions limitation for sulfur dioxide or oxides of nitrogen, applicable to the unit in 1985 or the limitation applicable in such other subsequent year as determined by the Administrator if such a limitation for 1985 does not exist. Where the emissions limitation for a unit is not expressed in pounds of emissions per million Btu, or the averaging period of that emissions limitation is not expressed on an annual basis, the Administrator shall calculate the annual equivalent of that emissions limitation in pounds per million Btu to establish the allowable 1985 emissions rate.

(19) The term “qualifying phase I technology” means a technological system of continuous emission reduction which achieves a 90 percent reduction in emissions of sulfur dioxide from the emissions that would have resulted from the use of fuels which were not subject to treatment prior to combustion.

(20) The term “alternative method of compliance” means a method of compliance in accordance with one or more of the following authorities:

³ See References in Text note below.

(A) a substitution plan submitted and approved in accordance with subsections⁴ 7651c(b) and (c) of this title;

(B) a Phase I extension plan approved by the Administrator under section 7651c(d) of this title, using qualifying phase I technology as determined by the Administrator in accordance with that section; or

(C) repowering with a qualifying clean coal technology under section 7651h of this title.

(21) The term “commenced” as applied to construction of any new electric utility unit means that an owner or operator has undertaken a continuous program of construction or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction.

(22) The term “commenced commercial operation” means to have begun to generate electricity for sale.

(23) The term “construction” means fabrication, erection, or installation of an affected unit.

(24) The term “industrial source” means a unit that does not serve a generator that produces electricity, a “nonutility unit” as defined in this section, or a process source as defined in section 7651i(e)⁵ of this title.

(25) The term “nonutility unit” means a unit other than a utility unit.

(26) The term “designated representative” means a responsible person or official authorized by the owner or operator of a unit to represent the owner or operator in matters pertaining to the holding, transfer, or disposition of allowances allocated to a unit, and the submission of and compliance with permits, permit applications, and compliance plans for the unit.

(27) The term “life-of-the-unit, firm power contractual arrangement” means a unit participation power sales agreement under which a utility or industrial customer reserves, or is entitled to receive, a specified amount or percentage of capacity and associated energy generated by a specified generating unit (or units) and pays its proportional amount of such unit’s total costs, pursuant to a contract either—

(A) for the life of the unit;

(B) for a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

(C) for a period equal to or greater than 25 years or 70 percent of the economic useful life of the unit determined as of the time the unit was built, with option rights to purchase or re-lease some portion of the capacity and associated energy generated by the unit (or units) at the end of the period.

(28) The term “basic Phase II allowance allocations” means:

(A) For calendar years 2000 through 2009 inclusive, allocations of allowances made by the Administrator pursuant to section 7651b of this title and subsections (b)(1), (3), and

(4); (c)(1), (2), (3), and (5); (d)(1), (2), (4), and (5); (e); (f); (g)(1), (2), (3), (4), and (5); (h)(1); (i) and (j) of section 7651d of this title.

(B) For each calendar year beginning in 2010, allocations of allowances made by the Administrator pursuant to section 7651b of this title and subsections (b)(1), (3), and (4); (c)(1), (2), (3), and (5); (d)(1), (2), (4) and (5); (e); (f); (g)(1), (2), (3), (4), and (5); (h)(1) and (3); (i) and (j) of section 7651d of this title.

(29) The term “Phase II bonus allowance allocations” means, for calendar year 2000 through 2009, inclusive, and only for such years, allocations made by the Administrator pursuant to section 7651b of this title, subsections (a)(2), (b)(2), (c)(4), (d)(3) (except as otherwise provided therein), and (h)(2) of section 7651d of this title, and section 7651e of this title.

(July 14, 1955, ch. 360, title IV, § 402, as added Pub. L. 101-549, title IV, § 401, Nov. 15, 1990, 104 Stat. 2585.)

REFERENCES IN TEXT

Part B of title III of the Act, referred to in par. (11), means title III of the Clean Air Act, act July 14, 1955, ch. 360, as added, which is classified to subchapter III of this chapter, but title III does not contain parts. For provisions of the Clean Air Act relating to permits, see subchapter V (§ 7661 et seq.) of this chapter.

CODIFICATION

Another section 402 of act July 14, 1955, as added by Pub. L. 91-604, § 14, Dec. 31, 1970, 84 Stat. 1709, is classified to section 7641 of this title.

§ 7651b. Sulfur dioxide allowance program for existing and new units

(a) Allocations of annual allowances for existing and new units

(1)¹ For the emission limitation programs under this subchapter, the Administrator shall allocate annual allowances for the unit, to be held or distributed by the designated representative of the owner or operator of each affected unit at an affected source in accordance with this subchapter, in an amount equal to the annual tonnage emission limitation calculated under section 7651c, 7651d, 7651e, 7651h, or 7651i of this title except as otherwise specifically provided elsewhere in this subchapter. Except as provided in sections 7651d(a)(2), 7651d(a)(3), 7651h and 7651i of this title, beginning January 1, 2000, the Administrator shall not allocate annual allowances to emit sulfur dioxide pursuant to section 7651d of this title in such an amount as would result in total annual emissions of sulfur dioxide from utility units in excess of 8.90 million tons except that the Administrator shall not take into account unused allowances carried forward by owners and operators of affected units or by other persons holding such allowances, following the year for which they were allocated. If necessary to meeting the restrictions imposed in the preceding sentence, the Administrator shall reduce, pro rata, the basic Phase II allowance allocations for each unit subject to the requirements of section 7651d of this title.

⁴ So in original. Probably should be “section”.

⁵ So in original. Probably should be section “7651i(d)”.

¹ So in original. No pars. (2) and (3) have been enacted.

Subject to the provisions of section 7651o of this title, the Administrator shall allocate allowances for each affected unit at an affected source annually, as provided in paragraphs (2) and (3)¹ and section 7651g of this title. Except as provided in sections 7651h and 7651i of this title, the removal of an existing affected unit or source from commercial operation at any time after November 15, 1990 (whether before or after January 1, 1995, or January 1, 2000) shall not terminate or otherwise affect the allocation of allowances pursuant to section 7651c or 7651d of this title to which the unit is entitled. Allowances shall be allocated by the Administrator without cost to the recipient, except for allowances sold by the Administrator pursuant to section 7651o of this title. Not later than December 31, 1991, the Administrator shall publish a proposed list of the basic Phase II allowance allocations, the Phase II bonus allowance allocations and, if applicable, allocations pursuant to section 7651d(a)(3) of this title for each unit subject to the emissions limitation requirements of section 7651d of this title for the year 2000 and the year 2010. After notice and opportunity for public comment, but not later than December 31, 1992, the Administrator shall publish a final list of such allocations, subject to the provisions of section 7651d(a)(2) of this title. Any owner or operator of an existing unit subject to the requirements of section 7651d(b) or (c) of this title who is considering applying for an extension of the emission limitation requirement compliance deadline for that unit from January 1, 2000, until not later than December 31, 2000, pursuant to section 7651h of this title, shall notify the Administrator no later than March 31, 1991. Such notification shall be used as the basis for estimating the basic Phase II allowances under this subsection. Prior to June 1, 1998, the Administrator shall publish a revised final statement of allowance allocations, subject to the provisions of section 7651d(a)(2) of this title and taking into account the effect of any compliance date extensions granted pursuant to section 7651h of this title on such allocations. Any person who may make an election concerning the amount of allowances to be allocated to a unit or units shall make such election and so inform the Administrator not later than March 31, 1991, in the case of an election under section 7651d of this title (or June 30, 1991, in the case of an election under section 7651e of this title). If such person fails to make such election, the Administrator shall set forth for each unit owned or operated by such person, the amount of allowances reflecting the election that would, in the judgment of the Administrator, provide the greatest benefit for the owner or operator of the unit. If such person is a Governor who may make an election under section 7651e of this title and the Governor fails to make an election, the Administrator shall set forth for each unit in the State the amount of allowances reflecting the election that would, in the judgment of the Administrator, provide the greatest benefit for units in the State.

(b) Allowance transfer system

Allowances allocated under this subchapter may be transferred among designated representatives of the owners or operators of affected

sources under this subchapter and any other person who holds such allowances, as provided by the allowance system regulations to be promulgated by the Administrator not later than eighteen months after November 15, 1990. Such regulations shall establish the allowance system prescribed under this section, including, but not limited to, requirements for the allocation, transfer, and use of allowances under this subchapter. Such regulations shall prohibit the use of any allowance prior to the calendar year for which the allowance was allocated, and shall provide, consistent with the purposes of this subchapter, for the identification of unused allowances, and for such unused allowances to be carried forward and added to allowances allocated in subsequent years, including allowances allocated to units subject to Phase I requirements (as described in section 7651c of this title) which are applied to emissions limitations requirements in Phase II (as described in section 7651d of this title). Transfers of allowances shall not be effective until written certification of the transfer, signed by a responsible official of each party to the transfer, is received and recorded by the Administrator. Such regulations shall permit the transfer of allowances prior to the issuance of such allowances. Recorded pre-allocation transfers shall be deducted by the Administrator from the number of allowances which would otherwise be allocated to the transferor, and added to those allowances allocated to the transferee. Pre-allocation transfers shall not affect the prohibition contained in this subsection against the use of allowances prior to the year for which they are allocated.

(c) Interpollutant trading

Not later than January 1, 1994, the Administrator shall furnish to the Congress a study evaluating the environmental and economic consequences of amending this subchapter to permit trading sulfur dioxide allowances for nitrogen oxides allowances.

(d) Allowance tracking system

(1) The Administrator shall promulgate, not later than 18 months after November 15, 1990, a system for issuing, recording, and tracking allowances, which shall specify all necessary procedures and requirements for an orderly and competitive functioning of the allowance system. All allowance allocations and transfers shall, upon recordation by the Administrator, be deemed a part of each unit's permit requirements pursuant to section 7651g of this title, without any further permit review and revision.

(2) In order to insure electric reliability, such regulations shall not prohibit or affect temporary increases and decreases in emissions within utility systems, power pools, or utilities entering into allowance pool agreements, that result from their operations, including emergencies and central dispatch, and such temporary emissions increases and decreases shall not require transfer of allowances among units nor shall it require recordation. The owners or operators of such units shall act through a designated representative. Notwithstanding the preceding sentence, the total tonnage of emissions in any calendar year (calculated at the end thereof) from all units in such a utility system,

power pool, or allowance pool agreements shall not exceed the total allowances for such units for the calendar year concerned.

(e) New utility units

After January 1, 2000, it shall be unlawful for a new utility unit to emit an annual tonnage of sulfur dioxide in excess of the number of allowances to emit held for the unit by the unit's owner or operator. Such new utility units shall not be eligible for an allocation of sulfur dioxide allowances under subsection (a)(1) of this section, unless the unit is subject to the provisions of subsection (g)(2) or (3) of section 7651d of this title. New utility units may obtain allowances from any person, in accordance with this subchapter. The owner or operator of any new utility unit in violation of this subsection shall be liable for fulfilling the obligations specified in section 7651j of this title.

(f) Nature of allowances

An allowance allocated under this subchapter is a limited authorization to emit sulfur dioxide in accordance with the provisions of this subchapter. Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization. Nothing in this section relating to allowances shall be construed as affecting the application of, or compliance with, any other provision of this chapter to an affected unit or source, including the provisions related to applicable National Ambient Air Quality Standards and State implementation plans. Nothing in this section shall be construed as requiring a change of any kind in any State law regulating electric utility rates and charges or affecting any State law regarding such State regulation or as limiting State regulation (including any prudency review) under such a State law. Nothing in this section shall be construed as modifying the Federal Power Act [16 U.S.C. 791a et seq.] or as affecting the authority of the Federal Energy Regulatory Commission under that Act. Nothing in this subchapter shall be construed to interfere with or impair any program for competitive bidding for power supply in a State in which such program is established. Allowances, once allocated to a person by the Administrator, may be received, held, and temporarily or permanently transferred in accordance with this subchapter and the regulations of the Administrator without regard to whether or not a permit is in effect under subchapter V of this chapter or section 7651g of this title with respect to the unit for which such allowance was originally allocated and recorded. Each permit under this subchapter and each permit issued under subchapter V of this chapter for any affected unit shall provide that the affected unit may not emit an annual tonnage of sulfur dioxide in excess of the allowances held for that unit.

(g) Prohibition

It shall be unlawful for any person to hold, use, or transfer any allowance allocated under this subchapter, except in accordance with regulations promulgated by the Administrator. It shall be unlawful for any affected unit to emit

sulfur dioxide in excess of the number of allowances held for that unit for that year by the owner or operator of the unit. Upon the allocation of allowances under this subchapter, the prohibition contained in the preceding sentence shall supersede any other emission limitation applicable under this subchapter to the units for which such allowances are allocated. Allowances may not be used prior to the calendar year for which they are allocated. Nothing in this section or in the allowance system regulations shall relieve the Administrator of the Administrator's permitting, monitoring and enforcement obligations under this chapter, nor relieve affected sources of their requirements and liabilities under this chapter.

(h) Competitive bidding for power supply

Nothing in this subchapter shall be construed to interfere with or impair any program for competitive bidding for power supply in a State in which such program is established.

(i) Applicability of antitrust laws

(1) Nothing in this section affects—

(A) the applicability of the antitrust laws to the transfer, use, or sale of allowances, or

(B) the authority of the Federal Energy Regulatory Commission under any provision of law respecting unfair methods of competition or anticompetitive acts or practices.

(2) As used in this section, "antitrust laws" means those Acts set forth in section 12 of title 15.

(j) Public Utility Holding Company Act

The acquisition or disposition of allowances pursuant to this subchapter including the issuance of securities or the undertaking of any other financing transaction in connection with such allowances shall not be subject to the provisions of the Public Utility Holding Company Act of 1935.²

(July 14, 1955, ch. 360, title IV, §403, as added Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2589.)

REFERENCES IN TEXT

The Federal Power Act, referred to in subsec. (f), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to chapter 12 (§791a et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 791a of Title 16 and Tables.

The Public Utility Holding Company Act of 1935, referred to in subsec. (j), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109-58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

CODIFICATION

Another section 403 of act July 14, 1955, as added by Pub. L. 91-604, §14, Dec. 31, 1970, 84 Stat. 1710, is classified to section 7642 of this title.

FOSSIL FUEL USE

Pub. L. 101-549, title IV, §402, Nov. 15, 1990, 104 Stat. 2631, provided that:

“(a) CONTRACTS FOR HYDROELECTRIC ENERGY.—Any person who, after the date of the enactment of the

² See References in Text note below.

Clean Air Act Amendments of 1990 [Nov. 15, 1990], enters into a contract under which such person receives hydroelectric energy in return for the provision of electric energy by such person shall use allowances held by such person as necessary to satisfy such person's obligations under such contract.

“(b) FEDERAL POWER MARKETING ADMINISTRATION.—A Federal Power Marketing Administration shall not be subject to the provisions and requirements of this title [enacting this subchapter, amending sections 7410, 7411, and 7479 of this title, and enacting provisions set out as notes under sections 7403, 7411, and 7651 of this title] with respect to electric energy generated by hydroelectric facilities and marketed by such Power Marketing Administration. Any person who sells or provides electric energy to a Federal Power Marketing Administration shall comply with the provisions and requirements of this title.”

§ 7651c. Phase I sulfur dioxide requirements

(a) Emission limitations

(1) After January 1, 1995, each source that includes one or more affected units listed in table A is an affected source under this section. After January 1, 1995, it shall be unlawful for any affected unit (other than an eligible phase I unit under subsection (d)(2) of this section) to emit sulfur dioxide in excess of the tonnage limitation stated as a total number of allowances in table A for phase I, unless (A) the emissions reduction requirements applicable to such unit have been achieved pursuant to subsection (b) or (d) of this section, or (B) the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions, except that, after January 1, 2000, the emissions limitations established in this section shall be superseded by those established in section 7651d of this title. The owner or operator of any unit in violation of this section shall be fully liable for such violation including, but not limited to, liability for fulfilling the obligations specified in section 7651j of this title.

(2) Not later than December 31, 1991, the Administrator shall determine the total tonnage of reductions in the emissions of sulfur dioxide from all utility units in calendar year 1995 that will occur as a result of compliance with the emissions limitation requirements of this section, and shall establish a reserve of allowances equal in amount to the number of tons determined thereby not to exceed a total of 3.50 million tons. In making such a determination, the Administrator shall compute for each unit subject to the emissions limitation requirements of this section the difference between:

(A) the product of its baseline multiplied by the lesser of each unit's allowable 1985 emissions rate and its actual 1985 emissions rate, divided by 2,000, and

(B) the product of each unit's baseline multiplied by 2.50 lbs/mmBtu divided by 2,000,

and sum the computations. The Administrator shall adjust the foregoing calculation to reflect projected calendar year 1995 utilization of the units subject to the emissions limitations of this subchapter that the Administrator finds would have occurred in the absence of the imposition of such requirements. Pursuant to subsection (d) of this section, the Administrator shall allocate allowances from the reserve established hereinunder until the earlier of such time

as all such allowances in the reserve are allocated or December 31, 1999.

(3) In addition to allowances allocated pursuant to paragraph (1), in each calendar year beginning in 1995 and ending in 1999, inclusive, the Administrator shall allocate for each unit on Table A that is located in the States of Illinois, Indiana, or Ohio (other than units at Kyger Creek, Clifty Creek and Joppa Steam), allowances in an amount equal to 200,000 multiplied by the unit's pro rata share of the total number of allowances allocated for all units on Table A in the 3 States (other than units at Kyger Creek, Clifty Creek, and Joppa Steam) pursuant to paragraph (1). Such allowances shall be excluded from the calculation of the reserve under paragraph (2).

(b) Substitutions

The owner or operator of an affected unit under subsection (a) of this section may include in its section 7651g of this title permit application and proposed compliance plan a proposal to reassign, in whole or in part, the affected unit's sulfur dioxide reduction requirements to any other unit(s) under the control of such owner or operator. Such proposal shall specify—

(1) the designation of the substitute unit or units to which any part of the reduction obligations of subsection (a) of this section shall be required, in addition to, or in lieu of, any original affected units designated under such subsection;

(2) the original affected unit's baseline, the actual and allowable 1985 emissions rate for sulfur dioxide, and the authorized annual allowance allocation stated in table A;

(3) calculation of the annual average tonnage for calendar years 1985, 1986, and 1987, emitted by the substitute unit or units, based on the baseline for each unit, as defined in section 7651a(d)¹ of this title, multiplied by the lesser of the unit's actual or allowable 1985 emissions rate;

(4) the emissions rates and tonnage limitations that would be applicable to the original and substitute affected units under the substitution proposal;

(5) documentation, to the satisfaction of the Administrator, that the reassigned tonnage limits will, in total, achieve the same or greater emissions reduction than would have been achieved by the original affected unit and the substitute unit or units without such substitution; and

(6) such other information as the Administrator may require.

(c) Administrator's action on substitution proposals

(1) The Administrator shall take final action on such substitution proposal in accordance with section 7651g(c) of this title if the substitution proposal fulfills the requirements of this subsection. The Administrator may approve a substitution proposal in whole or in part and with such modifications or conditions as may be consistent with the orderly functioning of the allowance system and which will ensure the emissions reductions contemplated by this sub-

¹ So in original. Probably should be section “7651a(4)”.

chapter. If a proposal does not meet the requirements of subsection (b) of this section, the Administrator shall disapprove it. The owner or operator of a unit listed in table A shall not substitute another unit or units without the prior approval of the Administrator.

(2) Upon approval of a substitution proposal, each substitute unit, and each source with such unit, shall be deemed affected under this subchapter, and the Administrator shall issue a permit to the original and substitute affected source and unit in accordance with the approved substitution plan and section 7651g of this title. The Administrator shall allocate allowances for the original and substitute affected units in accordance with the approved substitution proposal pursuant to section 7651b of this title. It shall be unlawful for any source or unit that is allocated allowances pursuant to this section to emit sulfur dioxide in excess of the emissions limitation provided for in the approved substitution permit and plan unless the owner or operator of each unit governed by the permit and approved substitution plan holds allowances to emit not less than the units² total annual emissions. The owner or operator of any original or substitute affected unit operated in violation of this subsection shall be fully liable for such violation, including liability for fulfilling the obligations specified in section 7651j of this title. If a substitution proposal is disapproved, the Administrator shall allocate allowances to the original affected unit or units in accordance with subsection (a) of this section.

(d) Eligible phase I extension units

(1) The owner or operator of any affected unit subject to an emissions limitation requirement under this section may petition the Administrator in its permit application under section 7651g of this title for an extension of 2 years of the deadline for meeting such requirement, provided that the owner or operator of any such unit holds allowances to emit not less than the unit's total annual emissions for each of the 2 years of the period of extension. To qualify for such an extension, the affected unit must either employ a qualifying phase I technology, or transfer its phase I emissions reduction obligation to a unit employing a qualifying phase I technology. Such transfer shall be accomplished in accordance with a compliance plan, submitted and approved under section 7651g of this title, that shall govern operations at all units included in the transfer, and that specifies the emissions reduction requirements imposed pursuant to this subchapter.

(2) Such extension proposal shall—

(A) specify the unit or units proposed for designation as an eligible phase I extension unit;

(B) provide a copy of an executed contract, which may be contingent upon the Administrator approving the proposal, for the design engineering, and construction of the qualifying phase I technology for the extension unit, or for the unit or units to which the extension unit's emission reduction obligation is to be transferred;

(C) specify the unit's or units' baseline, actual 1985 emissions rate, allowable 1985 emissions rate, and projected utilization for calendar years 1995 through 1999;

(D) require CEMS on both the eligible phase I extension unit or units and the transfer unit or units beginning no later than January 1, 1995; and

(E) specify the emission limitation and number of allowances expected to be necessary for annual operation after the qualifying phase I technology has been installed.

(3) The Administrator shall review and take final action on each extension proposal in order of receipt, consistent with section 7651g of this title, and for an approved proposal shall designate the unit or units as an eligible phase I extension unit. The Administrator may approve an extension proposal in whole or in part, and with such modifications or conditions as may be necessary, consistent with the orderly functioning of the allowance system, and to ensure the emissions reductions contemplated by the³ subchapter.

(4) In order to determine the number of proposals eligible for allocations from the reserve under subsection (a)(2) of this section and the number of allowances remaining available after each proposal is acted upon, the Administrator shall reduce the total number of allowances remaining available in the reserve by the number of allowances calculated according to subparagraphs (A), (B) and (C) until either no allowances remain available in the reserve for further allocation or all approved proposals have been acted upon. If no allowances remain available in the reserve for further allocation before all proposals have been acted upon by the Administrator, any pending proposals shall be disapproved. The Administrator shall calculate allowances equal to—

(A) the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or the projected emissions tonnage for calendar year 1995 of each eligible phase I extension unit, as designated under paragraph (3), and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000;

(B) the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or the projected emissions tonnage for calendar year 1996 of each eligible phase I extension unit, as designated under paragraph (3), and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000; and

(C) the amount by which (i) the product of each unit's baseline multiplied by an emission rate of 1.20 lbs/mmBtu, divided by 2,000, exceeds (ii) the tonnage level specified under subparagraph (E) of paragraph (2) of this subsection multiplied by a factor of 3.

(5) Each eligible Phase I extension unit shall receive allowances determined under subsection (a)(1) or (c) of this section. In addition, for calendar year 1995, the Administrator shall allocate to each eligible Phase I extension unit, from the

² So in original. Probably should be "unit's".

³ So in original. Probably should be "this".

allowance reserve created pursuant to subsection (a)(2) of this section, allowances equal to the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or its projected emissions tonnage for calendar year 1995 and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000. In calendar year 1996, the Administrator shall allocate for each eligible unit, from the allowance reserve created pursuant to subsection (a)(2) of this section, allowances equal to the difference between the lesser of the average annual emissions in calendar years 1988 and 1989 or its projected emissions tonnage for calendar year 1996 and the product of the unit's baseline multiplied by an emission rate of 2.50 lbs/mmBtu, divided by 2,000. It shall be unlawful for any source or unit subject to an approved extension plan under this subsection to emit sulfur dioxide in excess of the emissions limitations provided for in the permit and approved extension plan, unless the owner or operator of each unit governed by the permit and approved plan holds allowances to emit not less than the unit's total annual emissions.

(6) In addition to allowances specified in paragraph (5), the Administrator shall allocate for each eligible Phase I extension unit employing qualifying Phase I technology, for calendar years 1997, 1998, and 1999, additional allowances, from any remaining allowances in the reserve created pursuant to subsection (a)(2) of this section, following the reduction in the reserve provided for in paragraph (4), not to exceed the amount by which (A) the product of each eligible unit's baseline times an emission rate of 1.20 lbs/mmBtu, divided by 2,000, exceeds (B) the tonnage level specified under subparagraph (E) of paragraph (2) of this subsection.

(7) After January 1, 1997, in addition to any liability under this chapter, including under section 7651j of this title, if any eligible phase I extension unit employing qualifying phase I technology or any transfer unit under this subsection emits sulfur dioxide in excess of the annual tonnage limitation specified in the extension plan, as approved in paragraph (3) of this subsection, the Administrator shall, in the calendar year following such excess, deduct allowances equal to the amount of such excess from such unit's annual allowance allocation.

(e) Allocation of allowances

(1) In the case of a unit that receives authorization from the Governor of the State in which such unit is located to make reductions in the emissions of sulfur dioxide prior to calendar year 1995 and that is part of a utility system that meets the following requirements: (A) the total coal-fired generation within the utility system as a percentage of total system generation decreased by more than 20 percent between January 1, 1980, and December 31, 1985; and (B) the weighted capacity factor of all coal-fired units within the utility system averaged over the period from January 1, 1985, through December 31, 1987, was below 50 percent, the Administrator shall allocate allowances under this paragraph for the unit pursuant to this subsection. The Administrator shall allocate allowances for a unit that is an affected unit pursuant to sec-

tion 7651d of this title (but is not also an affected unit under this section) and part of a utility system that includes 1 or more affected units under section 7651d of this title for reductions in the emissions of sulfur dioxide made during the period 1995-1999 if the unit meets the requirements of this subsection and the requirements of the preceding sentence, except that for the purposes of applying this subsection to any such unit, the prior year concerned as specified below, shall be any year after January 1, 1995 but prior to January 1, 2000.

(2) In the case of an affected unit under this section described in subparagraph (A),⁴ the allowances allocated under this subsection for early reductions in any prior year may not exceed the amount which (A) the product of the unit's baseline multiplied by the unit's 1985 actual sulfur dioxide emission rate (in lbs. per mmBtu), divided by 2,000, exceeds (B) the allowances specified for such unit in Table A. In the case of an affected unit under section 7651d of this title described in subparagraph (A),⁴ the allowances awarded under this subsection for early reductions in any prior year may not exceed the amount by which (i) the product of the quantity of fossil fuel consumed by the unit (in mmBtu) in the prior year multiplied by the lesser of 2.50 or the most stringent emission rate (in lbs. per mmBtu) applicable to the unit under the applicable implementation plan, divided by 2,000, exceeds (ii) the unit's actual tonnage of sulfur dioxide emission for the prior year concerned. Allowances allocated under this subsection for units referred to in subparagraph (A)⁴ may be allocated only for emission reductions achieved as a result of physical changes or changes in the method of operation made after November 15, 1990, including changes in the type or quality of fossil fuel consumed.

(3) In no event shall the provisions of this paragraph⁵ be interpreted as an event of force majeure⁶ or a commercial impracticability⁷ or in any other way as a basis for excused non-performance by a utility system under a coal sales contract in effect before November 15, 1990.

TABLE A.—AFFECTED SOURCES AND UNITS IN PHASE I AND THEIR SULFUR DIOXIDE ALLOWANCES (TONS)

State	Plant Name	Generator	Phase I Allowances
Alabama	Colbert	1	13,570
		2	15,310
		3	15,400
		4	15,410
		5	37,180
	E.C. Gaston	1	18,100
		2	18,540
		3	18,310
		4	19,280
		5	59,840
Florida	Big Bend	1	28,410
		2	27,100
		3	26,740
	Crist	6	19,200
		7	31,680

⁴ So in original. Probably should be "paragraph (1)".

⁵ So in original. Probably should be "subsection".

⁶ So in original. Probably should be "majeure".

⁷ So in original. Probably should be "impracticability".

TABLE A.—AFFECTED SOURCES AND UNITS IN PHASE I
AND THEIR SULFUR DIOXIDE ALLOWANCES (TONS)—CON-
TINUED

State	Plant Name	Gener- ator	Phase I Allow- ances
Georgia	Bowen	1	56,320
		2	54,770
		3	71,750
		4	71,740
	Hammond	1	8,780
		2	9,220
		3	8,910
		4	37,640
	J. McDonough	1	19,910
		2	20,600
	Wansley	1	70,770
		2	65,430
	Yates	1	7,210
		2	7,040
		3	6,950
		4	8,910
		5	9,410
		6	24,760
		7	21,480
Illinois	Baldwin	1	42,010
		2	44,420
		3	42,550
		1	11,790
	Coffeen	2	35,670
		4	5,910
	Grand Tower	2	18,410
	Hennepin	1	12,590
	Joppa Steam	2	10,770
		3	12,270
		4	11,360
		5	11,420
		6	10,620
	Kincaid	1	31,530
		2	33,810
	Meredosia	3	13,890
	Vermilion	2	8,880
Indiana	Bailly	7	11,180
		8	15,630
	Breed	1	18,500
		1	33,370
	Cayuga	2	34,130
		1	20,150
	Clifty Creek	2	19,810
		3	20,410
		4	20,080
		5	19,360
		6	20,380
		5	3,880
		6	4,770
		7	23,610
	F. B. Culley	2	4,290
		3	16,970
	F. E. Ratts	1	8,330
		2	8,480
	Gibson	1	40,400
		2	41,010
		3	41,080
		4	40,320
	H. T. Pritchard ...	6	5,770
	Michigan City	12	23,310
	Petersburg	1	16,430
		2	32,380
	R. Gallagher	1	6,490
		2	7,280
		3	6,530
		4	7,650
	Tanners Creek	4	24,820
	Wabash River	1	4,000
		2	2,860
		3	3,750
		5	3,670
		6	12,280

TABLE A.—AFFECTED SOURCES AND UNITS IN PHASE I
AND THEIR SULFUR DIOXIDE ALLOWANCES (TONS)—CON-
TINUED

State	Plant Name	Gener- ator	Phase I Allow- ances
Iowa	Warrick	4	26,980
		1	10,710
	Burlington	7	2,320
		1	1,290
	George Neal	2	13,800
		4	8,180
	Prairie Creek	5	3,990
		2	4,220
	Riverside	1	11,250
		2	12,840
Kansas	Quindaro	3	12,340
		1	7,450
	Coleman	2	15,320
		1	7,110
	Cooper	2	10,910
		3	26,100
	E.W. Brown	1	6,520
		2	14,410
	Elmer Smith	1	28,410
		2	7,820
Maryland	Ghent	4	7,820
		1	22,780
	Green River	1	13,340
		2	12,310
	H.L. Spurlock	3	59,170
		10	10,170
	Henderson II	1	21,910
		2	24,330
	Paradise	1	10,330
		2	9,230
Michigan	Shawnee	1	35,260
		2	38,480
	Chalk Point	1	19,280
		2	23,060
	C. P. Crane	6	4,270
		4	17,910
	Morgantown	5	36,700
		1	16,190
	J. H. Campbell	5	4,850
		1	40,110
Minnesota	Jack Watson	2	37,710
		3	40,310
	Asbury	4	35,940
		1	7,390
	James River	2	8,200
		3	10,090
	Labadie	1	28,240
		2	32,480
	Montrose	3	15,580
		1	22,570
Mississippi	Sioux	2	23,690
		1	10,250
	Thomas Hill	2	19,390
		1	10,190
	Merrimack	2	22,000
		1	9,060
	New Hampshire	2	11,720
		3	12,600
	New Jersey	4	14,060
		4	7,540
Missouri	Dunkirk	1	11,170
		2	12,410
	Greenidge	1	19,810
		2	24,110
	Milliken	3	26,480
		3	10,470
	Northport	4	12,330
		5	16,740
	Port Jefferson	8	11,650
		9	30,480
New York	Ashtabula	1	34,270
		2	38,320
	Avon Lake		
Ohio	Cardinal		

TABLE A.—AFFECTED SOURCES AND UNITS IN PHASE I
AND THEIR SULFUR DIOXIDE ALLOWANCES (TONS)—CON-
TINUED

State	Plant Name	Gener- ator	Phase I Allow- ances
	Conesville	1	4,210
		2	4,890
		3	5,500
		4	48,770
	Eastlake	1	7,800
		2	8,640
		3	10,020
		4	14,510
		5	34,070
	Edgewater	4	5,050
		1	79,080
	Gen. J.M. Gavin ..	2	80,560
		1	19,280
	Kyger Creek	2	18,560
		3	17,910
		4	18,710
		5	18,740
		5	760
	Miami Fort	6	11,380
		7	38,510
		1	14,880
	Muskingum River	2	14,170
		3	13,950
		4	11,780
		5	40,470
		1	6,940
	Niles	2	9,100
		5	4,930
	Picway	3	6,150
		4	10,780
		5	12,430
		5	24,170
	W.H. Sammis	6	39,930
		7	43,220
		5	8,950
	W.C. Beckjord	6	23,020
		1	14,410
		2	15,430
Pennsylvania ...	Armstrong	1	27,760
		2	31,100
		3	53,820
		1	39,170
	Cheswick	1	59,790
		2	66,450
		1	37,830
		2	37,320
	Conemaugh	3	40,270
		1	12,660
		2	12,820
	Martins Creek	1	5,940
		2	10,230
	Portland	1	10,320
		2	10,320
		3	14,220
		4	14,070
	Shawville	3	8,760
		4	11,450
		1	15,320
Tennessee	Allen	2	16,770
		3	15,670
		1	86,700
		2	94,840
	Cumberland	1	17,870
		2	17,310
		3	20,020
		4	21,260

TABLE A.—AFFECTED SOURCES AND UNITS IN PHASE I
AND THEIR SULFUR DIOXIDE ALLOWANCES (TONS)—CON-
TINUED

State	Plant Name	Gener- ator	Phase I Allow- ances
	Johnsonville	1	7,790
		2	8,040
		3	8,410
		4	7,990
		5	8,240
		6	7,890
		7	8,980
		8	8,700
		9	7,080
		10	7,550
West Virginia ..	Albright	3	12,000
		1	41,590
	Fort Martin	2	41,200
		1	48,620
	Harrison	2	46,150
		3	41,500
		1	18,740
	Kammer	2	19,460
		3	17,390
	Mitchell	1	43,980
2		45,510	
	Mount Storm	1	43,720
		2	35,580
	Wisconsin	3	42,430
		4	24,750
		3	22,700
	La Crosse/Genoa ..	1	6,010
		2	6,680
	Nelson Dewey	1	5,220
		2	5,140
		3	5,370
	N. Oak Creek	4	6,320
		8	7,510
		5	9,670
		6	12,040
		7	16,180
	Pulliam	8	15,790
		5	9,670
		6	12,040
	S. Oak Creek	7	16,180
		8	15,790
		6	12,040

(f) Energy conservation and renewable energy**(1) Definitions**

As used in this subsection:

(A) Qualified energy conservation measure

The term “qualified energy conservation measure” means a cost effective measure, as identified by the Administrator in consultation with the Secretary of Energy, that increases the efficiency of the use of electricity provided by an electric utility to its customers.

(B) Qualified renewable energy

The term “qualified renewable energy” means energy derived from biomass, solar, geothermal, or wind as identified by the Administrator in consultation with the Secretary of Energy.

(C) Electric utility

The term “electric utility” means any person, State agency, or Federal agency, which sells electric energy.

(2) Allowances for emissions avoided through energy conservation and renewable energy**(A) In general**

The regulations under paragraph (4) of this subsection shall provide that for each ton of sulfur dioxide emissions avoided by an elec-

tric utility, during the applicable period, through the use of qualified energy conservation measures or qualified renewable energy, the Administrator shall allocate a single allowance to such electric utility, on a first-come-first-served basis from the Conservation and Renewable Energy Reserve established under subsection (g) of this section, up to a total of 300,000 allowances for allocation from such Reserve.

(B) Requirements for issuance

The Administrator shall allocate allowances to an electric utility under this subsection only if all of the following requirements are met:

(i) Such electric utility is paying for the qualified energy conservation measures or qualified renewable energy directly or through purchase from another person.

(ii) The emissions of sulfur dioxide avoided through the use of qualified energy conservation measures or qualified renewable energy are quantified in accordance with regulations promulgated by the Administrator under this subsection.

(iii)(I) Such electric utility has adopted and is implementing a least cost energy conservation and electric power plan which evaluates a range of resources, including new power supplies, energy conservation, and renewable energy resources, in order to meet expected future demand at the lowest system cost.

(II) The qualified energy conservation measures or qualified renewable energy, or both, are consistent with that plan.

(III) Electric utilities subject to the jurisdiction of a State regulatory authority must have such plan approved by such authority. For electric utilities not subject to the jurisdiction of a State regulatory authority such plan shall be approved by the entity with rate-making authority for such utility.

(iv) In the case of qualified energy conservation measures undertaken by a State regulated electric utility, the Secretary of Energy certifies that the State regulatory authority with jurisdiction over the electric rates of such electric utility has established rates and charges which ensure that the net income of such electric utility after implementation of specific cost effective energy conservation measures is at least as high as such net income would have been if the energy conservation measures had not been implemented. Upon the date of any such certification by the Secretary of Energy, all allowances which, but for this paragraph, would have been allocated under subparagraph (A) before such date, shall be allocated to the electric utility. This clause is not a requirement for qualified renewable energy.

(v) Such utility or any subsidiary of the utility's holding company owns or operates at least one affected unit.

(C) Period of applicability

Allowances under this subsection shall be allocated only with respect to kilowatt

hours of electric energy saved by qualified energy conservation measures or generated by qualified renewable energy after January 1, 1992 and before the earlier of (i) December 31, 2000, or (ii) the date on which any electric utility steam generating unit owned or operated by the electric utility to which the allowances are allocated becomes subject to this subchapter (including those sources that elect to become affected by this subchapter, pursuant to section 7651i of this title).

(D) Determination of avoided emissions

(i)⁸ Application

In order to receive allowances under this subsection, an electric utility shall make an application which—

(I) designates the qualified energy conservation measures implemented and the qualified renewable energy sources used for purposes of avoiding emissions;⁹

(II) calculates, in accordance with subparagraphs (F) and (G), the number of tons of emissions avoided by reason of the implementation of such measures or the use of such renewable energy sources; and

(III) demonstrates that the requirements of subparagraph (B) have been met.

Such application for allowances by a State-regulated electric utility shall require approval by the State regulatory authority with jurisdiction over such electric utility. The authority shall review the application for accuracy and compliance with this subsection and the rules under this subsection. Electric utilities whose retail rates are not subject to the jurisdiction of a State regulatory authority shall apply directly to the Administrator for such approval.

(E) Avoided emissions from qualified energy conservation measures

For the purposes of this subsection, the emission tonnage deemed avoided by reason of the implementation of qualified energy conservation measures for any calendar year shall be a tonnage equal to the product of multiplying—

(i) the kilowatt hours that would otherwise have been supplied by the utility during such year in the absence of such qualified energy conservation measures, by

(ii) 0.004,

and dividing by 2,000.

(F) Avoided emissions from the use of qualified renewable energy

The emissions tonnage deemed avoided by reason of the use of qualified renewable energy by an electric utility for any calendar year shall be a tonnage equal to the product of multiplying—

(i) the actual kilowatt hours generated by, or purchased from, qualified renewable energy, by

⁸ So in original. There is no cl. (ii).

⁹ So in original. The comma probably should be a semicolon.

(ii) 0.004,
and dividing by 2,000.

(G) Prohibitions

(i) No allowances shall be allocated under this subsection for the implementation of programs that are exclusively informational or educational in nature.

(ii) No allowances shall be allocated for energy conservation measures or renewable energy that were operational before January 1, 1992.

(3) Savings provision

Nothing in this subsection precludes a State or State regulatory authority from providing additional incentives to utilities to encourage investment in demand-side resources.

(4) Regulations

Not later than 18 months after November 15, 1990, and in conjunction with the regulations required to be promulgated under subsections (b) and (c) of this section, the Administrator shall, in consultation with the Secretary of Energy, promulgate regulations under this subsection. Such regulations shall list energy conservation measures and renewable energy sources which may be treated as qualified energy conservation measures and qualified renewable energy for purposes of this subsection. Allowances shall only be allocated if all requirements of this subsection and the rules promulgated to implement this subsection are complied with. The Administrator shall review the determinations of each State regulatory authority under this subsection to encourage consistency from electric utility to electric utility and from State to State in accordance with the Administrator's rules. The Administrator shall publish the findings of this review no less than annually.

(g) Conservation and Renewable Energy Reserve

The Administrator shall establish a Conservation and Renewable Energy Reserve under this subsection. Beginning on January 1, 1995, the Administrator may allocate from the Conservation and Renewable Energy Reserve an amount equal to a total of 300,000 allowances for emissions of sulfur dioxide pursuant to section 7651b of this title. In order to provide 300,000 allowances for such reserve, in each year beginning in calendar year 2000 and until calendar year 2009, inclusive, the Administrator shall reduce each unit's basic Phase II allowance allocation on the basis of its pro rata share of 30,000 allowances. If allowances remain in the reserve after January 2, 2010, the Administrator shall allocate such allowances for affected units under section 7651d of this title on a pro rata basis. For purposes of this subsection, for any unit subject to the emissions limitation requirements of section 7651d of this title, the term "pro rata basis" refers to the ratio which the reductions made in such unit's allowances in order to establish the reserve under this subsection bears to the total of such reductions for all such units.

(h) Alternative allowance allocation for units in certain utility systems with optional baseline

(1) Optional baseline for units in certain systems

In the case of a unit subject to the emissions limitation requirements of this section which (as of November 15, 1990)—

(A) has an emission rate below 1.0 lbs/mmBtu,

(B) has decreased its sulfur dioxide emissions rate by 60 percent or greater since 1980, and

(C) is part of a utility system which has a weighted average sulfur dioxide emissions rate for all fossil fueled-fired units below 1.0 lbs/mmBtu,

at the election of the owner or operator of such unit, the unit's baseline may be calculated (i) as provided under section 7651a(d)¹⁰ of this title, or (ii) by utilizing the unit's average annual fuel consumption at a 60 percent capacity factor. Such election shall be made no later than March 1, 1991.

(2) Allowance allocation

Whenever a unit referred to in paragraph (1) elects to calculate its baseline as provided in clause (ii) of paragraph (1), the Administrator shall allocate allowances for the unit pursuant to section 7651b(a)(1) of this title, this section, and section 7651d of this title (as basic Phase II allowance allocations) in an amount equal to the baseline selected multiplied by the lower of the average annual emission rate for such unit in 1989, or 1.0 lbs./mmBtu. Such allowance allocation shall be in lieu of any allocation of allowances under this section and section 7651d of this title.

(July 14, 1955, ch. 360, title IV, § 404, as added Pub. L. 101-549, title IV, § 401, Nov. 15, 1990, 104 Stat. 2592.)

§ 7651d. Phase II sulfur dioxide requirements

(a) Applicability

(1) After January 1, 2000, each existing utility unit as provided below is subject to the limitations or requirements of this section. Each utility unit subject to an annual sulfur dioxide tonnage emission limitation under this section is an affected unit under this subchapter. Each source that includes one or more affected units is an affected source. In the case of an existing unit that was not in operation during calendar year 1985, the emission rate for a calendar year after 1985, as determined by the Administrator, shall be used in lieu of the 1985 rate. The owner or operator of any unit operated in violation of this section shall be fully liable under this chapter for fulfilling the obligations specified in section 7651j of this title.

(2) In addition to basic Phase II allowance allocations, in each year beginning in calendar year 2000 and ending in calendar year 2009, inclusive, the Administrator shall allocate up to 530,000 Phase II bonus allowances pursuant to subsections (b)(2), (c)(4), (d)(3)(A) and (B), and (h)(2) of this section and section 7651e of this

¹⁰ So in original. Probably should be section "7651a(4)".

title. Not later than June 1, 1998, the Administrator shall calculate, for each unit granted an extension pursuant to section 7651h of this title the difference between (A) the number of allowances allocated for the unit in calendar year 2000, and (B) the product of the unit's baseline multiplied by 1.20 lbs/mmBtu, divided by 2000, and sum the computations. In each year, beginning in calendar year 2000 and ending in calendar year 2009, inclusive, the Administrator shall deduct from each unit's basic Phase II allowance allocation its pro rata share of 10 percent of the sum calculated pursuant to the preceding sentence.

(3) In addition to basic Phase II allowance allocations and Phase II bonus allowance allocations, beginning January 1, 2000, the Administrator shall allocate for each unit listed on Table A in section 7651c of this title (other than units at Kyger Creek, Clifty Creek, and Joppa Steam) and located in the States of Illinois, Indiana, Ohio, Georgia, Alabama, Missouri, Pennsylvania, West Virginia, Kentucky, or Tennessee allowances in an amount equal to 50,000 multiplied by the unit's pro rata share of the total number of basic allowances allocated for all units listed on Table A (other than units at Kyger Creek, Clifty Creek, and Joppa Steam). Allowances allocated pursuant to this paragraph shall not be subject to the 8,900,000 ton limitation in section 7651b(a) of this title.

(b) Units equal to, or above, 75 MWe and 1.20 lbs/mmBtu

(1) Except as otherwise provided in paragraph (3), after January 1, 2000, it shall be unlawful for any existing utility unit that serves a generator with nameplate capacity equal to, or greater, than 75 MWe and an actual 1985 emission rate equal to or greater than 1.20 lbs/mmBtu to exceed an annual sulfur dioxide tonnage emission limitation equal to the product of the unit's baseline multiplied by an emission rate equal to 1.20 lbs/mmBtu, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) In addition to allowances allocated pursuant to paragraph (1) and section 7651b(a)(1) of this title as basic Phase II allowance allocations, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (1) with an actual 1985 emissions rate greater than 1.20 lbs/mmBtu and less than 2.50 lbs/mmBtu and a baseline capacity factor of less than 60 percent, allowances from the reserve created pursuant to subsection (a)(2) of this section in an amount equal to 1.20 lbs/mmBtu multiplied by 50 percent of the difference, on a Btu basis, between the unit's baseline and the unit's fuel consumption at a 60 percent capacity factor.

(3) After January 1, 2000, it shall be unlawful for any existing utility unit with an actual 1985 emissions rate equal to or greater than 1.20 lbs/mmBtu whose annual average fuel consumption during 1985, 1986, and 1987 on a Btu basis exceeded 90 percent in the form of lignite coal which is located in a State in which, as of July 1, 1989, no

county or portion of a county was designated nonattainment under section 7407 of this title for any pollutant subject to the requirements of section 7409 of this title to exceed an annual sulfur dioxide tonnage limitation equal to the product of the unit's baseline multiplied by the lesser of the unit's actual 1985 emissions rate or its allowable 1985 emissions rate, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(4) After January 1, 2000, the Administrator shall allocate annually for each unit, subject to the emissions limitation requirements of paragraph (1), which is located in a State with an installed electrical generating capacity of more than 30,000,000 kw in 1988 and for which was issued a prohibition order or a proposed prohibition order (from burning oil), which unit subsequently converted to coal between January 1, 1980 and December 31, 1985, allowances equal to the difference between (A) the product of the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the lesser of its actual or allowable emissions rate during the first full calendar year after conversion, divided by 2,000, and (B) the number of allowances allocated for the unit pursuant to paragraph (1): *Provided*, That the number of allowances allocated pursuant to this paragraph shall not exceed an annual total of five thousand. If necessary to meeting the restriction imposed in the preceding sentence the Administrator shall reduce, pro rata, the annual allowances allocated for each unit under this paragraph.

(c) Coal or oil-fired units below 75 MWe and above 1.20 lbs/mmBtu

(1) Except as otherwise provided in paragraph (3), after January 1, 2000, it shall be unlawful for a coal or oil-fired existing utility unit that serves a generator with nameplate capacity of less than 75 MWe and an actual 1985 emission rate equal to, or greater than, 1.20 lbs/mmBtu and which is a unit owned by a utility operating company whose aggregate nameplate fossil fuel steam-electric capacity is, as of December 31, 1989, equal to, or greater than, 250 MWe to exceed an annual sulfur dioxide emissions limitation equal to the product of the unit's baseline multiplied by an emission rate equal to 1.20 lbs/mmBtu, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) After January 1, 2000, it shall be unlawful for a coal or oil-fired existing utility unit that serves a generator with nameplate capacity of less than 75 MWe and an actual 1985 emission rate equal to, or greater than, 1.20 lbs/mmBtu (excluding units subject to section 7411 of this title or to a federally enforceable emissions limitation for sulfur dioxide equivalent to an annual rate of less than 1.20 lbs/mmBtu) and which is a unit owned by a utility operating company whose aggregate nameplate fossil fuel steam-electric capacity is, as of December 31, 1989, less than 250 MWe, to exceed an annual sulfur dioxide tonnage emissions limitation equal to the product of the unit's baseline multiplied by the lesser of its actual 1985 emissions rate or its al-

allowable 1985 emissions rate, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(3) After January 1, 2000, it shall be unlawful for any existing utility unit with a nameplate capacity below 75 MWe and an actual 1985 emissions rate equal to, or greater than, 1.20 lbs/mmBtu which became operational on or before December 31, 1965, which is owned by a utility operating company with, as of December 31, 1989, a total fossil fuel steam-electric generating capacity greater than 250 MWe, and less than 450 MWe which serves fewer than 78,000 electrical customers as of November 15, 1990, to exceed an annual sulfur dioxide emissions tonnage limitation equal to the product of its baseline multiplied by the lesser of its actual or allowable 1985 emission rate, divided by 2,000, unless the owner or operator holds allowances to emit not less than the unit's¹ total annual emissions. After January 1, 2010, it shall be unlawful for each unit subject to the emissions limitation requirements of this paragraph to exceed an annual emissions tonnage limitation equal to the product of its baseline multiplied by an emissions rate of 1.20 lbs/mmBtu, divided by 2,000, unless the owner or operator holds allowances to emit not less than the unit's total annual emissions.

(4) In addition to allowances allocated pursuant to paragraph (1) and section 7651b(a)(1) of this title as basic Phase II allowance allocations, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, inclusive, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (1) with an actual 1985 emissions rate equal to, or greater than, 1.20 lbs/mmBtu and less than 2.50 lbs/mmBtu and a baseline capacity factor of less than 60 percent, allowances from the reserve created pursuant to subsection (a)(2) of this section in an amount equal to 1.20 lbs/mmBtu multiplied by 50 percent of the difference, on a Btu basis, between the unit's baseline and the unit's fuel consumption at a 60 percent capacity factor.

(5) After January 1, 2000, it shall be unlawful for any existing utility unit with a nameplate capacity below 75 MWe and an actual 1985 emissions rate equal to, or greater than, 1.20 lbs/mmBtu which is part of an electric utility system which, as of November 15, 1990, (A) has at least 20 percent of its fossil-fuel capacity controlled by flue gas desulfurization devices, (B) has more than 10 percent of its fossil-fuel capacity consisting of coal-fired units of less than 75 MWe, and (C) has large units (greater than 400 MWe) all of which have difficult or very difficult FGD Retrofit Cost Factors (according to the Emissions and the FGD Retrofit Feasibility at the 200 Top Emitting Generating Stations, prepared for the United States Environmental Protection Agency on January 10, 1986) to exceed an annual sulfur dioxide emissions tonnage limitation equal to the product of its baseline multiplied by an emissions rate of 2.5 lbs/mmBtu, divided by 2,000, unless the owner or operator holds allowances to emit not less than the unit's

total annual emissions. After January 1, 2010, it shall be unlawful for each unit subject to the emissions limitation requirements of this paragraph to exceed an annual emissions tonnage limitation equal to the product of its baseline multiplied by an emissions rate of 1.20 lbs/mmBtu, divided by 2,000, unless the owner or operator holds for use allowances to emit not less than the unit's total annual emissions.

(d) Coal-fired units below 1.20 lbs/mmBtu

(1) After January 1, 2000, it shall be unlawful for any existing coal-fired utility unit the lesser of whose actual or allowable 1985 sulfur dioxide emissions rate is less than 0.60 lbs/mmBtu to exceed an annual sulfur dioxide tonnage emission limitation equal to the product of the unit's baseline multiplied by (A) the lesser of 0.60 lbs/mmBtu or the unit's allowable 1985 emissions rate, and (B) a numerical factor of 120 percent, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) After January 1, 2000, it shall be unlawful for any existing coal-fired utility unit the lesser of whose actual or allowable 1985 sulfur dioxide emissions rate is equal to, or greater than, 0.60 lbs/mmBtu and less than 1.20 lbs/mmBtu to exceed an annual sulfur dioxide tonnage emissions limitation equal to the product of the unit's baseline multiplied by (A) the lesser of its actual 1985 emissions rate or its allowable 1985 emissions rate, and (B) a numerical factor of 120 percent, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(3)(A) In addition to allowances allocated pursuant to paragraph (1) and section 7651b(a)(1) of this title as basic Phase II allowance allocations, at the election of the designated representative of the operating company, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (1) allowances from the reserve created pursuant to subsection (a)(2) of this section in an amount equal to the amount by which (i) the product of the lesser of 0.60 lbs/mmBtu or the unit's allowable 1985 emissions rate multiplied by the unit's baseline adjusted to reflect operation at a 60 percent capacity factor, divided by 2,000, exceeds (ii) the number of allowances allocated for the unit pursuant to paragraph (1) and section 7651b(a)(1) of this title as basic Phase II allowance allocations.

(B) In addition to allowances allocated pursuant to paragraph (2) and section 7651b(a)(1) of this title as basic Phase II allowance allocations, at the election of the designated representative of the operating company, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (2) allowances from the reserve created pursuant to subsection (a)(2) of this section in an amount equal to the amount by which (i) the product of the lesser of the unit's actual 1985 emissions rate or its allowable 1985 emissions rate multiplied by the unit's baseline adjusted

¹ So in original. Probably should be "unit's".

to reflect operation at a 60 percent capacity factor, divided by 2,000, exceeds (ii) the number of allowances allocated for the unit pursuant to paragraph (2) and section 7651b(a)(1) of this title as basic Phase II allowance allocations.

(C) An operating company with units subject to the emissions limitation requirements of this subsection may elect the allocation of allowances as provided under subparagraphs (A) and (B). Such election shall apply to the annual allowance allocation for each and every unit in the operating company subject to the emissions limitation requirements of this subsection. The Administrator shall allocate allowances pursuant to subparagraphs (A) and (B) only in accordance with this subparagraph.

(4) Notwithstanding any other provision of this section, at the election of the owner or operator, after January 1, 2000, the Administrator shall allocate in lieu of allocation, pursuant to paragraph (1), (2), (3), (5), or (6),² allowances for a unit subject to the emissions limitation requirements of this subsection which commenced commercial operation on or after January 1, 1981 and before December 31, 1985, which was subject to, and in compliance with, section 7411 of this title in an amount equal to the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the unit's allowable 1985 emissions rate, divided by 2,000.

(5) For the purposes of this section, in the case of an oil- and gas-fired unit which has been awarded a clean coal technology demonstration grant as of January 1, 1991, by the United States Department of Energy, beginning January 1, 2000, the Administrator shall allocate for the unit allowances in an amount equal to the unit's baseline multiplied by 1.20 lbs/mmBtu, divided by 2,000.

(e) Oil and gas-fired units equal to or greater than 0.60 lbs/mmBtu and less than 1.20 lbs/mmBtu

After January 1, 2000, it shall be unlawful for any existing oil and gas-fired utility unit the lesser of whose actual or allowable 1985 sulfur dioxide emission rate is equal to, or greater than, 0.60 lbs/mmBtu, but less than 1.20 lbs/mmBtu to exceed an annual sulfur dioxide tonnage limitation equal to the product of the unit's baseline multiplied by (A) the lesser of the unit's allowable 1985 emissions rate or its actual 1985 emissions rate and (B) a numerical factor of 120 percent divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(f) Oil and gas-fired units less than 0.60 lbs/mmBtu

(1) After January 1, 2000, it shall be unlawful for any oil and gas-fired existing utility unit the lesser of whose actual or allowable 1985 emission rate is less than 0.60 lbs/mmBtu and whose average annual fuel consumption during the period 1980 through 1989 on a Btu basis was 90 percent or less in the form of natural gas to exceed an annual sulfur dioxide tonnage emissions limitation equal to the product of the unit's baseline

multiplied by (A) the lesser of 0.60 lbs/mmBtu or the unit's allowable 1985 emissions, and (B) a numerical factor of 120 percent, divided by 2,000, unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) In addition to allowances allocated pursuant to paragraph (1) as basic Phase II allowance allocations and section 7651b(a)(1) of this title, beginning January 1, 2000, the Administrator shall,³ in the case of any unit operated by a utility that furnishes electricity, electric energy, steam, and natural gas within an area consisting of a city and 1 contiguous county, and in the case of any unit owned by a State authority, the output of which unit is furnished within that same area consisting of a city and 1 contiguous county, the Administrator shall allocate for each unit in the utility its pro rata share of 7,000 allowances and for each unit in the State authority its pro rata share of 2,000 allowances.

(g) Units that commence operation between 1986 and December 31, 1995

(1) After January 1, 2000, it shall be unlawful for any utility unit that has commenced commercial operation on or after January 1, 1986, but not later than September 30, 1990 to exceed an annual tonnage emission limitation equal to the product of the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the unit's allowable 1985 sulfur dioxide emission rate (converted, if necessary, to pounds per mmBtu), divided by 2,000 unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) After January 1, 2000, the Administrator shall allocate allowances pursuant to section 7651b of this title to each unit which is listed in table B of this paragraph in an annual amount equal to the amount specified in table B.

TABLE B

Unit	Allowances
Brandon Shores	8,907
Miller 4	9,197
TNP One 2	4,000
Zimmer 1	18,458
Spruce 1	7,647
Clover 1	2,796
Clover 2	2,796
Twin Oak 2	1,760
Twin Oak 1	9,158
Cross 1	6,401
Malakoff 1	1,759

Notwithstanding any other paragraph of this subsection, for units subject to this paragraph, the Administrator shall not allocate allowances pursuant to any other paragraph of this subsection, Provided⁴ that the owner or operator of a unit listed on Table B may elect an allocation of allowances under another paragraph of this subsection in lieu of an allocation under this paragraph.

(3) Beginning January 1, 2000, the Administrator shall allocate to the owner or operator of any utility unit that commences commercial operation, or has commenced commercial oper-

²So in original. This subsection does not contain a paragraph (6).

³So in original. The words "the Administrator shall," probably should not appear.

⁴So in original. Probably should not be capitalized.

ation, on or after October 1, 1990, but not later than December 31, 1992 allowances in an amount equal to the product of the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the lesser of 0.30 lbs/mmBtu or the unit's allowable sulfur dioxide emission rate (converted, if necessary, to pounds per mmBtu), divided by 2,000.

(4) Beginning January 1, 2000, the Administrator shall allocate to the owner or operator of any utility unit that has commenced construction before December 31, 1990 and that commences commercial operation between January 1, 1993 and December 31, 1995, allowances in an amount equal to the product of the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the lesser of 0.30 lbs/mmBtu or the unit's allowable sulfur dioxide emission rate (converted, if necessary, to pounds per mmBtu), divided by 2,000.

(5) After January 1, 2000, it shall be unlawful for any existing utility unit that has completed conversion from predominantly gas fired existing operation to coal fired operation between January 1, 1985 and December 31, 1987, for which there has been allocated a proposed or final prohibition order pursuant to section 301(b)⁵ of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8301 et seq.,⁶ repealed 1987) to exceed an annual sulfur dioxide tonnage emissions limitation equal to the product of the unit's annual fuel consumption, on a Btu basis, at a 65 percent capacity factor multiplied by the lesser of 1.20 lbs/mmBtu or the unit's allowable 1987 sulfur dioxide emissions rate, divided by 2,000, unless the owner or operator of such unit has obtained allowances equal to its actual emissions.

(6)(A)⁷ Unless the Administrator has approved a designation of such facility under section 7651i of this title, the provisions of this subchapter shall not apply to a "qualifying small power production facility" or "qualifying cogeneration facility" (within the meaning of section 796(17)(C) or 796(18)(B) of title 16) or to a "new independent power production facility" as defined in section 7651o of this title except⁸ that clause (iii)⁹ of such definition in section 7651o of this title shall not apply for purposes of this paragraph if, as of November 15, 1990,

(i) an applicable power sales agreement has been executed;

(ii) the facility is the subject of a State regulatory authority order requiring an electric utility to enter into a power sales agreement with, purchase capacity from, or (for purposes of establishing terms and conditions of the electric utility's purchase of power) enter into arbitration concerning, the facility;

(iii) an electric utility has issued a letter of intent or similar instrument committing to purchase power from the facility at a previously offered or lower price and a power sales agreement is executed within a reasonable period of time; or

(iv) the facility has been selected as a winning bidder in a utility competitive bid solicitation.

⁵ See References in Text note below.

⁶ So in original. Probably should be "seq.,".

⁷ So in original. No subpar. (B) has been enacted.

⁸ So in original. Probably should be preceded by a comma.

⁹ So in original. Probably means clause "(C)".

(h) Oil and gas-fired units less than 10 percent oil consumed

(1) After January 1, 2000, it shall be unlawful for any oil- and gas-fired utility unit whose average annual fuel consumption during the period 1980 through 1989 on a Btu basis exceeded 90 percent in the form of natural gas to exceed an annual sulfur dioxide tonnage limitation equal to the product of the unit's baseline multiplied by the unit's actual 1985 emissions rate divided by 2,000 unless the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions.

(2) In addition to allowances allocated pursuant to paragraph (1) and section 7651b(a)(1) of this title as basic Phase II allowance allocations, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (1) allowances from the reserve created pursuant to subsection (a)(2) of this section in an amount equal to the unit's baseline multiplied by 0.050 lbs/mmBtu, divided by 2,000.

(3) In addition to allowances allocated pursuant to paragraph (1) and section 7651b(a)(1) of this title, beginning January 1, 2010, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of paragraph (1) allowances in an amount equal to the unit's baseline multiplied by 0.050 lbs/mmBtu, divided by 2,000.

(i) Units in high growth States

(1) In addition to allowances allocated pursuant to this section and section 7651b(a)(1) of this title as basic Phase II allowance allocations, beginning January 1, 2000, the Administrator shall allocate annually allowances for each unit, subject to an emissions limitation requirement under this section, and located in a State that—

(A) has experienced a growth in population in excess of 25 percent between 1980 and 1988 according to State Population and Household Estimates, With Age, Sex, and Components of Change: 1981-1988 allocated by the United States Department of Commerce, and

(B) had an installed electrical generating capacity of more than 30,000,000 kw in 1988,

in an amount equal to the difference between (A) the number of allowances that would be allocated for the unit pursuant to the emissions limitation requirements of this section applicable to the unit adjusted to reflect the unit's annual average fuel consumption on a Btu basis of any three consecutive calendar years between 1980 and 1989 (inclusive) as elected by the owner or operator and (B) the number of allowances allocated for the unit pursuant to the emissions limitation requirements of this section: *Provided*, That the number of allowances allocated pursuant to this subsection shall not exceed an annual total of 40,000. If necessary to meeting the 40,000 allowance restriction imposed under this subsection the Administrator shall reduce, pro rata, the additional annual allowances allocated to each unit under this subsection.

(2) Beginning January 1, 2000, in addition to allowances allocated pursuant to this section and section 7651b(a)(1) of this title as basic Phase II

allowance allocations, the Administrator shall allocate annually for each unit subject to the emissions limitation requirements of subsection (b)(1) of this section, (A) the lesser of whose actual or allowable 1980 emissions rate has declined by 50 percent or more as of November 15, 1990, (B) whose actual emissions rate is less than 1.2 lbs/mmBtu as of January 1, 2000, (C) which commenced operation after January 1, 1970, (D) which is owned by a utility company whose combined commercial and industrial kilowatt-hour sales have increased by more than 20 percent between calendar year 1980 and November 15, 1990, and (E) whose company-wide fossil-fuel sulfur dioxide emissions rate has declined 40 percentum or more from 1980 to 1988, allowances in an amount equal to the difference between (i) the number of allowances that would be allocated for the unit pursuant to the emissions limitation requirements of subsection (b)(1) of this section adjusted to reflect the unit's annual average fuel consumption on a Btu basis for any three consecutive years between 1980 and 1989 (inclusive) as elected by the owner or operator and (ii) the number of allowances allocated for the unit pursuant to the emissions limitation requirements of subsection (b)(1) of this section: *Provided*, That the number of allowances allocated pursuant to this paragraph shall not exceed an annual total of 5,000. If necessary to meeting the 5,000-allowance restriction imposed in the last clause of the preceding sentence the Administrator shall reduce, pro rata, the additional allowances allocated to each unit pursuant to this paragraph.

(j) Certain municipally owned power plants

Beginning January 1, 2000, in addition to allowances allocated pursuant to this section and section 7651b(a)(1) of this title as basic Phase II allowance allocations, the Administrator shall allocate annually for each existing municipally owned oil and gas-fired utility unit with nameplate capacity equal to, or less than, 40 MWe, the lesser of whose actual or allowable 1985 sulfur dioxide emission rate is less than 1.20 lbs/mmBtu, allowances in an amount equal to the product of the unit's annual fuel consumption on a Btu basis at a 60 percent capacity factor multiplied by the lesser of its allowable 1985 emission rate or its actual 1985 emission rate, divided by 2,000.

(July 14, 1955, ch. 360, title IV, §405, as added Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2605.)

REFERENCES IN TEXT

Section 301(b) of the Powerplant and Industrial Fuel Use Act of 1978, referred to in subsec. (g)(5), is section 301(b) of Pub. L. 95-620, which is classified to section 8341(b) of this title. A prior section 301(b) of Pub. L. 95-620, title III, Nov. 9, 1978, 92 Stat. 3305, which was formerly classified to section 8341(b) of this title, was repealed by Pub. L. 97-35, title X, §102(a), Aug. 13, 1981, 95 Stat. 614.

§ 7651e. Allowances for States with emissions rates at or below 0.80 lbs/mmBtu

(a) Election of Governor

In addition to basic Phase II allowance allocations, upon the election of the Governor of any

State, with a 1985 state-wide annual sulfur dioxide emissions rate equal to or less than, 0.80 lbs/mmBtu, averaged over all fossil fuel-fired utility steam generating units, beginning January 1, 2000, and for each calendar year thereafter until and including 2009, the Administrator shall allocate, in lieu of other Phase II bonus allowance allocations, allowances from the reserve created pursuant to section 7651d(a)(2) of this title to all such units in the State in an amount equal to 125,000 multiplied by the unit's pro rata share of electricity generated in calendar year 1985 at fossil fuel-fired utility steam units in all States eligible for the election.

(b) Notification of Administrator

Pursuant to section 7651b(a)(1) of this title, each Governor of a State eligible to make an election under paragraph¹ (a) shall notify the Administrator of such election. In the event that the Governor of any such State fails to notify the Administrator of the Governor's elections, the Administrator shall allocate allowances pursuant to section 7651d of this title.

(c) Allowances after January 1, 2010

After January 1, 2010, the Administrator shall allocate allowances to units subject to the provisions of this section pursuant to section 7651d of this title.

(July 14, 1955, ch. 360, title IV, §406, as added Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2613.)

§ 7651f. Nitrogen oxides emission reduction program

(a) Applicability

On the date that a coal-fired utility unit becomes an affected unit pursuant to sections 7651c, 7651d,¹ 7651h of this title, or on the date a unit subject to the provisions of section 7651c(d) or 7651h(b) of this title, must meet the SO₂ reduction requirements, each such unit shall become an affected unit for purposes of this section and shall be subject to the emission limitations for nitrogen oxides set forth herein.

(b) Emission limitations

(1) Not later than eighteen months after November 15, 1990, the Administrator shall by regulation establish annual allowable emission limitations for nitrogen oxides for the types of utility boilers listed below, which limitations shall not exceed the rates listed below: *Provided*, That the Administrator may set a rate higher than that listed for any type of utility boiler if the Administrator finds that the maximum listed rate for that boiler type cannot be achieved using low NO_x burner technology. The maximum allowable emission rates are as follows:

(A) for tangentially fired boilers, 0.45 lb/mmBtu;

(B) for dry bottom wall-fired boilers (other than units applying cell burner technology), 0.50 lb/mmBtu.

After January 1, 1995, it shall be unlawful for any unit that is an affected unit on that date

¹ So in original. Probably should be "subsection".

¹ So in original. Probably should be followed by "or".

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amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

(g) Within 180 days of the completion of any physical or operational change subject to the control measures specified in paragraph (a) of this section, compliance with all applicable standards must be achieved.

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

(i) Repowering projects that are awarded funding from the Department of Energy as permanent clean coal technology demonstration projects (or similar projects funded by EPA) are exempt from the requirements of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the five years prior to the change.

(j)(1) Repowering projects that qualify for an extension under section 409(b) of the Clean Air Act are exempt from the requirements of this section, provided that such change does not increase the actual hourly emissions of any pollutant regulated under this section above the actual hourly emissions achievable at that unit during the 5 years prior to the change.

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(2) This exemption shall not apply to any new unit that:

(i) Is designated as a replacement for an existing unit;

(ii) Qualifies under section 409(b) of the Clean Air Act for an extension of an emission limitation compliance date under section 405 of the Clean Air Act; and

(iii) Is located at a different site than the existing unit.

(k) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project is exempt from the requirements of this section. A *temporary clean coal control technology demonstration project*, for the purposes of this section is a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(l) The reactivation of a very clean coal-fired electric utility steam generating unit is exempt from the requirements of this section.

[40 FR 58419, Dec. 16, 1975, as amended at 43 FR 34347, Aug. 3, 1978; 45 FR 5617, Jan. 23, 1980; 57 FR 32339, July 21, 1992; 65 FR 61750, Oct. 17, 2000]

§ 60.15 Reconstruction.

(a) An existing facility, upon reconstruction, becomes an affected facility, irrespective of any change in emission rate.

(b) “Reconstruction” means the replacement of components of an existing facility to such an extent that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, and

(2) It is technologically and economically feasible to meet the applicable standards set forth in this part.

(c) “Fixed capital cost” means the capital needed to provide all the depreciable components.

(d) If an owner or operator of an existing facility proposes to replace components, and the fixed capital cost of

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the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, he shall notify the Administrator of the proposed replacements. The notice must be postmarked 60 days (or as soon as practicable) before construction of the replacements is commenced and must include the following information:

(1) Name and address of the owner or operator.

(2) The location of the existing facility.

(3) A brief description of the existing facility and the components which are to be replaced.

(4) A description of the existing air pollution control equipment and the proposed air pollution control equipment.

(5) An estimate of the fixed capital cost of the replacements and of constructing a comparable entirely new facility.

(6) The estimated life of the existing facility after the replacements.

(7) A discussion of any economic or technical limitations the facility may have in complying with the applicable standards of performance after the proposed replacements.

(e) The Administrator will determine, within 30 days of the receipt of the notice required by paragraph (d) of this section and any additional information he may reasonably require, whether the proposed replacement constitutes reconstruction.

(f) The Administrator's determination under paragraph (e) shall be based on:

(1) The fixed capital cost of the replacements in comparison to the fixed capital cost that would be required to construct a comparable entirely new facility;

(2) The estimated life of the facility after the replacements compared to the life of a comparable entirely new facility;

(3) The extent to which the components being replaced cause or contribute to the emissions from the facility; and

(4) Any economic or technical limitations on compliance with applicable standards of performance which are inherent in the proposed replacements.

(g) Individual subparts of this part may include specific provisions which refine and delimit the concept of reconstruction set forth in this section.

[40 FR 58420, Dec. 16, 1975]

§ 60.16 Priority list.**PRIORITIZED MAJOR SOURCE CATEGORIES**

<i>Priority Number¹</i>	<i>Source Category</i>
1.	Synthetic Organic Chemical Manufacturing Industry (SOCMI) and Volatile Organic Liquid Storage Vessels and Handling Equipment
	(a) SOCMI unit processes
	(b) Volatile organic liquid (VOL) storage vessels and handling equipment
	(c) SOCMI fugitive sources
	(d) SOCMI secondary sources
2.	Industrial Surface Coating: Cans
3.	Petroleum Refineries: Fugitive Sources
4.	Industrial Surface Coating: Paper
5.	Dry Cleaning
	(a) Perchloroethylene
	(b) Petroleum solvent
6.	Graphic Arts
7.	Polymers and Resins: Acrylic Resins
8.	Mineral Wool (Deleted)
9.	Stationary Internal Combustion Engines
10.	Industrial Surface Coating: Fabric
11.	Industrial-Commercial-Institutional Steam Generating Units.
12.	Incineration: Non-Municipal (Deleted)
13.	Non-Metallic Mineral Processing
14.	Metallic Mineral Processing
15.	Secondary Copper (Deleted)
16.	Phosphate Rock Preparation
17.	Foundries: Steel and Gray Iron
18.	Polymers and Resins: Polyethylene
19.	Charcoal Production
20.	Synthetic Rubber
	(a) Tire manufacture
	(b) SBR production
21.	Vegetable Oil
22.	Industrial Surface Coating: Metal Coil
23.	Petroleum Transportation and Marketing
24.	By-Product Coke Ovens
25.	Synthetic Fibers
26.	Plywood Manufacture
27.	Industrial Surface Coating: Automobiles
28.	Industrial Surface Coating: Large Appliances
29.	Crude Oil and Natural Gas Production
30.	Secondary Aluminum
31.	Potash (Deleted)
32.	Lightweight Aggregate Industry: Clay, Shale, and Slate ²
33.	Glass
34.	Gypsum
35.	Sodium Carbonate
36.	Secondary Zinc (Deleted)
37.	Polymers and Resins: Phenolic
38.	Polymers and Resins: Urea-Melamine
39.	Ammonia (Deleted)
40.	Polymers and Resins: Polystyrene
41.	Polymers and Resins: ABS-SAN Resins
42.	Fiberglass
43.	Polymers and Resins: Polypropylene
44.	Textile Processing
45.	Asphalt Processing and Asphalt Roofing Manufacture
46.	Brick and Related Clay Products

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time periods or deadlines may be changed by mutual agreement between the owner or operator and the Administrator. An owner or operator who wishes to request a change in a time period or postmark deadline for a particular requirement shall request the adjustment in writing as soon as practicable before the subject activity is required to take place. The owner or operator shall include in the request whatever information he or she considers useful to convince the Administrator that an adjustment is warranted.

(3) If, in the Administrator's judgment, an owner or operator's request for an adjustment to a particular time period or postmark deadline is warranted, the Administrator will approve the adjustment. The Administrator will notify the owner or operator in writing of approval or disapproval of the request for an adjustment within 15 calendar days of receiving sufficient information to evaluate the request.

(4) If the Administrator is unable to meet a specified deadline, he or she will notify the owner or operator of any significant delay and inform the owner or operator of the amended schedule.

[59 FR 12428, Mar. 16, 1994, as amended at 64 FR 7463, Feb. 12, 1998]

TABLE 1 TO SUBPART A OF PART 60—DETECTION SENSITIVITY LEVELS (GRAMS PER HOUR)

Monitoring frequency per subpart ^a	Detection sensitivity level
Bi-Monthly	60
Semi-Quarterly	85
Monthly	100

^aWhen this alternative work practice is used to identify leaking equipment, the owner or operator must choose one of the monitoring frequencies listed in this table in lieu of the monitoring frequency specified in the applicable subpart. Bi-monthly means every other month. Semi-quarterly means twice per quarter. Monthly means once per month.

[73 FR 78211, Dec. 22, 2008]

Subpart B—Adoption and Submittal of State Plans for Designated Facilities

SOURCE: 40 FR 53346, Nov. 17, 1975, unless otherwise noted.

§ 60.20 Applicability.

The provisions of this subpart apply to States upon publication of a final guideline document under § 60.22(a).

§ 60.21 Definitions.

Terms used but not defined in this subpart shall have the meaning given them in the Act and in subpart A:

(a) *Designated pollutant* means any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality criteria have not been issued and that is not included on a list published under section 108(a) or section 112(b)(1)(A) of the Act.

(b) *Designated facility* means any existing facility (see § 60.2(aa)) which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility (see § 60.2(e)).

(c) *Plan* means a plan under section 111(d) of the Act which establishes emission standards for designated pollutants from designated facilities and provides for the implementation and enforcement of such emission standards.

(d) *Applicable plan* means the plan, or most recent revision thereof, which has been approved under § 60.27(b) or promulgated under § 60.27(d).

(e) *Emission guideline* means a guideline set forth in subpart C of this part, or in a final guideline document published under § 60.22(a), which reflects the degree of emission reduction achievable through the application of the best system of emission reduction which (taking into account the cost of such reduction) the Administrator has determined has been adequately demonstrated for designated facilities.

(f) *Emission standard* means a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, establishing an allowance system, or prescribing equipment specifications for control of air pollution emissions.

(g) *Compliance schedule* means a legally enforceable schedule specifying a date or dates by which a source or category of sources must comply with specific emission standards contained in a

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plan or with any increments of progress to achieve such compliance.

(h) *Increments of progress* means steps to achieve compliance which must be taken by an owner or operator of a designated facility, including:

(1) Submittal of a final control plan for the designated facility to the appropriate air pollution control agency;

(2) Awarding of contracts for emission control systems or for process modifications, or issuance of orders for the purchase of component parts to accomplish emission control or process modification;

(3) Initiation of on-site construction or installation of emission control equipment or process change;

(4) Completion of on-site construction or installation of emission control equipment or process change; and

(5) Final compliance.

(i) *Region* means an air quality control region designated under section 107 of the Act and described in part 81 of this chapter.

(j) *Local agency* means any local governmental agency.

[40 FR 53346, Nov. 17, 1975, as amended at 70 FR 28649, May 18, 2005; 77 FR 9447, Feb. 16, 2012]

§ 60.22 Publication of guideline documents, emission guidelines, and final compliance times.

(a) Concurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant from designated facilities. Notice of the availability of the draft guideline document will be published in the FEDERAL REGISTER and public comments on its contents will be invited. After consideration of public comments and upon or after promulgation of standards of performance for control of a designated pollutant from affected facilities, a final guideline document will be published and notice of its availability will be published in the FEDERAL REGISTER.

(b) Guideline documents published under this section will provide information for the development of State plans, such as:

(1) Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.

(2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) An emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved. The Administrator will specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate. (6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) Except as provided in paragraph (d)(1) of this section, the emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in subpart C of this part with such modifications as may be appropriate.

(d)(1) If the Administrator determines that a designated pollutant may cause or contribute to endangerment of public welfare, but that adverse effects on public health have not been demonstrated, he will include the determination in the draft guideline document and in the FEDERAL REGISTER notice of its availability. Except as provided in paragraph (d)(2) of this section, paragraph (c) of this section shall be inapplicable in such cases.

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(2) If the Administrator determines at any time on the basis of new information that a prior determination under paragraph (d)(1) of this section is incorrect or no longer correct, he will publish notice of the determination in the FEDERAL REGISTER, revise the guideline document as necessary under paragraph (a) of this section, and propose and promulgate emission guidelines and compliance times under paragraph (c) of this section.

[40 FR 53346, Nov. 17, 1975, as amended at 54 FR 52189, Dec. 20, 1989]

§ 60.23 Adoption and submittal of State plans; public hearings.

(a)(1) Unless otherwise specified in the applicable subpart, within 9 months after notice of the availability of a final guideline document is published under § 60.22(a), each State shall adopt and submit to the Administrator, in accordance with § 60.4 of subpart A of this part, a plan for the control of the designated pollutant to which the guideline document applies.

(2) Within nine months after notice of the availability of a final revised guideline document is published as provided in § 60.22(d)(2), each State shall adopt and submit to the Administrator any plan revision necessary to meet the requirements of this subpart.

(b) If no designated facility is located within a State, the State shall submit a letter of certification to that effect to the Administrator within the time specified in paragraph (a) of this section. Such certification shall exempt the State from the requirements of this subpart for that designated pollutant.

(c)(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, the State shall, prior to the adoption of any plan or revision thereof, conduct one or more public hearings within the State on such plan or plan revision.

(2) No hearing shall be required for any change to an increment of progress in an approved compliance schedule unless the change is likely to cause the facility to be unable to comply with the final compliance date in the schedule.

(3) No hearing shall be required on an emission standard in effect prior to the effective date of this subpart if it was adopted after a public hearing and is at

least as stringent as the corresponding emission guideline specified in the applicable guideline document published under § 60.22(a).

(d) Any hearing required by paragraph (c) of this section shall be held only after reasonable notice. Notice shall be given at least 30 days prior to the date of such hearing and shall include:

(1) Notification to the public by prominently advertising the date, time, and place of such hearing in each region affected;

(2) Availability, at the time of public announcement, of each proposed plan or revision thereof for public inspection in at least one location in each region to which it will apply;

(3) Notification to the Administrator;

(4) Notification to each local air pollution control agency in each region to which the plan or revision will apply; and

(5) In the case of an interstate region, notification to any other State included in the region.

(e) The State shall prepare and retain, for a minimum of 2 years, a record of each hearing for inspection by any interested party. The record shall contain, as a minimum, a list of witnesses together with the text of each presentation.

(f) The State shall submit with the plan or revision:

(1) Certification that each hearing required by paragraph (c) of this section was held in accordance with the notice required by paragraph (d) of this section; and

(2) A list of witnesses and their organizational affiliations, if any, appearing at the hearing and a brief written summary of each presentation or written submission.

(g) Upon written application by a State agency (through the appropriate Regional Office), the Administrator may approve State procedures designed to insure public participation in the matters for which hearings are required and public notification of the opportunity to participate if, in the judgment of the Administrator, the procedures, although different from the requirements of this subpart, in fact

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provide for adequate notice to and participation of the public. The Administrator may impose such conditions on his approval as he deems necessary. Procedures approved under this section shall be deemed to satisfy the requirements of this subpart regarding procedures for public hearings.

[40 FR 53346, Nov. 17, 1975, as amended at 60 FR 65414, Dec. 19, 1995]

§ 60.24 Emission standards and compliance schedules.

(a) Each plan shall include emission standards and compliance schedules.

(b) (1) Emission standards shall either be based on an allowance system or prescribe allowable rates of emissions except when it is clearly impracticable. Such cases will be identified in the guideline documents issued under § 60.22. Where emission standards prescribing equipment specifications are established, the plan shall, to the degree possible, set forth the emission reductions achievable by implementation of such specifications, and may permit compliance by the use of equipment determined by the State to be equivalent to that prescribed.

(2) Test methods and procedures for determining compliance with the emission standards shall be specified in the plan. Methods other than those specified in appendix A to this part may be specified in the plan if shown to be equivalent or alternative methods as defined in § 60.2 (t) and (u).

(3) Emission standards shall apply to all designated facilities within the State. A plan may contain emission standards adopted by local jurisdictions provided that the standards are enforceable by the State.

(c) Except as provided in paragraph (f) of this section, where the Administrator has determined that a designated pollutant may cause or contribute to endangerment of public health, emission standards shall be no less stringent than the corresponding emission guideline(s) specified in subpart C of this part, and final compliance shall be required as expeditiously as practicable but no later than the compliance times specified in subpart C of this part.

(d) Where the Administrator has determined that a designated pollutant

may cause or contribute to endangerment of public welfare but that adverse effects on public health have not been demonstrated, States may balance the emission guidelines, compliance times, and other information provided in the applicable guideline document against other factors of public concern in establishing emission standards, compliance schedules, and variances. Appropriate consideration shall be given to the factors specified in § 60.22(b) and to information presented at the public hearing(s) conducted under § 60.23(c).

(e)(1) Any compliance schedule extending more than 12 months from the date required for submittal of the plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. Unless otherwise specified in the applicable subpart, increments of progress must include, where practicable, each increment of progress specified in § 60.21(h) and must include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance.

(2) A plan may provide that compliance schedules for individual sources or categories of sources will be formulated after plan submittal. Any such schedule shall be the subject of a public hearing held according to § 60.23 and shall be submitted to the Administrator within 60 days after the date of adoption of the schedule but in no case later than the date prescribed for submittal of the first semiannual report required by § 60.25(e).

(f) Unless otherwise specified in the applicable subpart on a case-by-case basis for particular designated facilities or classes of facilities, States may provide for the application of less stringent emissions standards or longer compliance schedules than those otherwise required by paragraph (c) of this section, provided that the State demonstrates with respect to each such facility (or class of facilities):

(1) Unreasonable cost of control resulting from plant age, location, or basic process design;

(2) Physical impossibility of installing necessary control equipment; or

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(3) Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.

(g) Nothing in this subpart shall be construed to preclude any State or political subdivision thereof from adopting or enforcing (1) emission standards more stringent than emission guidelines specified in subpart C of this part or in applicable guideline documents or (2) compliance schedules requiring final compliance at earlier times than those specified in subpart C or in applicable guideline documents.

[40 FR 53346, Nov. 17, 1975, as amended at 60 FR 65414, Dec. 19, 1995; 65 FR 76384, Dec. 6, 2000; 70 FR 28649, May 18, 2005; 71 FR 33398, June 9, 2006; 72 FR 59204, Oct. 19, 2007; 77 FR 9447, Feb. 16, 2012]

§ 60.25 Emission inventories, source surveillance, reports.

(a) Each plan shall include an inventory of all designated facilities, including emission data for the designated pollutants and information related to emissions as specified in appendix D to this part. Such data shall be summarized in the plan, and emission rates of designated pollutants from designated facilities shall be correlated with applicable emission standards. As used in this subpart, “correlated” means presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under applicable emission standards.

(b) Each plan shall provide for monitoring the status of compliance with applicable emission standards. Each plan shall, as a minimum, provide for:

(1) Legally enforceable procedures for requiring owners or operators of designated facilities to maintain records and periodically report to the State information on the nature and amount of emissions from such facilities, and/or such other information as may be necessary to enable the State to determine whether such facilities are in compliance with applicable portions of the plan. Submission of electronic documents shall comply with the requirements of 40 CFR part 3—(Electronic reporting).

(2) Periodic inspection and, when applicable, testing of designated facilities.

(c) Each plan shall provide that information obtained by the State under paragraph (b) of this section shall be correlated with applicable emission standards (see § 60.25(a)) and made available to the general public.

(d) The provisions referred to in paragraphs (b) and (c) of this section shall be specifically identified. Copies of such provisions shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act, and

(2) The State demonstrates:

(i) That the provisions are applicable to the designated pollutant(s) for which the plan is submitted, and

(ii) That the requirements of § 60.26 are met.

(e) The State shall submit reports on progress in plan enforcement to the Administrator on an annual (calendar year) basis, commencing with the first full report period after approval of a plan or after promulgation of a plan by the Administrator. Information required under this paragraph must be included in the annual report required by § 51.321 of this chapter.

(f) Each progress report shall include:

(1) Enforcement actions initiated against designated facilities during the reporting period, under any emission standard or compliance schedule of the plan.

(2) Identification of the achievement of any increment of progress required by the applicable plan during the reporting period.

(3) Identification of designated facilities that have ceased operation during the reporting period.

(4) Submission of emission inventory data as described in paragraph (a) of this section for designated facilities that were not in operation at the time of plan development but began operation during the reporting period.

(5) Submission of additional data as necessary to update the information submitted under paragraph (a) of this section or in previous progress reports.

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(6) Submission of copies of technical reports on all performance testing on designated facilities conducted under paragraph (b)(2) of this section, complete with concurrently recorded process data.

[40 FR 53346, Nov. 17, 1975, as amended at 44 FR 65071, Nov. 9, 1979; 70 FR 59887, Oct. 13, 2005]

§ 60.26 Legal authority.

(a) Each plan shall show that the State has legal authority to carry out the plan, including authority to:

(1) Adopt emission standards and compliance schedules applicable to designated facilities.

(2) Enforce applicable laws, regulations, standards, and compliance schedules, and seek injunctive relief.

(3) Obtain information necessary to determine whether designated facilities are in compliance with applicable laws, regulations, standards, and compliance schedules, including authority to require recordkeeping and to make inspections and conduct tests of designated facilities.

(4) Require owners or operators of designated facilities to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such facilities; also authority for the State to make such data available to the public as reported and as correlated with applicable emission standards.

(b) The provisions of law or regulations which the State determines provide the authorities required by this section shall be specifically identified. Copies of such laws or regulations shall be submitted with the plan unless:

(1) They have been approved as portions of a preceding plan submitted under this subpart or as portions of an implementation plan submitted under section 110 of the Act, and

(2) The State demonstrates that the laws or regulations are applicable to the designated pollutant(s) for which the plan is submitted.

(c) The plan shall show that the legal authorities specified in this section are available to the State at the time of submission of the plan. Legal authority adequate to meet the requirements of paragraphs (a)(3) and (4) of this section

may be delegated to the State under section 114 of the Act.

(d) A State governmental agency other than the State air pollution control agency may be assigned responsibility for carrying out a portion of a plan if the plan demonstrates to the Administrator's satisfaction that the State governmental agency has the legal authority necessary to carry out that portion of the plan.

(e) The State may authorize a local agency to carry out a plan, or portion thereof, within the local agency's jurisdiction if the plan demonstrates to the Administrator's satisfaction that the local agency has the legal authority necessary to implement the plan or portion thereof, and that the authorization does not relieve the State of responsibility under the Act for carrying out the plan or portion thereof.

§ 60.27 Actions by the Administrator.

(a) The Administrator may, whenever he determines necessary, extend the period for submission of any plan or plan revision or portion thereof.

(b) After receipt of a plan or plan revision, the Administrator will propose the plan or revision for approval or disapproval. The Administrator will, within four months after the date required for submission of a plan or plan revision, approve or disapprove such plan or revision or each portion thereof.

(c) The Administrator will, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth a plan, or portion thereof, for a State if:

(1) The State fails to submit a plan within the time prescribed;

(2) The State fails to submit a plan revision required by § 60.23(a)(2) within the time prescribed; or

(3) The Administrator disapproves the State plan or plan revision or any portion thereof, as unsatisfactory because the requirements of this subpart have not been met.

(d) The Administrator will, within six months after the date required for submission of a plan or plan revision, promulgate the regulations proposed under paragraph (c) of this section with

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such modifications as may be appropriate unless, prior to such promulgation, the State has adopted and submitted a plan or plan revision which the Administrator determines to be approvable.

(e)(1) Except as provided in paragraph (e)(2) of this section, regulations proposed and promulgated by the Administrator under this section will prescribe emission standards of the same stringency as the corresponding emission guideline(s) specified in the final guideline document published under § 60.22(a) and will require final compliance with such standards as expeditiously as practicable but no later than the times specified in the guideline document.

(2) Upon application by the owner or operator of a designated facility to which regulations proposed and promulgated under this section will apply, the Administrator may provide for the application of less stringent emission standards or longer compliance schedules than those otherwise required by this section in accordance with the criteria specified in § 60.24(f).

(f) Prior to promulgation of a plan under paragraph (d) of this section, the Administrator will provide the opportunity for at least one public hearing in either:

(1) Each State that failed to hold a public hearing as required by § 60.23(c); or

(2) Washington, DC or an alternate location specified in the FEDERAL REGISTER.

[40 FR 53346, Nov. 17, 1975, as amended at 65 FR 76384, Dec. 6, 2000]

§ 60.28 Plan revisions by the State.

(a) Plan revisions which have the effect of delaying compliance with applicable emission standards or increments of progress or of establishing less stringent emission standards shall be submitted to the Administrator within 60 days after adoption in accordance with the procedures and requirements applicable to development and submission of the original plan.

(b) More stringent emission standards, or orders which have the effect of accelerating compliance, may be submitted to the Administrator as plan revisions in accordance with the procedures and requirements applicable to

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development and submission of the original plan.

(c) A revision of a plan, or any portion thereof, shall not be considered part of an applicable plan until approved by the Administrator in accordance with this subpart.

§ 60.29 Plan revisions by the Administrator.

After notice and opportunity for public hearing in each affected State, the Administrator may revise any provision of an applicable plan if:

(a) The provision was promulgated by the Administrator, and

(b) The plan, as revised, will be consistent with the Act and with the requirements of this subpart.

Subpart C—Emission Guidelines and Compliance Times**§ 60.30 Scope.**

The following subparts contain emission guidelines and compliance times for the control of certain designated pollutants in accordance with section 111(d) and section 129 of the Clean Air Act and subpart B of this part.

(a) Subpart Ca [Reserved]

(b) Subpart Cb—Municipal Waste Combustors.

(c) Subpart Cc—Municipal Solid Waste Landfills.

(d) Subpart Cd—Sulfuric Acid Production Plants.

(e) Subpart Ce—Hospital/Medical/Infectious Waste Incinerators.

[62 FR 48379, Sept. 15, 1997]

§ 60.31 Definitions.

Terms used but not defined in this subpart have the meaning given them in the Act and in subparts A and B of this part.

[42 FR 55797, Oct. 18, 1977]

Subpart Ca [Reserved]

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Municipal waste combustor technology	Carbon monoxide emissions levels (parts per million by volume) ^a	Averaging time (hrs) ^b
Fluidized bed, mixed fuel (wood/refuse-derived fuel)	200	c 24
Bubbling fluidized bed combustor	100	4
Circulating fluidized bed combustor	100	4
Pulverized coal/refuse-derived fuel mixed fuel-fired combustor	150	4
Spreader stoker coal/refuse-derived fuel mixed fuel-fired combustor	200	24
Semi-suspension refuse-derived fuel-fired combustor/wet refuse-derived fuel process conversion	250	c 24
Spreader stoker fixed floor refuse-derived fuel-fired combustor/100 percent coal capable	250	c 24

^a Measured at the combustor outlet in conjunction with a measurement of oxygen concentration, corrected to 7 percent oxygen, dry basis. Calculated as an arithmetic average.

^b Averaging times are 4-hour or 24-hour block averages.

^c 24-hour block average, geometric mean.

[71 FR 27334, May 10, 2006]

Subpart Cc—Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills

SOURCE: 61 FR 9919, Mar. 12, 1996, unless otherwise noted.

§ 60.30c Scope.

This subpart contains emission guidelines and compliance times for the control of certain designated pollutants from certain designated municipal solid waste landfills in accordance with section 111(d) of the Act and subpart B.

§ 60.31c Definitions.

Terms used but not defined in this subpart have the meaning given them in the Act and in subparts A, B, and WWW of this part.

Municipal solid waste landfill or *MSW landfill* means an entire disposal facility in a contiguous geographical space where household waste is placed in or on land. An MSW landfill may also receive other types of RCRA Subtitle D wastes such as commercial solid waste, nonhazardous sludge, conditionally exempt small quantity generator waste, and industrial solid waste. Portions of an MSW landfill may be separated by access roads. An MSW landfill may be publicly or privately owned. An MSW landfill may be a new MSW landfill, an existing MSW landfill or a lateral expansion.

§ 60.32c Designated facilities.

(a) The designated facility to which the guidelines apply is each existing MSW landfill for which construction, reconstruction or modification was commenced before May 30, 1991.

(b) Physical or operational changes made to an existing MSW landfill solely to comply with an emission guideline are not considered a modification or reconstruction and would not subject an existing MSW landfill to the requirements of subpart WWW [see § 60.750 of subpart WWW].

(c) For purposes of obtaining an operating permit under title V of the Act, the owner or operator of a MSW landfill subject to this subpart with a design capacity less than 2.5 million megagrams or 2.5 million cubic meters is not subject to the requirement to obtain an operating permit for the landfill under part 70 or 71 of this chapter, unless the landfill is otherwise subject to either part 70 or 71. For purposes of submitting a timely application for an operating permit under part 70 or 71, the owner or operator of a MSW landfill subject to this subpart with a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters on the effective date of EPA approval of the State's program under section 111(d) of the Act, and not otherwise subject to either part 70 or 71, becomes subject to the requirements of §§ 70.5(a)(1)(i) or 71.5(a)(1)(i) of this chapter 90 days after the effective date of such 111(d) program approval, even if the design capacity report is submitted earlier.

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(d) When a MSW landfill subject to this subpart is closed, the owner or operator is no longer subject to the requirement to maintain an operating permit under part 70 or 71 of this chapter for the landfill if the landfill is not otherwise subject to the requirements of either part 70 or 71 and if either of the following conditions are met.

(1) The landfill was never subject to the requirement for a control system under § 60.33c(c) of this subpart; or

(2) The owner or operator meets the conditions for control system removal specified in § 60.752(b)(2)(v) of subpart WWW.

[61 FR 9919, Mar. 12, 1996, as amended at 63 FR 32750, June 16, 1998]

§ 60.33c Emission guidelines for municipal solid waste landfill emissions.

(a) For approval, a State plan shall include control of MSW landfill emissions at each MSW landfill meeting the following three conditions:

(1) The landfill has accepted waste at any time since November 8, 1987, or has additional design capacity available for future waste deposition;

(2) The landfill has a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters. The landfill may calculate design capacity in either megagrams or cubic meters for comparison with the exemption values. Any density conversions shall be documented and submitted with the design capacity report; and

(3) The landfill has a nonmethane organic compound emission rate of 50 megagrams per year or more.

(b) For approval, a State plan shall include the installation of a collection and control system meeting the conditions provided in § 60.752(b)(2)(ii) of this part at each MSW landfill meeting the conditions in paragraph (a) of this section. The State plan shall include a process for State review and approval of the site-specific design plans for the gas collection and control system(s).

(c) For approval, a State plan shall include provisions for the control of collected MSW landfill emissions through the use of control devices meeting the requirements of paragraph (c)(1), (2), or (3) of this section, except as provided in § 60.24.

(1) An open flare designed and operated in accordance with the parameters established in § 60.18; or

(2) A control system designed and operated to reduce NMOC by 98 weight percent; or

(3) An enclosed combustor designed and operated to reduce the outlet NMOC concentration to 20 parts per million as hexane by volume, dry basis at 3 percent oxygen, or less.

(d) For approval, a State plan shall require each owner or operator of an MSW landfill having a design capacity less than 2.5 million megagrams by mass or 2.5 million cubic meters by volume to submit an initial design capacity report to the Administrator as provided in § 60.757(a)(2) of subpart WWW by the date specified in § 60.35c of this subpart. The landfill may calculate design capacity in either megagrams or cubic meters for comparison with the exemption values. Any density conversions shall be documented and submitted with the report. Submittal of the initial design capacity report shall fulfill the requirements of this subpart except as provided in paragraph (d)(1) and (d)(2) of this section.

(1) The owner or operator shall submit an amended design capacity report as provided in § 60.757(a)(3) of subpart WWW. [Guidance: Note that if the design capacity increase is the result of a modification, as defined in § 60.751 of subpart WWW, that was commenced on or after May 30, 1991, the landfill will become subject to subpart WWW instead of this subpart. If the design capacity increase is the result of a change in operating practices, density, or some other change that is not a modification, the landfill remains subject to this subpart.]

(2) When an increase in the maximum design capacity of a landfill with an initial design capacity less than 2.5 million megagrams or 2.5 million cubic meters results in a revised maximum design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters, the owner or operator shall comply with paragraph (e) of this section.

(e) For approval, a State plan shall require each owner or operator of an MSW landfill having a design capacity equal to or greater than 2.5 million

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megagrams and 2.5 million cubic meters to either install a collection and control system as provided in paragraph (b) of this section and § 60.752(b)(2) of subpart WWW or calculate an initial NMOC emission rate for the landfill using the procedures specified in § 60.34c of this subpart and § 60.754 of subpart WWW. The NMOC emission rate shall be recalculated annually, except as provided in § 60.757(b)(1)(ii) of subpart WWW.

(1) If the calculated NMOC emission rate is less than 50 megagrams per year, the owner or operator shall:

(i) Submit an annual emission report, except as provided for in § 60.757(b)(1)(ii); and

(ii) Recalculate the NMOC emission rate annually using the procedures specified in § 60.754(a)(1) of subpart WWW until such time as the calculated NMOC emission rate is equal to or greater than 50 megagrams per year, or the landfill is closed.

(2)(i) If the NMOC emission rate, upon initial calculation or annual recalculation required in paragraph (e)(1)(ii) of this section, is equal to or greater than 50 megagrams per year, the owner or operator shall install a collection and control system as provided in paragraph (b) of this section and § 60.752(b)(2) of subpart WWW.

(ii) If the landfill is permanently closed, a closure notification shall be submitted to the Administrator as provided in § 60.35c of this subpart and § 60.757(d) of subpart WWW.

[61 FR 9919, Mar. 12, 1996, as amended at 63 FR 32750, June 16, 1998; 64 FR 9261, Feb. 24, 1999]

§ 60.34c Test methods and procedures.

For approval, a State plan shall include provisions for: the calculation of the landfill NMOC emission rate listed in § 60.754, as applicable, to determine whether the landfill meets the condition in § 60.33c(a)(3); the operational standards in § 60.753; the compliance provisions in § 60.755; and the monitoring provisions in § 60.756.

§ 60.35c Reporting and recordkeeping guidelines.

For approval, a State plan shall include the recordkeeping and reporting provisions listed in §§ 60.757 and 60.758,

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as applicable, except as provided under § 60.24.

(a) For existing MSW landfills subject to this subpart the initial design capacity report shall be submitted no later than 90 days after the effective date of EPA approval of the State's plan under section 111(d) of the Act.

(b) For existing MSW landfills covered by this subpart with a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters, the initial NMOC emission rate report shall be submitted no later than 90 days after the effective date of EPA approval of the State's plan under section 111(d) of the Act.

[61 FR 9919, Mar. 12, 1996, as amended at 64 FR 9262, Feb. 24, 1999]

§ 60.36c Compliance times.

(a) Except as provided for under paragraph (b) of this section, planning, awarding of contracts, and installation of MSW landfill air emission collection and control equipment capable of meeting the emission guidelines established under § 60.33c shall be accomplished within 30 months after the date the initial NMOC emission rate report shows NMOC emissions equal or exceed 50 megagrams per year.

(b) For each existing MSW landfill meeting the conditions in § 60.33c(a)(1) and § 60.33c(a)(2) whose NMOC emission rate is less than 50 megagrams per year on the effective date of the State emission standard, installation of collection and control systems capable of meeting emission guidelines in § 60.33c shall be accomplished within 30 months of the date when the condition in § 60.33c(a)(3) is met (i.e., the date of the first annual nonmethane organic compounds emission rate which equals or exceeds 50 megagrams per year).

[61 FR 9919, Mar. 12, 1996, as amended at 63 FR 32750, June 16, 1998]

Subpart Cd—Emissions Guidelines and Compliance Times for Sulfuric Acid Production Units

SOURCE: 60 FR 65414, Dec. 19, 1995, unless otherwise noted.

by limiting GHG emissions through the establishment of CO₂ emission guidelines for existing affected fossil fuel-fired EGUs.

In addition to reducing CO₂ emissions, the guidelines finalized in this rulemaking would reduce other emissions from affected EGUs that reduce generation due to higher adoption of EE and RE. These emission reductions will include SO₂ and NO_x, which form ambient PM_{2.5} and ozone in the atmosphere, and HAP, such as mercury and hydrochloric acid. In the final rule revising the annual PM_{2.5} NAAQS,¹⁰⁷⁰ the EPA identified low-income populations as being a vulnerable population for experiencing adverse health effects related to PM exposures. Low-income populations have been generally found to have a higher prevalence of pre-existing diseases, limited access to medical treatment, and increased nutritional deficiencies, which can increase this population's susceptibility to PM-related effects.¹⁰⁷¹ In areas where this rulemaking reduces exposure to PM_{2.5}, ozone, and methylmercury, low-income populations will also benefit from such emissions reductions. The RIA for this rulemaking, included in the docket for this rulemaking, provides additional information regarding the health and ecosystem effects associated with these emission reductions.

Additionally, as outlined in the community and environmental justice considerations section IX of this preamble, the EPA has taken a number of actions to help ensure that this action will not have potential disproportionately high and adverse human health or environmental effects on overburdened communities. The EPA consulted its May 2015, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, when determining what actions to take.¹⁰⁷² As described in the community and environmental justice considerations section of this preamble the EPA also conducted a proximity analysis, which is available in the docket of this rulemaking and is

discussed in section IX. Additionally, as outlined in sections I and IX of this preamble, the EPA has engaged with communities throughout this rulemaking and has devised a robust outreach strategy for continual engagement throughout the implementation phase of this rulemaking.

K. Congressional Review Act (CRA)

This final action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a "major rule" as defined by 5 U.S.C. 804(2).

XIII. Statutory Authority

The statutory authority for this action is provided by sections 111, 301, 302, and 307(d)(1)(C) of the CAA as amended (42 U.S.C. 7411, 7601, 7602, 7607(d)(1)(C)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: August 3, 2015.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 60 of the Code of the Federal Regulations is amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for Part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Add subpart UUUU to read as follows:

Subpart—UUUU Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units

Sec.

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¹⁰⁷⁰ "National Ambient Air Quality Standards for Particulate Matter, Final Rule," 78 FR 3086 (Jan. 15, 2013).

¹⁰⁷¹ U.S. Environmental Protection Agency (U.S. EPA). 2009. *Integrated Science Assessment for Particulate Matter (Final Report)*. EPA-600-R-08-139F. National Center for Environmental Assessment—RTP Division. December. Available on the Internet at <<http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=216546>>.

¹⁰⁷² Guidance on Considering Environmental Justice During the Development of Regulatory Actions. <http://epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-final.pdf>. May 2015.

requirements do I need to include in my plan for affected EGUs?

Recordkeeping and Reporting Requirements

60.5865 What are my recordkeeping requirements?

60.5870 What are my reporting and notification requirements?

60.5875 How do I submit information required by these emission guidelines to the EPA?

Definitions

60.5880 What definitions apply to this subpart?

Table 1 to Subpart UUUU of Part 60—CO₂ Emission Performance Rates (Pounds of CO₂ per Net MWh)

Table 2 to Subpart UUUU of Part 60—Statewide Rate-based CO₂ Emission Goals (Pounds of CO₂ per Net MWh)

Table 3 to Subpart UUUU of Part 60—Statewide Mass-based CO₂ Emission Goals (Short Tons of CO₂)

Table 4 to Subpart UUUU of Part 60—Statewide Mass-based CO₂ Emission Goals plus New Source CO₂ Emission Complement (Short Tons of CO₂)

Introduction

§ 60.5700 What is the purpose of this subpart?

This subpart establishes emission guidelines and approval criteria for State or multi-State plans that establish emission standards limiting greenhouse gas (GHG) emissions from an affected steam generating unit, integrated gasification combined cycle (IGCC), or stationary combustion turbine. An affected steam generating unit, IGCC, or stationary combustion turbine shall, for the purposes of this subpart, be referred to as an affected EGU. These emission guidelines are developed in accordance with section 111(d) of the Clean Air Act and subpart B of this part. To the extent any requirement of this subpart is inconsistent with the requirements of subparts A or B of this part, the requirements of this subpart will apply.

§ 60.5705 Which pollutants are regulated by this subpart?

(a) The pollutants regulated by this subpart are greenhouse gases. The emission guidelines for greenhouse gases established in this subpart are expressed as carbon dioxide (CO₂) emission performance rates and equivalent statewide CO₂ emission goals.

(b) PSD and Title V Thresholds for Greenhouse Gases.

(1) For the purposes of § 51.166(b)(49)(ii), with respect to GHG emissions from facilities, the “pollutant that is subject to the standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in

§ 51.166(b)(48) and in any State Implementation Plan (SIP) approved by the EPA that is interpreted to incorporate, or specifically incorporates, § 51.166(b)(48) of this chapter.

(2) For the purposes of § 52.21(b)(50)(ii), with respect to GHG emissions from facilities regulated in the plan, the “pollutant that is subject to the standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in § 52.21(b)(49) of this chapter.

(3) For the purposes of § 70.2 of this chapter, with respect to greenhouse gas emissions from facilities regulated in the plan, the “pollutant that is subject to any standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is “subject to regulation” as defined in § 70.2 of this chapter.

(4) For the purposes of § 71.2, with respect to greenhouse gas emissions from facilities regulated in the plan, the “pollutant that is subject to any standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is “subject to regulation” as defined in § 71.2 of this chapter.

§ 60.5710 Am I affected by this subpart?

If you are the Governor of a State in the contiguous United States with one or more affected EGUs that commenced construction on or before January 8, 2014, you must submit a State or multi-State plan to the U.S. Environmental Protection Agency (EPA) that implements the emission guidelines contained in this subpart. If you are the Governor of a State in the contiguous United States with no affected EGUs for which construction commenced on or before January 8, 2014, in your State, you must submit a negative declaration letter in place of the State plan.

§ 60.5715 What is the review and approval process for my plan?

The EPA will review your plan according to § 60.27 except that under § 60.27(b) the Administrator will have 12 months after the date the final plan or plan revision (as allowed under § 60.5785) is submitted, to approve or disapprove such plan or revision or each portion thereof. If you submit an initial submittal under § 60.5765(a) in lieu of a final plan submittal the EPA will follow the procedure in § 60.5765(b).

§ 60.5720 What if I do not submit a plan or my plan is not approvable?

(a) If you do not submit an approvable plan the EPA will develop a Federal

plan for your State according to § 60.27. The Federal plan will implement the emission guidelines contained in this subpart. Owners and operators of affected EGUs not covered by an approved plan must comply with a Federal plan implemented by the EPA for the State.

(b) After a Federal plan has been implemented in your State, it will be withdrawn when your State submits, and the EPA approves, a final plan.

§ 60.5725 In lieu of a State plan submittal, are there other acceptable option(s) for a State to meet its CAA section 111(d) obligations?

A State may meet its CAA section 111(d) obligations only by submitting a final State or multi-State plan submittal or a negative declaration letter (if applicable).

§ 60.5730 Is there an approval process for a negative declaration letter?

No. The EPA has no formal review process for negative declaration letters. Once your negative declaration letter has been received, the EPA will place a copy in the public docket and publish a notice in the **Federal Register**. If, at a later date, an affected EGU for which construction commenced on or before January 8, 2014 is found in your State, you will be found to have failed to submit a final plan as required, and a Federal plan implementing the emission guidelines contained in this subpart, when promulgated by the EPA, will apply to that affected EGU until you submit, and the EPA approves, a final State plan.

§ 60.5735 What authorities will not be delegated to State, local, or tribal agencies?

The authorities that will not be delegated to State, local, or tribal agencies are specified in paragraphs (a) and (b) of this section.

(a) Approval of alternatives, not already approved by this subpart, to the CO₂ emission performance rates in Table 1 to this subpart established under § 60.5855.

(b) Approval of alternatives, not already approved by this subpart, to the CO₂ emissions goals in Tables 2, 3 and 4 to this subpart established under § 60.5855.

§ 60.5736 Will the EPA impose any sanctions?

No. The EPA will not withhold any existing federal funds from a State on account of a State's failure to submit, implement, or enforce an approvable plan or plan revision, or to meet any other requirements under this subpart or subpart B of this part.

§ 60.5737 What is the Clean Energy Incentive Program and how do I participate?

(a) This subpart establishes the Clean Energy Incentive Program (CEIP). Participation in this program is optional. The program enables States to award early action emission rate credits (ERCs) and allowances to eligible renewable energy (RE) or demand-side energy efficiency (EE) projects that generate megawatt hours (MWh) or reduce end-use energy demand during 2020 and/or 2021. Eligible projects are those that:

(1) Are located in or benefit a state that has submitted a final state plan that includes requirements establishing its participation in the CEIP; and

(2) Commence construction in the case of RE, or commence operation in the case of demand-side EE, following the submission of a final state plan to the EPA, or after September 6, 2018 for a state that chooses not to submit a final state plan by that date; and either

(3) Generate metered MWh from any type of wind or solar resources; or

(4) Result in quantified and verified electricity savings (MWh) through demand-side EE implemented in low-income communities.

(b) The EPA will award matching ERCs or allowances to States that award early action ERCs or allowances, up to a match limit equivalent to 300 million tons of CO₂ emissions. The awards will be executed as follows:

(1) For RE projects that generate metered MWh from wind or solar resources: For every two MWh generated, the project will receive one early action ERC (or the equivalent number of allowances) from the State, and the EPA will provide one matching ERC (or the equivalent number of allowances) to the State to award to the project.

(2) For EE projects implemented in low-income communities: For every two MWh in end-use demand savings achieved, the project will receive two early action ERCs (or the equivalent number of allowances) from the State, and the EPA will provide two matching ERCs (or the equivalent number of allowances) to the State to award to the project.

(c) You may participate in this program by including in your State plan a mechanism that enables issuance of early action ERCs or allowances by the State to parties effectuating reductions in the calendar years 2020 and/or 2021 in a manner that would have no impact on the emission performance of affected EGUs required to meet rate-based or mass-based emission standards during the performance periods. This

mechanism is not required to account for matching ERCs or allowances that may be issued to the State by the EPA.

(d) If you are submitting an initial submittal by September 6, 2016, and you intend to participate in the CEIP, you must include a non-binding statement of intent to participate in the program. If you are submitting a final plan by September 6, 2016, and you intend to participate in the CEIP, your State plan must either include requirements establishing the necessary infrastructure to implement such a program and authorizing your affected EGUs to use early action allowances or ERCs as appropriate, or you must include a non-binding statement of intent as part of your supporting documentation and revise your plan to include the appropriate requirements at a later date.

(e) If you intend to participate in the CEIP, your final State plan, or plan revision if applicable, must require that projects eligible under this program be evaluated, monitored, and verified, and that resulting ERCs or allowances be issued, per applicable requirements of the State plan approved by the EPA as meeting § 60.5805 through § 60.5835.

State and Multi-State Plan Requirements**§ 60.5740 What must I include in my federally enforceable State or multi State plan?**

(a) You must include the components described in paragraphs (a)(1) through (5) of this section in your plan submittal. The final plan must meet the requirements and include the information required under § 60.5745.

(1) *Identification of affected EGUs.* Consistent with § 60.25(a), you must identify the affected EGUs covered by your plan and all affected EGUs in your State that meet the applicability criteria in § 60.5845. In addition, you must include an inventory of CO₂ emissions from the affected EGUs during the most recent calendar year for which data is available prior to the submission of the plan.

(2) *Emission standards.* You must include an identification of all emission standards for each affected EGU according to § 60.5775, compliance periods for each emission standard according to § 60.5770, and a demonstration that the emission standards, when taken together, achieve the applicable CO₂ emission performance rates or CO₂ emission goals described in § 60.5855. Allowance systems are an acceptable form of emission standards under this subpart.

(i) Your plan does not need to include corrective measures specified in

paragraph (a)(2)(ii) of this section if your plan:

(A) Imposes emission standards on all affected EGUs that, assuming full compliance by all affected EGUs, mathematically assure achievement of the CO₂ emission performance rates in the plan for each plan period;

(B) Imposes emission standards on all affected EGUs that, assuming full compliance by all affected EGUs, mathematically assure achievement of the CO₂ emission goals; or

(C) Imposes emission standards on all affected EGUs that, assuming full compliance by all affected EGUs, in conjunction with applicable requirements under state law for EGUs subject to subpart TTTT of this subpart, assuming the applicable requirements under state law are met by all EGUs subject to subpart TTTT of this subpart, achieve the applicable mass-based CO₂ emission goals plus new source CO₂ emission complement allowed for in § 60.5790(b)(5).

(ii) If your plan does not meet the requirements of (a)(2)(i) or (iii) of this section, your plan must include the requirement for corrective measures to be implemented if triggered. Upon triggering corrective measures, if you do not already have them included in your approved State plan, you must submit corrective measures to EPA for approval as a plan revision per the requirements of § 60.5785(c). These corrective measures must ensure that the interim period and final period CO₂ emission performance rates or CO₂ emission goals are achieved by your affected EGUs, as applicable, and must achieve additional emission reductions to offset any emission performance shortfall. Your plan must include the requirement that corrective measures be triggered and implemented according to paragraphs (a)(2)(ii)(A) through (H) of this section.

(A) Your plan must include a trigger for an exceedance of an interim step 1 or interim step 2 CO₂ emission performance rate or CO₂ emission goal by 10 percent or greater, either on average or cumulatively (if applicable).

(B) Your plan must include a trigger for an exceedance of an interim step 1 goal or interim step 2 goal of 10 percent or greater based on either reported CO₂ emissions with applied plus or minus net allowance export or import adjustments (if applicable), or based on the adjusted CO₂ emission rate (if applicable).

(C) Your plan must include a trigger for a failure to meet an interim period goal based on reported CO₂ emissions with applied plus or minus net allowance export or import adjustments

(if applicable), or based on the adjusted CO₂ emission rate (if applicable).

(D) Your plan must include a trigger for a failure to meet the interim period or any final reporting period CO₂ emission performance rate or CO₂ emission goal, either on average or cumulatively (as applicable).

(E) Your plan must include a trigger for a failure to meet any final reporting period goal based on reported CO₂ emissions with applied plus or minus net allowance export or import adjustments (if applicable).

(F) Your plan must include a trigger for a failure to meet the interim period CO₂ emission performance rate or CO₂ emission goal based on the adjusted CO₂ emission rate (if applicable).

(G) Your plan must include a trigger for a failure to meet any final reporting period CO₂ emission performance rate or CO₂ emission goal based on the adjusted CO₂ emission rate (if applicable).

(H) A net allowance import adjustment represents the CO₂ emissions (in tons) equal to the number of net imported CO₂ allowances. This adjustment is subtracted from reported CO₂ emissions. Under this adjustment, such allowances must be issued by a state with an emission budget trading program that only applies to affected EGUs (or affected EGUs plus EGUs covered by subpart TTTT of this part as applicable). A net allowance export adjustment represents the CO₂ emissions (in tons) equal to the number of net exported CO₂ allowances. This adjustment is added to reported CO₂ emissions.

(iii) If your plan relies upon State measures, in addition to or in lieu of emission standards on your affected EGUs, then the final State plan must include the requirements in paragraph (a)(3) of this section and the submittal must include the information listed in § 60.5745(a)(6).

(iv) If your plan requires emission standards in addition to relying upon State measures, then you must demonstrate that the emission standards and State measures, when taken together, result in the achievement of the applicable mass-based CO₂ emission goal described in § 60.5855 by your State's affected EGUs.

(3) *State measures backstop.* If your plan relies upon State measures, you must submit, as part of the plan in lieu of the requirements in paragraph (a)(2)(i) and (ii) of this section, a federally enforceable backstop that includes emission standards for affected EGUs that will be put into place, if there is a triggering event listed in paragraph (a)(3)(i) of this section, within 18

months of the due date of the report required in § 60.5870(b). The emission standards on the affected EGUs as part of the backstop must be able to meet either the CO₂ emission performance rates or mass-based or rate-based CO₂ emission goal for your State during the interim and final periods. You must either submit, along with the backstop emission standards, provisions to adjust the emission standards to make up for the prior emission performance shortfall, such that no later plan revision to modify the emission standards is necessary in order to address the emission performance shortfall, or you must submit, as part of the final plan, backstop emission standards that assure affected EGUs would achieve your State's CO₂ emission performance rates or emission goals during the interim and final periods, and then later submit appropriate revisions to the backstop emission standards adjusting for the shortfall through the State plan revision process described in § 60.5785. The backstop must also include the requirements in paragraphs (a)(3)(i) through (iii) of this section, as applicable.

(i) You must include a trigger for the backstop to go into effect upon:

(A) A failure to meet a programmatic milestone;

(B) An exceedance of 10 percent or greater of an interim step 1 goal or interim step 2 goal based on reported CO₂ emissions, with applied plus or minus net allowance export or import adjustments (if applicable);

(C) A failure to meet the interim period goal based on reported CO₂ emissions, with applied plus or minus net allowance export or import adjustments (if applicable); or

(D) A failure to meet any final reporting period goal based on reported CO₂ emissions, with applied plus or minus net allowance export or import adjustments (if applicable).

(ii) You may include in your plan any additional triggers so long as they do not reduce the stringency of the triggers required under paragraph (a)(3)(i) of this section.

(iii) You must include a schedule for implementation of the backstop once triggered, and you must identify all necessary State administrative and technical procedures for implementing the backstop.

(4) *Identification of applicable monitoring, reporting, and recordkeeping requirements for each affected EGU.* You must include in your plan all applicable monitoring, reporting and recordkeeping requirements for each affected EGU and

the requirements must be consistent with or no less stringent than the requirements specified in § 60.5860.

(5) *State reporting.* You must include in your plan a description of the process, contents, and schedule for State reporting to the EPA about plan implementation and progress, including information required under § 60.5870.

(i) You must include in your plan a requirement for a report to be submitted by July 1, 2021, that demonstrates that the State has met, or is on track to meet, the programmatic milestone steps indicated in the timeline required in § 60.5770.

(b) You must follow the requirements of subpart B of this part and demonstrate that they were met in your State plan. However, the provisions of § 60.24(f) shall not apply.

§ 60.5745 What must I include in my final plan submittal?

(a) In addition to the components of the plan listed in § 60.5740, a final plan submittal to the EPA must include the information in paragraphs (a)(1) through (13) of this section. This information must be submitted to the EPA as part of your final plan submittal but will not be codified as part of the federally enforceable plan upon approval by EPA.

(1) You must include a description of your plan approach and the geographic scope of the plan (*i.e.*, State or multi-State, geographic boundaries related to the plan elements), including, if applicable, identification of multi-State plan participants.

(2) You must identify CO₂ emission performance rates or equivalent statewide CO₂ emission goals that your affected EGUs will achieve. If the geographic scope of your plan is a single State, then you must identify CO₂ emission performance rates or emission goals according to § 60.5855. If your plan includes multiple States and you elect to set CO₂ emission goals, you must identify CO₂ emission goals calculated according to § 60.5750.

(i) You must specify in the plan submittal the CO₂ emission performance rates or emission goals that affected EGUs will meet for the interim period, each interim step, and the final period (including each final reporting period) pursuant to § 60.5770.

(ii) [Reserved]

(3) You must include a demonstration that the affected EGUs covered by the plan are projected to achieve the CO₂ emission performance rates or CO₂ emission goals described in § 60.5855.

(4) You must include a demonstration that each affected EGU's emission standard is quantifiable, non-

duplicative, permanent, verifiable, and enforceable according to § 60.5775.

(5) If your plan includes emission standards on your affected EGUs sufficient to meet either the CO₂ emission performance rates or CO₂ emission goals, you must include in your plan submittal the information in paragraphs (a)(5)(i) through (v) of this section as applicable.

(i) If your plan applies separate rate-based CO₂ emission standards for affected EGUs (in lbs CO₂/MWh) that are equal to or lower than the CO₂ emission performance rates listed in Table 1 of this subpart or uniform rate-based CO₂ emission standards equal to or lower than the rate-based CO₂ emission goals listed in Table 2 of this subpart, then no additional demonstration is required beyond inclusion of the emission standards in the plan.

(ii) If a plan applies rate-based emission standards to individual affected EGUs at a lbs CO₂/MWh rate that differs from the CO₂ emission performance rates in Table 1 of this subpart or the State's rate-based CO₂ emission goal in Table 2 of this subpart, then a further demonstration is required that the application of the CO₂ emission standards will achieve the CO₂ emission performance rates or State rate-based CO₂ emission goal. You must demonstrate through a projection that the adjusted weighted average CO₂ emission rate of affected EGUs, when weighted by generation (in MWh), will be equal to or less than the CO₂ emission performance rates or the rate-based CO₂ emission goal. This projection must address the interim period and the final period. The projection in the plan submittal must include the information listed in paragraph (a)(5)(v) of this section and in addition the following:

(A) An analysis of the change in generation of affected EGUs given the compliance costs and incentives under the application of different emission rate standards across affected EGUs in a State;

(B) A projection showing how generation is expected to shift between affected EGUs and across affected EGUs and non-affected EGUs over time;

(C) Assumptions regarding the availability and anticipated use of the MWh of electricity generation or electricity savings from eligible resources that can be issued ERCs;

(D) The specific calculation (or assumption) of how eligible resource MWh of electricity generation or savings are being used in the projection to adjust the reported CO₂ emission rate of affected EGUs;

(E) If a state plan provides for the ability of renewable energy resources located in states with mass-based plans to be issued ERCs, consideration in the projection that such resources must meet geographic eligibility requirements, consistent with § 60.5800(a); and

(F) Any other applicable assumptions used in the projection.

(iii) If a plan establishes mass-based emission standards for affected EGUs that cumulatively do not exceed the State's EPA-specified mass CO₂ emission goal, then no additional demonstration is required beyond inclusion of the emission standards in the plan.

(iv) If a plan applies mass-based emission standards to individual affected EGUs that cumulatively exceed the State's EPA-specified mass CO₂ emission goal, then you must include a demonstration that your mass-based emission program will be designed such that compliance by affected EGUs would achieve the State mass-based CO₂ emission goals. This demonstration includes the information listed in paragraph (a)(5)(v) of this section.

(v) Your plan demonstration to be included in your plan submittal, if applicable, must include the information listed in paragraphs (a)(5)(v)(A) through (L) of this section.

(A) A summary of each affected EGU's anticipated future operation characteristics, including:

- (1) Annual generation;
- (2) CO₂ emissions;
- (3) Fuel use, fuel prices (when applicable), fuel carbon content;
- (4) Fixed and variable operations and maintenance costs (when applicable);
- (5) Heat rates; and
- (6) Electric generation capacity and capacity factors.

(B) An identification of any planned new electric generating capacity.

(C) Analytic treatment of the potential for building unplanned new electric generating capacity.

(D) A timeline for implementation of EGU-specific actions (if applicable).

(E) All wholesale electricity prices.

(F) A geographic representation appropriate for capturing impacts and/or changes in the electric system.

(G) A time period of analysis, which must extend through at least 2031.

(H) An anticipated electricity demand forecast (MWh load and MW peak demand) at the State and regional level, including the source and basis for these estimates, and, if appropriate, justification and documentation of underlying assumptions that inform the development of the demand forecast (e.g., annual economic and demand growth rate or population growth rate).

(I) A demonstration that each emission standard included in your plan meets the requirements of § 60.5775.

(J) Any ERC or emission allowance prices, when applicable.

(K) An identification of planning reserve margins.

(L) Any other applicable assumptions used in the projection.

(6) If your plan relies upon State measures, in addition to or in lieu of the emission standards required by paragraph § 60.5740(a)(2), the final State plan submittal must include the information under paragraphs (a)(5)(v) and (a)(6)(i) through (v) of this section.

(i) You must include a description of all the State measures the State will rely upon to achieve the applicable CO₂ emission goals required under § 60.5855(e), the projected impacts of the State measures over time, the applicable State laws or regulations related to such measures, and identification of parties or entities subject to or implementing such State measures.

(ii) You must include the schedule and milestones for the implementation of the State measures. If the State measures in your plan submittal rely upon measures that do not have a direct effect on the CO₂ emissions measured at an affected EGU's stack, you must also demonstrate how the minimum emission, monitoring and verification (EM&V) requirements listed under § 60.5795 that apply to those programs and projects will be met.

(iii) You must demonstrate that federally enforceable emission standards for affected EGUs in conjunction with any State measures relied upon for your plan, are sufficient to achieve the mass-based CO₂ emission goal for the interim period, each interim step in that interim period, the final period, and each final reporting period. In addition, you must demonstrate that each emission standard included in your plan meets the requirements of § 60.5775 and each State measure included in your plan submittal meets the requirements of § 60.5780.

(iv) You must include a CO₂ performance projection of your State measures that shows how the measures, whether alone or in conjunction with any federally enforceable CO₂ emission standards for affected EGUs, will result in the achievement of the future CO₂ performance at affected EGUs. Elements of this projection must include those specified in paragraph (a)(5)(v) of this section, as applicable, and the following for the interim period and the final period:

(A) A baseline demand and supply forecast as well as the underlying assumptions and data sources of each forecast;

(B) The magnitude of energy and emission impacts from all measures included in the plan and applicable assumptions;

(C) An identification of State-enforceable measures with electricity savings and RE generation, in MWh, expected for individual and collective measures and any assumptions related to the quantification of the MWh, as applicable.

(7) Your plan submittal must include a demonstration that the reliability of the electrical grid has been considered in the development of your plan.

(8) Your plan submittal must include a timeline with all the programmatic milestone steps the State intends to take between the time of the State plan submittal and January 1, 2022 to ensure the plan is effective as of January 1, 2022.

(9) Your plan submittal must adequately demonstrate that your State has the legal authority (e.g., through regulations or legislation) and funding to implement and enforce each component of the State plan submittal, including federally enforceable emission standards for affected EGUs, and State measures as applicable.

(10) Your State plan submittal must demonstrate that each interim step goal required under § 60.5855(c), will be met and include in its supporting documentation, if applicable, a description of the analytic process, tools, methods, and assumptions used to make this demonstration.

(11) Your plan submittal must include certification that a hearing required under § 60.23(c)(1) on the State plan was held, a list of witnesses and their organizational affiliations, if any, appearing at the hearing, and a brief written summary of each presentation or written submission, pursuant to the requirements of § 60.23(d) and (f).

(12) Your plan submittal must include documentation of any conducted community outreach and community involvement, including engagement with vulnerable communities.

(13) Your plan submittal must include supporting material for your plan including:

(i) Materials demonstrating the State's legal authority and funding to implement and enforce each component of its plan, including emissions standards and/or State measures that the plan relies upon;

(ii) Materials supporting that the CO₂ emission performance rates or CO₂ emission goals will be achieved by

affected EGUs identified under the plan, according to paragraph (a)(3) of this section;

(iii) Materials supporting any calculations for CO₂ emission goals calculated according to § 60.5855, if applicable; and

(iv) Any other materials necessary to support evaluation of the plan by the EPA.

(b) You must submit your final plan to the EPA electronically according to § 60.5875.

§ 60.5750 Can I work with other States to develop a multi-State plan?

A multi-State plan must include all the required elements for a plan specified in § 60.5740(a). A multi-State plan must meet the requirements of paragraphs (a) and (b) of this section.

(a) The multi-State plan must demonstrate that all affected EGUs in all participating States will meet the CO₂ emission performance rates listed in Table 1 of this subpart or an equivalent CO₂ emission goal according to paragraphs (a)(1) or (2) of this section. States may only follow the procedures in (a)(1) or (2) if they have functionally equivalent requirements meeting § 60.5775 and § 60.5790 included in their plans.

(1) For States electing to demonstrate performance with a CO₂ emission rate-based goal, the CO₂ emission goals identified in the plan according to § 60.5855 will be an adjusted weighted (by net energy output) average lbs CO₂/MWh emission rate to be achieved by all affected EGUs in the multi-State area during the plan periods; or

(2) For States electing to demonstrate performance with a CO₂ emission mass-based goal, the CO₂ emission goals identified in the multi-State plan according to § 60.5855 will be total mass CO₂ emissions by all affected EGUs in the multi-State area during the plan periods, representing the sum of all individual mass CO₂ goals for states participating in the multi-state plan.

(b) Options for submitting a multi-State plan include the following:

(1) States participating in a multi-State plan may submit one multi-State plan submittal on behalf of all participating States. The joint submittal must be signed electronically, according to § 60.5875, by authorized officials for each of the States participating in the multi-State plan. In this instance, the joint submittal will have the same legal effect as an individual submittal for each participating State. The joint submittal must address plan components that apply jointly for all participating States and components that apply for each individual State in

the multi-State plan, including necessary State legal authority to implement the plan, such as State regulations and statutes.

(2) States participating in a multi-State plan may submit a single plan submittal, signed by authorized officials from each participating State, which addresses common plan elements. Each participating State must, in addition, provide individual plan submittals that address State-specific elements of the multi-State plan.

(3) States participating in a multi-State plan may separately make individual submittals that address all elements of the multi-State plan. The plan submittals must be materially consistent for all common plan elements that apply to all participating States, and also must address individual State-specific aspects of the multi-State plan. Each individual State plan submittal must address all required plan components in § 60.5740.

(c) A State may elect to participate in more than one multi-State plan. If your State elects to participate in more than one multi-State plan then you must identify in the State plan submittal required under § 60.5745, the subset of affected EGUs that are subject to the specific multi-State plan or your State's individual plan. An affected EGU can only be subject to one plan.

(d) A State may elect to allow its affected EGUs to interact with affected EGUs in other States through mass-based trading programs or a rate-based trading program without entering into a formal multi-State plan allowed for under this section, so long as such programs are part of an EPA-approved state plan and meet the requirements of paragraphs (d)(1) and (2) of this section, as applicable.

(1) For States that elect to do mass-based trading under this option the State must indicate in its plan that its emission budget trading program will be administered using an EPA-approved (or EPA-administered) emission and allowance tracking system.

(2) For States that elect to use a rate-based trading program which allows the affected EGUs to use ERCs from other State rate-based trading programs, the plan must require affected EGUs within their State to comply with emission standards equal to the sub-category CO₂ emission performance rates in Table 1 of this subpart.

§ 60.5760 What are the timing requirements for submitting my plan?

(a) You must submit a final plan with the information required under § 60.5745 by September 6, 2016, unless you are submitting an initial submittal,

allowed under § 60.5765, in lieu of a final State plan submittal, according to paragraph (b) of this section.

(b) For States seeking a two year extension for a final plan submittal, you must include the information in § 60.5765(a) in an initial submittal by September 6, 2016, to receive an extension to submit your final State plan submittal by September 6, 2018.

(c) You must submit all information required under paragraphs (a) and (b) of this section according to the electronic reporting requirements in § 60.5875.

§ 60.5765 What must I include in an initial submittal if requesting an extension for a final plan submittal?

(a) You must sufficiently demonstrate that your State is able to undertake steps and processes necessary to timely submit a final plan by the extended date of September 6, 2018, by addressing the following required components in an initial submittal by September 6, 2016, if requesting an extension for a final plan submittal:

(1) An identification of final plan approach or approaches under consideration and a description of progress made to date on the final plan components;

(2) An appropriate explanation of why the State requires additional time to submit a final plan by September 6, 2018; and

(3) A demonstration or description of the opportunity for public comment on the initial submittal and meaningful engagement with stakeholders, including vulnerable communities, during the time in preparation of the initial submittal and the plans for engagement during development of the final plan.

(b) You must submit an initial submittal allowed in paragraph (a) of this section, information required under paragraph (c) of this section (only if a State elects to submit an initial submittal to request an extension for a final plan submittal), and a final State plan submittal according to § 60.5870. If a State submits an initial submittal, an extension for a final State plan submittal is considered granted and a final State plan submittal is due according to § 60.5760(b) unless a State is notified within 90 days of the EPA receiving the initial submittal that the EPA finds the initial submittal does not meet the requirements listed in paragraph (a) of this section. If the EPA notifies the State that the initial submittal does not meet such requirements, the EPA will also notify the State that it has failed to submit the final plan required by September 6, 2016.

(c) If an extension for submission of a final plan has been granted, you must submit a progress report by September 6, 2017. The 2017 report must include the following:

(1) A summary of the status of each component of the final plan, including an update from the 2016 initial submittal and a list of which final plan components are not complete.

(2) A commitment to a plan approach (e.g., single or multi-State, rate-based or mass-based emission performance level, rate-based or mass-based emission standards), including draft or proposed legislation and/or regulations.

(3) An updated comprehensive roadmap with a schedule and milestones for completing the final plan, including any updates to community engagement undertaken and planned.

§ 60.5770 What schedules, performance periods, and compliance periods must I include in my plan?

(a) The affected EGUs covered by your plan must meet the CO₂ emission requirements required under § 60.5855 for the interim period, interim steps, and the final reporting periods according to paragraph (b) of this section. You must also include in your plan compliance periods for each affected EGU regulated under the plan according to paragraphs (c) and (d) of this section.

(b) Your plan must require your affected EGUs to achieve each CO₂ emission performance rate or CO₂ emission goal, as applicable, required under § 60.5855 over the periods according to paragraphs (b)(1) through (3) of this section.

(1) The interim period.

(2) Each interim step.

(3) Each final reporting period.

(c) The emission standards for affected EGUs regulated under the plan must include the following compliance periods:

(1) For the interim period, affected EGUs must have emission standards that have compliance periods that are no longer than each interim step and are imposed for the entirety of the interim step either alone or in combination.

(2) For the final period, affected EGUs must have emission standards that have compliance periods that are no longer than each final reporting period and are imposed for the entirety of the final reporting period either alone or in combination.

(3) Compliance periods for each interim step and each final reporting period may take forms shorter than specified in this regulation, provided the schedules of compliance collectively end on the same schedule as each interim step and final reporting period.

(d) If your plan relies upon State measures in lieu of or in addition to emission standards for affected EGUs regulated under the plan, then the performance periods must be identical to the compliance periods for affected EGUs listed in paragraphs (c)(1) through (3) of this section.

§ 60.5775 What emission standards must I include in my plan?

(a) Emission standard(s) for affected EGUs included under your plan must be demonstrated to be quantifiable, verifiable, non-duplicative, permanent, and enforceable with respect to each affected EGU. The plan submittal must include the methods by which each emission standard meets each of the following requirements in paragraphs (b) through (f) of this section.

(b) An affected EGU's emission standard is quantifiable if it can be reliably measured in a manner that can be replicated.

(c) An affected EGU's emission standard is verifiable if adequate monitoring, recordkeeping and reporting requirements are in place to enable the State and the Administrator to independently evaluate, measure, and verify compliance with the emission standard.

(d) An affected EGU's emission standard is non-duplicative with respect to a State plan if it is not already incorporated as an emission standard in another State plan unless incorporated in multi-State plan.

(e) An affected EGU's emission standard is permanent if the emission standard must be met for each compliance period, unless it is replaced by another emission standard in an approved plan revision, or the State demonstrates in an approvable plan revision that the emission reductions from the emission standard are no longer necessary for the State to meet its State level of performance.

(f) An affected EGU's emission standard is enforceable if:

(1) A technically accurate limitation or requirement and the time period for the limitation or requirement are specified;

(2) Compliance requirements are clearly defined;

(3) The affected EGUs responsible for compliance and liable for violations can be identified;

(4) Each compliance activity or measure is enforceable as a practical matter; and

(5) The Administrator, the State, and third parties maintain the ability to enforce against violations (including if an affected EGU does not meet its emission standard based on its

emissions, its allowances if it is subject to a mass-based emission standard, or its ERCs if it is subject to a rate-based emission standard) and secure appropriate corrective actions, in the case of the Administrator pursuant to CAA sections 113(a)–(h), in the case of a State, pursuant to its plan, State law or CAA section 304, as applicable, and in the case of third parties, pursuant to CAA section 304.

§ 60.5780 What State measures may I rely upon in support of my plan?

You may rely upon State measures in support of your plan that are not emission standard(s) on affected EGUs, provided those State measures meet the requirements in paragraph (a) of this section.

(a) Each State measure is quantifiable, verifiable, non-duplicative, permanent, and enforceable with respect to each affected entity (e.g., entities other than affected EGUs with no federally enforceable obligations under a State plan), and your plan supporting materials include the methods by which each State measure meets each of the following requirements in paragraphs (a)(1) through (5) of this section.

(1) A State measure is quantifiable with respect to an affected entity if it can be reliably measured in a manner that can be replicated.

(2) A State measure is verifiable with respect to an affected entity if adequate monitoring, recordkeeping and reporting requirements are in place to enable the State to independently evaluate, measure, and verify compliance with the State measure.

(3) A State measure is non-duplicative with respect to an affected entity if it is not already incorporated as a State measure or an emission standard in another State plan or State plan supporting material unless incorporated in a multi-State plan.

(4) A State measure is permanent with respect to an affected entity if the State measure must be met for at least each compliance period, or unless either it is replaced by another State measure in an approved plan revision, or the State demonstrates in an approved plan revision that the emission reductions from the State measure are no longer necessary for the State's affected EGUs to meet their mass-based CO₂ emission goal.

(5) A State measure is enforceable against an affected entity if:

(i) A technically accurate limitation or requirement and the time period for the limitation or requirement are specified;

(ii) Compliance requirements are clearly defined;

(iii) The affected entities responsible for compliance and liable for violations can be identified;

(iv) Each compliance activity or measure is enforceable as a practical matter; and

(v) The State maintains the ability to enforce violations and secure appropriate corrective actions.

(b) [Reserved]

§ 60.5785 What is the procedure for revising my plan?

(a) EPA-approved plans can be revised only with approval by the Administrator. The Administrator will approve a plan revision if it is satisfactory with respect to the applicable requirements of this subpart and any applicable requirements of subpart B of this part, including the requirement in § 60.5745(a)(3) to demonstrate achievement of the CO₂ emission performance rates or CO₂ emission goals in § 60.5855. If one (or more) of the elements of the plan set in § 60.5740 require revision with respect to achieving the CO₂ emission performance rates or CO₂ emission goals in § 60.5855, a request must be submitted to the Administrator indicating the proposed revisions to the plan to ensure the CO₂ emission performance rates or CO₂ emission goals are met. In addition, the following provisions in paragraphs (b) through (d) of this section may apply.

(b) You may submit revisions to a plan to adjust CO₂ emission goals according to § 60.5855(d).

(c) If your State is required to submit a notification according to § 60.5870(d) indicating a triggering of corrective measures as described in § 60.5740(a)(2)(i) and your plan does not already include corrective measures to be implemented if triggered, you must revise your State plan to include corrective measures to be implemented. The corrective measures must ensure achievement of the CO₂ emission performance rates or State CO₂ emission goal. Additionally, the corrective measures must achieve additional CO₂ emission reductions to offset any CO₂ emission performance shortfall relative to the overall interim period or final period CO₂ emission performance rate or State CO₂ emission goal. The State plan revision submission must explain how the corrective measures both make up for the shortfall and address the State plan deficiency that caused the shortfall. The State must submit the revised plan and explanation to the EPA within 24 months after submitting the State report required in § 60.5870(a) indicating the CO₂ emission performance deficiency in lieu of the

requirements of § 60.28(a). The State must implement corrective measures within 6 months of the EPA's approval of a plan revision adding them. The shortfall must be made up as expeditiously as practicable.

(d) If your plan relies upon State measures, your backstop is triggered under § 60.5740(a)(3)(i), and your State measures plan backstop does not include a mechanism to make up the shortfall, you must revise your backstop emission standards to make up the shortfall. The shortfall must be made up as expeditiously as practicable.

(e) Reliability Safety Valve:

(1) In order to trigger a reliability safety valve, you must notify the EPA within 48 hours of an unforeseen, emergency situation that threatens reliability, such that your State will need a short-term modification of emission standards under a State plan for a specified affected EGU or EGUs. The EPA will consider the notification in § 60.5870(g)(1) to be an approved short-term modification to the State plan without needing to go through the full State plan revision process if the State provides a second notification to the EPA within seven days of the first notification. The short-term modification under a reliability safety valve allows modification to emission standards under the State plan for an affected EGU or EGUs for an initial period of up to 90 days. During that period of time, the affected EGU or EGUs will need to comply with the modified emission standards identified in the initial notification required under § 60.5870(g)(1) or amended in the second notification required under § 60.5870(g)(2). For the duration of the up to 90-day short-term modification, the CO₂ emissions of the affected EGU or EGUs that exceed their obligations under the originally approved State plan will not be counted against the State's CO₂ emission performance rate or CO₂ emission goal. The EPA reserves the right to review any such notification required under § 60.5870(g), and, in the event that the EPA finds such notification is improper, the EPA may disallow the short-term modification and affected EGUs must continue to operate under the approved State plan emission standards. As described more fully in § 60.5870(g)(3), at least seven days before the end of the initial 90-day reliability safety valve period, the State must notify the appropriate EPA regional office whether the reliability concern has been addressed and the affected EGU or EGUs can resume meeting the original emission standards established in the State plan prior to the short-term modification or whether a

serious, ongoing reliability issue necessitates the affected EGU or EGUs emitting beyond the amount allowed under the State plan.

(2) Plan revisions submitted pursuant to § 60.5870(g)(3) must meet the requirements for State plan revisions under § 60.5785(a).

§ 60.5790 What must I do to meet my plan obligations?

(a) To meet your plan obligations, you must demonstrate that your affected EGUs are complying with their emission standards as specified in § 60.5740, and you must demonstrate that the emission standards on affected EGUs, alone or in conjunction with any State measures, are resulting in achievement of the CO₂ emission performance rates or statewide CO₂ emission goals by affected EGUs using the procedures in paragraphs (b) through (d) of this section. If your plan requires the use of allowances for your affected EGUs to comply with their mass-based emission standards, you must follow the requirements under paragraph (b) of this section and § 60.5830. If your plan requires the use of ERCs for your affected EGUs to comply with their rate-based emission standards, you must follow the requirements under paragraphs (c) and (d) of this section and §§ 60.5795 through 60.5805.

(b) If you submit a plan that sets a mass-based emission trading program for your affected EGUs, the State plan

must include emission standards and requirements that specify the allowance system, related compliance requirements and mechanisms, and the emission budget as appropriate. These requirements must include those listed in paragraphs (b)(1) through (5) of this section.

(1) CO₂ emission monitoring, reporting, and recordkeeping requirements for affected EGUs.

(2) Requirements for State allocation of allowances consistent with § 60.5815.

(3) Requirements for tracking of allowances, from issuance through submission for compliance, consistent with § 60.5820.

(4) The process for affected EGUs to demonstrate compliance (allowance “true-up” with reported CO₂ emissions) consistent with § 60.5825.

(5) Requirements that address potential increased CO₂ emissions from new sources, beyond the emissions expected from new sources if affected EGUs were given emission standards in the form of the subcategory-specific CO₂ emission performance rates. You may meet this requirement by requiring one of the options under paragraphs (b)(5)(i) through (iii) of this section.

(i) You may include, as part of your plan’s supporting documentation, requirements enforceable as a matter of State law regulating CO₂ emissions from EGUs covered by subpart TTTT of this part under the mass-based CO₂ goal plus new source CO₂ emission complement

applicable to your State in Table 4 of this subpart. If you choose this option, the term “mass-based CO₂ goal plus new source CO₂ emission complement” shall apply rather than “CO₂ mass-based goal” and the term “CO₂ emission goal” shall include “mass-based CO₂ goal plus new source CO₂ emission complement” in these emission guidelines.

(ii) You may include requirements in your State plan for emission budget allowance allocation methods that align incentives to generate to affected EGUs or EGUs covered by subpart TTTT of this part that result in the affected EGUs meeting the mass-based CO₂ emission goal;

(iii) You may submit for the EPA’s approval, an equivalent method which requires affected EGUs to meet the mass-based CO₂ emission goal. The EPA will evaluate the approvability of such an alternative method on a case by case basis.

(c) If you submit a plan that sets rate-based emission standards on your affected EGUs, to meet the requirements of § 60.5775, you must follow the requirements in paragraphs (c)(1) through (4) of this section.

(1) You must require the owner or operator of each affected EGU covered by your plan to calculate an adjusted CO₂ emission rate to demonstrate compliance with its emission standard by factoring stack emissions and any ERCs into the following equation:

$$CO_2 \text{ emission rate} = \frac{\sum M_{CO_2}}{\sum MWh_{op} + \sum MWh_{ERC}}$$

Where:

CO₂ emission rate = An affected EGU’s adjusted CO₂ emission rate that will be used to determine compliance with the applicable CO₂ emission standard.

M_{CO₂} = Measured CO₂ mass in units of pounds (lbs) summed over the compliance period for an affected EGU.

MWh_{op} = Total net energy output over the compliance period for an affected EGU in units of MWh.

MWh_{ERC} = ERC replacement generation for an affected EGU in units of MWh (ERCs are denominated in whole integers as specified in paragraph (d) of this section).

(2) Your plan must specify that an ERC qualifies for the compliance demonstration specified in paragraph (c)(1) of this section if the ERC meets the requirements of paragraphs (c)(2)(i) through (iv) of this section.

(i) An ERC must have a unique serial number.

(ii) An ERC must represent one MWh of actual energy generated or saved with zero associated CO₂ emissions.

(iii) An ERC must only be issued to an eligible resource that meets the requirements of § 60.5800 or to an affected EGU that meets the requirements of § 60.5795 and must only be issued by a State or its State agent through an EPA-approved ERC tracking system that meets the requirements of § 60.5810, or by the EPA through an EPA-administered tracking system.

(iv) An ERC must be surrendered and retired only once for purpose of compliance with this regulation through an EPA-approved ERC tracking system that meets the requirements of § 60.5810, or by the EPA through an EPA-administered tracking system.

(3) Your plan must specify that an ERC does not qualify for the compliance demonstration specified in paragraph

(c)(1) of this section if it does not meet the requirements of paragraph (c)(2) of this section or if any State has used that same ERC for purposes of demonstrating achievement of a CO₂ emission performance rate or CO₂ emission goal. The plan must additionally include provisions that address requirements for revocation or adjustment that apply if an ERC issued by the State is subsequently found to have been improperly issued.

(4) Your plan must include provisions either allowing for or restricting banking of ERCs between compliance periods for affected EGUs, and provisions not allowing any borrowing of any ERCs from future compliance periods by affected EGUs or eligible resources.

Emission Rate Credit Requirements**§ 60.5795 What affected EGUs qualify for generation of ERCs?**

(a) For issuance of ERCs to the affected EGUs that generate them, the plan must specify the accounting method and process for ERC issuance. For plans that require that affected EGUs meet a rate-based CO₂ emission goal, where all affected EGUs have identical emission standards, you must specify the accounting method listed in paragraph (a)(1) of this section for generating ERCs. For plans that require affected EGUs to meet the CO₂ emission performance rates or CO₂ emission goals where affected EGUs have emission standards that are not equal for all affected EGUs, you must specify the accounting methods listed in paragraphs (a)(1) and (2) of this section for generating ERCs.

(1) You must include the calculation method for determining the number of ERCs, denominated in MWh, that may be generated by and issued to an affected EGU that is in compliance with its emission standard, based on the difference between its emission standard and its reported CO₂ emission rate for the compliance period; and

(2) You must include the calculation method for determining the number of ERCs, denominated in MWh, that may be issued to affected EGUs that meet the definition of a stationary combustion turbine based on the displaced emissions from affected EGUs not meeting the definition of a stationary combustion turbine, resulting from the difference between its annualized net energy output in MWh for the calendar year(s) in the compliance period and its net energy output in MWh for the 2012 calendar year (January 1, 2012, through December 31, 2012).

(b) Any ERCs generated through the method described as required by paragraph (a)(2) of this section must not be used by any affected EGUs other than steam generating units or IGCCs to demonstrate compliance as prescribed under § 60.5790(c)(1).

(c) Any states in a multi-State plan that requires the use of ERCs for affected EGUs to comply with their emission standards must have functionally equivalent requirements pursuant to paragraphs (a)(1) and (2) of this section for generating ERCs.

§ 60.5800 What other resources qualify for issuance of ERCs?

(a) ERCs may only be issued for generation or savings produced on or after January 1, 2022, to a resource that qualifies as an eligible resource because it meets each of the requirements in

paragraphs (a)(1) through (4) of this section.

(1) Resources qualifying for eligibility only include resources that increased installed electrical generation nameplate capacity, or implemented new electrical savings measures, on or after January 1, 2013. If a resource had a nameplate capacity uprate, ERCs may be issued only for the difference in generation between its uprated nameplate capacity and its nameplate capacity prior to the uprate. ERCs must not be issued for generation for an uprate that followed a derate that occurred on or after January 1, 2013. A resource that is relicensed or receives a license extension is considered existing capacity and is not an eligible resource, unless it receives a capacity uprate as a result of the relicensing process that is reflected in its relicensed permit. In such a case, only the difference in nameplate capacity between its relicensed permit and its prior permit is eligible to be issued ERCs.

(2) The resource must be connected to, and deliver energy to or save electricity on, the electric grid in the contiguous United States.

(3) The resource must be located in either:

(i) A State whose affected EGUs are subject to rate-based emission standards pursuant to this regulation; or

(ii) A State with a mass-based CO₂ emission goal, and the resource can demonstrate (e.g., through a power purchase agreement or contract for delivery) that the electricity generated is delivered with the intention to meet load in a State with affected EGUs which are subject to rate-based emission standards pursuant to this regulation, and was treated as a generation resource used to serve regional load that included the State whose affected EGUs are subject to rate-based emission standards. Notwithstanding any other provision of paragraph (a)(4) of this section, the only type of eligible resource in the State with mass-based emission standards is renewable generating technologies listed in (a)(4)(i) of this section.

(4) The resource falls into one of the following categories of resources:

(i) Renewable electric generating technologies using one of the following renewable energy resources: Wind, solar, geothermal, hydro, wave, tidal;

(ii) Qualified biomass;

(iii) Waste-to-energy (biogenic portion only);

(iv) Nuclear power;

(v) A non-affected combined heat and power (CHP) unit, including waste heat power;

(vi) A demand-side EE or demand-side management measure that saves electricity and is calculated on the basis of quantified ex post savings, not “projected” or “claimed” savings; or

(vii) A category identified in a State plan and approved by the EPA to generate ERCs.

(b) Any resource that does not meet the requirements of this subpart or an approved State plan cannot be issued ERCs for use by an affected EGU with its compliance demonstration required under § 60.5790(c).

(c) ERCs may not be issued to or for any of the following:

(1) New, modified, or reconstructed EGUs that are subject to subpart TTTT of this part, except CHP units that meet the requirements of a CHP unit under paragraph (a);

(2) EGUs that do not meet the applicability requirements of §§ 60.5845 and 60.5850, except CHP units that meet the requirements of a CHP unit under paragraph (a);

(3) Measures that reduce CO₂ emissions outside the electric power sector, including, for example, GHG offset projects representing emission reductions that occur in the forestry and agriculture sectors, direct air capture, and crediting of CO₂ emission reductions that occur in the transportation sector as a result of vehicle electrification; and

(4) Any measure not approved by the EPA for issuance of ERCs in connection with a specific State plan.

(d) You must include the appropriate requirements in paragraphs (d)(1) through (3) of this section for an applicable eligible resource in your plan.

(1) If qualified biomass is an eligible resource, the plan must include a description of why the proposed feedstocks or feedstock categories should qualify as an approach for controlling increases of CO₂ levels in the atmosphere as well as the proposed valuation of biogenic CO₂ emissions. In addition, for sustainably-derived agricultural and forest biomass feedstocks, the state plan must adequately demonstrate that such feedstocks appropriately control increases of CO₂ levels in the atmosphere and methods for adequately monitoring and verifying these feedstock sources and related sustainability practices. For all qualified biomass feedstocks, plans must specify how biogenic CO₂ emissions will be monitored and reported, and identify specific EM&V, tracking and auditing approaches.

(2) If waste-to-energy is an eligible resource, the plan must assess both the

capacity to strengthen existing or implement new waste reduction, reuse, recycling and composting programs, and measures to minimize any potential negative impacts of waste-to-energy operations on such programs. Additionally the plan must include a method for determining the proportion of total MWh generation from a waste-to-energy facility that is eligible for use in adjusting a CO₂ emission rate (*i.e.*, that which is generated from biogenic materials).

(3) If carbon capture and utilization (CCU) is an eligible resource in a plan, the plan must include analysis supporting how the proposed qualifying CCU technology results in CO₂ emission mitigation from affected EGUs and provide monitoring, reporting, and verification requirements to demonstrate the reductions.

(e) States and areas of Indian country that do not have any affected EGUs, and other countries, may provide ERCs to adjust CO₂ emissions provided they are connected to the contiguous U.S. grid and meet the other requirements for eligibility and eligible resources and the issuance of ERCs included in these emission guidelines, except that such States and other countries may not provide ERCs from resources described in § 60.5800(a)(4)(vi).

§ 60.5805 What is the process for the issuance of ERCs?

If your plan uses ERCs your plan must include the process and requirements for issuance of ERCs to affected EGUs and eligible resources set forth in paragraphs (a) through (f) of this section.

(a) *Eligibility application.* Your plan must require that, to receive ERCs, the owner or operator must submit an eligibility application to you that demonstrates that the requirements of your State plan as approved by the EPA as meeting § 60.5795 (for an affected EGU) or § 60.5800 (for an eligible resource) are met, and, in the case of an eligible resource, includes at a minimum:

(1) Documentation that the eligibility application has only been submitted to you, or pursuant to an EPA-approved multi-State collaborative approach;

(2) An EM&V plan that meets the requirements of the State plan as approved by the EPA as meeting § 60.5830; and

(3) A verification report from an independent verifier that verifies the eligibility of the eligible resource to be issued an ERC and that the EM&V plan meets the requirements of the State plan as approved by the EPA of meeting § 60.5805.

(b) *Registration.* Your plan must require that any affected EGU or eligible resource register with an ERC tracking system that meets the requirements of § 60.5810 prior to the issuance of ERCs, and your plan must specify that you will only register an affected EGU or eligible resource after you approve its eligibility application and determine that the requirements of paragraph (a) of this section are met.

(c) *M&V reports.* For an eligible resource registered pursuant to paragraph (b) of this section, your plan must require that, prior to issuance of ERCs by you, the owner or operator must submit the following:

(1) An M&V report that meets the requirements of your State plan as approved by the EPA as meeting § 60.5835; and

(2) A verification report from an independent verifier that verifies that the requirements for the M&V report are met.

(e) *Issuance of ERCs.* Your plan must specify your procedure for issuance of ERCs based on your review of an M&V report and verification report, and must require that ERCs be issued only on the basis of energy actually generated or saved, and that only one ERC is issued for each verified MWh.

(f) *Tracking system.* Your plan must require that ERCs may only be issued through an ERC tracking system approved as part of the State plan.

(g) *Error adjustment.* Your plan must include a mechanism to adjust the number of ERCs issued if any are issued based on error (clerical, formula input error, etc.).

(h) *Qualification status of an eligible resource.* Your plan must include a mechanism to temporarily or permanently revoke the qualification status of an eligible resource, such that it can no longer be issued ERCs for at least the duration that it does not meet the requirements for being issued ERCs in your State plan.

(i) *Qualification status of an independent verifier—(1) Eligibility.* To be an independent verifier, a person must be approved by the State as:

(A) An independent verifier, as defined by this regulation; and

(B) Eligible to verify eligibility applications, EM&V plans, and/or M&V reports per the requirements of the approved State plan as meeting §§ 60.5830 and 60.5835 respectively.

(2) *Revocation of qualification.* Your plan must include a mechanism to temporarily or permanently revoke the qualification status of an independent verifier, such that it can no longer verify eligibility applications, EM&V plans or M&V reports for at least the duration of

the period it does not meet the requirements of your State plan.

§ 60.5810 What applicable requirements are there for an ERC tracking system?

(a) Your plan must include provisions for an ERC tracking system, if applicable, that meets the following requirements:

(1) It electronically records the issuance of ERCs, transfers of ERCs among accounts, surrender of ERCs by affected EGUs as part of a compliance demonstration, and retirement or cancellation of ERCs; and

(2) It documents and provides electronic, internet-based public access to all information that supports the eligibility of eligible resources and issuance of ERCs and functionality to generate reports based on such information, which must include, for each ERC, an eligibility application, EM&V plan, M&V reports, and independent verifier verification reports.

(b) If approved in a State plan, an ERC tracking system may provide for transfers of ERCs to or from another ERC tracking system approved in a State plan, or provide for transfers of ERCs to or from an EPA-administered ERC tracking system used to administer a Federal plan.

Mass Allocation Requirements

§ 60.5815 What are the requirements for State allocation of allowances in a mass-based program?

(a) For a mass-based trading program, a State plan must include requirements for CO₂ allowance allocations according to paragraphs (b) through (f) of this section.

(b) Provisions for allocation of allowances for each compliance period prior to the beginning of the compliance period.

(c) Provisions for allocation of set-aside allowance, if applicable, must be established to ensure that the eligible resources must meet the same requirements for the ERC eligible resource requirements of § 60.5800, and the State must include eligibility application and verification provisions equivalent to those for ERCs in § 60.5805 and EM&V plan and M&V report provisions that meet the requirements of § 60.5830 and § 60.5835.

(d) Provisions for adjusting allocations if the affected EGUs or eligible resources are incorrectly allocated CO₂ allowances.

(e) Provisions allowing for or restricting banking of allowances between compliance periods for affected EGUs.

(f) Provisions not allowing any borrowing of allowances from future compliance periods by affected EGUs.

§ 60.5820 What are my allowance tracking requirements?

(a) Your plan must include provisions for an allowance tracking system, if applicable, that meets the following requirements:

(1) It electronically records the issuance of allowances, transfers of allowances among accounts, surrender of allowances by affected EGUs as part of a compliance demonstration, and retirement of allowances; and

(2) It documents and provides electronic, internet-based public access to all information that supports the eligibility of eligible resources and issuance of set aside allowances, if applicable, and functionality to generate reports based on such information, which must include, for each set aside allowance, an eligibility application, EM&V plan, M&V reports, and independent verifier verification reports.

(b) If approved in a State plan, an allowance tracking system may provide for transfers of allowances to or from another allowance tracking system approved in a State plan, or provide for transfers of allowances to or from an EPA-administered allowance tracking system used to administer a Federal plan.

§ 60.5825 What is the process for affected EGUs to demonstrate compliance in a mass-based program?

(a) A plan must require an affected EGU's owners or operators to demonstrate compliance with emission standards in a mass based program by holding an amount of allowances not less than the tons of total CO₂ emissions for such compliance period from the affected EGUs in the account for the affected EGU's emissions in the allowance tracking system required under § 60.5820 during the applicable compliance period.

(b) In a mass-based trading program a plan may allow multiple affected EGUs co-located at the same facility to demonstrate that they are meeting the applicable emission standards on a facility-wide basis by the owner or operator holding enough allowances to cover the CO₂ emissions of all the affected EGUs at the facility.

(1) If there are not enough allowances to cover the facility's affected EGUs' CO₂ emissions then there must be provisions for determining the compliance status of each affected EGU located at that facility.

(2) [Reserved]

Evaluation Measurement and Verification Plans and Monitoring and Verification Reports

§ 60.5830 What are the requirements for EM&V plans for eligible resources?

(a) If your plan requires your affected EGUs to meet their emission standards in accordance with § 60.5790, your plan must include requirements that any EM&V plan that is submitted in accordance with the requirements of § 60.5805, in support of the issuance of an ERC or set-aside allowance that can be used in accordance with § 60.5790, must meet the EM&V criteria approved as part of your State plan.

(b) Your plan must require each EM&V plan to include identification of the eligible resource.

(c) Your plan must require that an EM&V plan must contain specific criteria, as applicable to the specific eligible resource.

(1) For RE resources, your plan must include requirements discussing how the generation data will be physically measured on a continuous basis using, for example, a revenue-quality meter.

(2) For demand-side EE, your plan must require that each EM&V plan quantify and verify electricity savings on a retrospective (ex-post) basis using industry best-practice EM&V protocols and methods that yield accurate and reliable measurements of electricity savings. Your plan must also require each EM&V plan to include an assessment of the independent factors that influence the electricity savings, the expected life of the savings (in years), and a baseline that represents what would have happened in the absence of the demand-side EE activity.

Additionally, your plan must require that each EM&V plan include a demonstration of how the industry best-practices protocol and methods were applied to the specific activity, project, measure, or program covered in the EM&V plan, and include an explanation of why these protocols or methods were selected. EM&V plans must require eligible resources to demonstrate how all such best-practice approaches will be applied for the purposes of quantifying and verifying MWh results. Subsequent reporting of demand-side EE savings values must demonstrate and explain how the EM&V plan was followed.

§ 60.5835 What are the requirements for M&V reports for eligible resources?

(a) If your plan requires your affected EGUs to meet their emission standards in accordance with § 60.5790, your plan must include requirements that any M&V report that is submitted in accordance with the requirements of

§ 60.5805, in support of the issuance of an ERC or set-aside allocation that can be used in accordance with § 60.5790, must meet the requirements of this section.

(b) Your plan must require that each M&V report include the following:

(1) For the first M&V report

submitted, documentation that the energy-generating resources, energy-saving measures, or practices were installed or implemented consistent with the description in the approved eligibility application required in § 60.5805(a).

(2) Each M&V report submitted must include the following:

(i) Identification of the time period covered by the M&V report;

(ii) A description of how relevant quantification methods, protocols, guidelines, and guidance specified in the EM&V plan were applied during the reporting period to generate the quantified MWh of generation or MWh of energy savings;

(iii) Documentation (including data) of the energy generation and/or energy savings from any activity, project, measure, resource, or program addressed in the EM&V plan, quantified and verified in MWh for the period covered by the M&V report, in accordance with its EM&V plan, and based on ex-post energy generation or savings; and

(iv) Documentation of any change in the energy generation or savings capability of the eligible resource from the description of the resource in the approved eligibility application during the period covered by the M&V report and the date on which the change occurred, and/or demonstration that the eligible resource continued to meet the requirements of § 60.5800.

Applicability of Plans to Affected EGUs

§ 60.5840 Does this subpart directly affect EGU owners or operators in my State?

(a) This subpart does not directly affect EGU owners or operators in your State. However, affected EGU owners or operators must comply with the plan that a State or States develop to implement the emission guidelines contained in this subpart.

(b) If a State does not submit a final plan to implement and enforce the emission guidelines contained in this subpart, or an initial submittal for which an extension to submit a final plan can be granted, by September 6, 2016, or the EPA disapproves a final plan, the EPA will implement and enforce a Federal plan, as provided in § 60.5720, applicable to each affected EGU within the State that commenced

construction on or before January 8, 2014.

§ 60.5845 What affected EGUs must I address in my State plan?

(a) The EGUs that must be addressed by your plan are any affected steam generating unit, IGCC, or stationary combustion turbine that commenced construction on or before January 8, 2014.

(b) An affected EGU is a steam generating unit, IGCC, or stationary combustion turbine that meets the relevant applicability conditions specified in paragraph (b)(1) through (3) of this section, as applicable, except as provided in § 60.5850.

(1) Serves a generator or generators connected to a utility power distribution system with a nameplate capacity greater than 25 MW-net (*i.e.*, capable of selling greater than 25 MW of electricity);

(2) Has a base load rating (*i.e.*, design heat input capacity) greater than 260 GJ/hr (250 MMBtu/hr) heat input of fossil fuel (either alone or in combination with any other fuel); and

(3) Stationary combustion turbines that meet the definition of either a combined cycle or combined heat and power combustion turbine.

§ 60.5850 What EGUs are excluded from being affected EGUs?

EGUs that are excluded from being affected EGUs are:

(a) EGUs that are subject to subpart TTTT of this part as a result of commencing construction after the subpart TTTT applicability date;

(b) Steam generating units and IGCCs that are, and always have been, subject to a federally enforceable permit limiting annual net-electric sales to one-third or less of its potential electric output, or 219,000 MWh or less;

(c) Non-fossil units (*i.e.*, units that are capable of combusting 50 percent or more non-fossil fuel) that have always historically limited the use of fossil fuels to 10 percent or less of the annual capacity factor or are subject to a federally enforceable permit limiting fossil fuel use to 10 percent or less of the annual capacity factor;

(d) Stationary combustion turbines not capable of combusting natural gas (*e.g.*, not connected to a natural gas pipeline);

(e) EGUs that are combined heat and power units that have always historically limited, or are subject to a federally enforceable permit limiting, annual net-electric sales to a utility distribution system to no more than the greater of either 219,000 MWh or the product of the design efficiency and the potential electric output;

(f) EGUs that serve a generator along with other steam generating unit(s), IGCC(s), or stationary combustion turbine(s) where the effective generation capacity (determined based on a prorated output of the base load rating of each steam generating unit, IGCC, or stationary combustion turbine) is 25 MW or less;

(g) EGUs that are a municipal waste combustor unit that is subject to subpart Eb of this part; and

(h) EGUs that are a commercial or industrial solid waste incineration unit that is subject to subpart CCCC of this part.

§ 60.5855 What are the CO₂ emission performance rates for affected EGUs?

(a) You must require, in your plan, emission standards on affected EGUs to meet the CO₂ emission performance rates listed in Table 1 of this subpart except as provided in paragraph (b) of this section. In addition, you must set CO₂ emission performance rates for the interim steps, according to paragraph (a)(1) of this section, except as provided in paragraph (b) of this section.

(1) You must set CO₂ emission performance rates for your affected EGUs to meet during the interim step periods on average and as applicable for the two subcategories of affected EGUs.

(2) [Reserved]

(b) You may elect to require your affected EGUs to meet emission standards that differ from the CO₂ emission performance rates listed in Table 1 of this subpart, provided that you demonstrate that the affected EGUs in your State will collectively meet their CO₂ emission performance rate by achieving statewide emission goals that are equivalent and no less stringent than the CO₂ emission performance rates listed in Table 1, and provided that your equivalent statewide CO₂ emission goals take one of the following forms:

(1) Average statewide rate-based CO₂ emission goals listed in Table 2 of this subpart, except as provided in paragraphs (c) and (d); or

(2) Cumulative statewide mass-based CO₂ emission goals listed in Table 3 of this subpart, except as provided in paragraphs (c) and (d) of this section.

(c) If your plan meets CO₂ emission goals listed in paragraphs (b)(1) or (2) of this section you must develop your own interim step goals and final reporting period goal for your affected EGUs to meet either on average (in the case of rate-based goals) or cumulatively (in the case of mass-based goals). Additionally the following applies if you develop your own goals:

(1) The interim period and interim steps CO₂ emission goals must be in the

same form, either both rate (in units of pounds per net MWh) or both mass (in tons); and

(2) You must set interim step goals that will either on average or cumulatively meet the State's interim period goal, as applicable to a rate-based or mass-based CO₂ emission goal.

(d) Your plan's interim period and final period CO₂ emission goals required to be met pursuant to paragraph (b)(1) or (2) of this section, may be changed in the plan only according to situations listed in paragraphs (d)(1) through (3) of this section. If a situation requires a plan revision, you must follow the procedures in § 60.5785 to submit a plan revision.

(1) If your plan implements CO₂ emission goals, you may submit a plan or plan revision, allowed in § 60.5785, to make corrections to them, subject to EPA's approval, as a result of changes in the inventory of affected EGUs; and

(2) If you elect to require your affected EGUs to meet emission standards to meet mass-based CO₂ emission goals in your plan, you may elect to incorporate, as a matter of state law, the mass emissions from EGUs that are subject to subpart TTTT of this part that are considered new affected EGUs under subpart TTTT of this part.

(e) If your plan relies upon State measures in addition to or in lieu of emission standards, you must only use the mass-based goals allowed for in paragraph (b)(2) of this section to demonstrate that your affected EGUs are meeting the required emissions performance.

(f) Nothing in this subpart precludes an affected EGU from complying with its emission standard or you from meeting your obligations under the State plan.

§ 60.5860 What applicable monitoring, recordkeeping, and reporting requirements do I need to include in my plan for affected EGUs?

(a) Your plan must include monitoring for affected EGUs that is no less stringent than what is described in (a)(1) through (8) of this section.

(1) The owner or operator of an affected EGU (or group of affected EGUs that share a monitored common stack) that is required to meet rate-based or mass-based emission standards must prepare a monitoring plan in accordance with the applicable provisions in § 75.53(g) and (h) of this chapter, unless such a plan is already in place under another program that requires CO₂ mass emissions to be monitored and reported according to part 75 of this chapter.

(2) For rate-based emission standards, each compliance period shall include

only “valid operating hours” in the compliance period, *i.e.*, full or partial unit (or stack) operating hours for which:

(i) “Valid data” (as defined in § 60.5880) are obtained for all of the parameters used to determine the hourly CO₂ mass emissions (lbs). For the purposes of this subpart, substitute data recorded under part 75 of this chapter are not considered to be valid data; and

(ii) The corresponding hourly net energy output value is also valid data (**Note:** For operating hours with no useful output, zero is considered to be a valid value).

(3) For rate-based emission standards, the owner or operator of an affected EGU must measure and report the hourly CO₂ mass emissions (lbs) from each affected unit using the procedures in paragraphs (a)(3)(i) through (vi) of this section, except as otherwise provided in paragraph (a)(4) of this section.

(i) The owner or operator of an affected EGU must install, certify, operate, maintain, and calibrate a CO₂ continuous emissions monitoring system (CEMS) to directly measure and record CO₂ concentrations in the affected EGU exhaust gases emitted to the atmosphere and an exhaust gas flow rate monitoring system according to § 75.10(a)(3)(i) of this chapter. As an alternative to direct measurement of CO₂ concentration, provided that the affected EGU does not use carbon separation (*e.g.*, carbon capture and storage), the owner or operator of an affected EGU may use data from a certified oxygen (O₂) monitor to calculate hourly average CO₂ concentrations, in accordance with § 75.10(a)(3)(iii) of this chapter. However, when an O₂ monitor is used this way, it only quantifies the combustion CO₂; therefore, if the EGU is equipped with emission controls that produce non-combustion CO₂ (*e.g.*, from sorbent injection), this additional CO₂ must be accounted for, in accordance with section 3 of appendix G to part 75 of this chapter. If CO₂ concentration is measured on a dry basis, the owner or operator of the affected EGU must also install, certify, operate, maintain, and calibrate a continuous moisture monitoring system, according to § 75.11(b) of this chapter. Alternatively, the owner or operator of an affected EGU may either use an appropriate fuel-specific default moisture value from § 75.11(b) or submit a petition to the Administrator under § 75.66 of this chapter for a site-specific default moisture value.

(ii) For each “valid operating hour” (as defined in paragraph (a)(2) of this

section), calculate the hourly CO₂ mass emission rate (tons/hr), either from Equation F–11 in Appendix F to part 75 of this chapter (if CO₂ concentration is measured on a wet basis), or by following the procedure in section 4.2 of Appendix F to part 75 of this chapter (if CO₂ concentration is measured on a dry basis).

(iii) Next, multiply each hourly CO₂ mass emission rate by the EGU or stack operating time in hours (as defined in § 72.2 of this chapter), to convert it to tons of CO₂. Multiply the result by 2,000 lbs/ton to convert it to lbs.

(iv) The hourly CO₂ tons/hr values and EGU (or stack) operating times used to calculate CO₂ mass emissions are required to be recorded under § 75.57(e) of this chapter and must be reported electronically under § 75.64(a)(6), if required by a plan. The owner or operator must use these data, or equivalent data, to calculate the hourly CO₂ mass emissions.

(v) Sum all of the hourly CO₂ mass emissions values from paragraph (a)(3)(ii) of this section over the entire compliance period.

(vi) For each continuous monitoring system used to determine the CO₂ mass emissions from an affected EGU, the monitoring system must meet the applicable certification and quality assurance procedures in § 75.20 of this chapter and Appendices A and B to part 75 of this chapter.

(4) The owner or operator of an affected EGU that exclusively combusts liquid fuel and/or gaseous fuel may, as an alternative to complying with paragraph (a)(3) of this section, determine the hourly CO₂ mass emissions according to paragraphs (a)(4)(i) through (a)(4)(vi) of this section.

(i) Implement the applicable procedures in appendix D to part 75 of this chapter to determine hourly EGU heat input rates (MMBtu/hr), based on hourly measurements of fuel flow rate and periodic determinations of the gross calorific value (GCV) of each fuel combusted. The fuel flow meter(s) used to measure the hourly fuel flow rates must meet the applicable certification and quality-assurance requirements in sections 2.1.5 and 2.1.6 of appendix D to part 75 (except for qualifying commercial billing meters). The fuel GCV must be determined in accordance with section 2.2 or 2.3 of appendix D, as applicable.

(ii) For each measured hourly heat input rate, use Equation G–4 in Appendix G to part 75 of this chapter to calculate the hourly CO₂ mass emission rate (tons/hr).

(iii) For each “valid operating hour” (as defined in paragraph (a)(2) of this

section), multiply the hourly tons/hr CO₂ mass emission rate from paragraph (a)(4)(ii) of this section by the EGU or stack operating time in hours (as defined in § 72.2 of this chapter), to convert it to tons of CO₂. Then, multiply the result by 2,000 lbs/ton to convert it to lbs.

(iv) The hourly CO₂ tons/hr values and EGU (or stack) operating times used to calculate CO₂ mass emissions are required to be recorded under § 75.57(e) of this chapter and must be reported electronically under § 75.64(a)(6), if required by a plan. You must use these data, or equivalent data, to calculate the hourly CO₂ mass emissions.

(v) Sum all of the hourly CO₂ mass emissions values (lb) from paragraph (a)(4)(iii) of this section over the entire compliance period.

(vi) The owner or operator of an affected EGU may determine site-specific carbon-based F-factors (F_c) using Equation F–7b in section 3.3.6 of appendix F to part 75 of this chapter, and may use these F_c values in the emissions calculations instead of using the default F_c values in the Equation G–4 nomenclature.

(5) For both rate-based and mass-based standards, the owner or operator of an affected EGU (or group of affected units that share a monitored common stack) must install, calibrate, maintain, and operate a sufficient number of watt meters to continuously measure and record on an hourly basis net electric output. Measurements must be performed using 0.2 accuracy class electricity metering instrumentation and calibration procedures as specified under ANSI Standards No. C12.20. Further, the owner or operator of an affected EGU that is a combined heat and power facility must install, calibrate, maintain and operate equipment to continuously measure and record on an hourly basis useful thermal output and, if applicable, mechanical output, which are used with net electric output to determine net energy output. The owner or operator must use the following procedures to calculate net energy output, as appropriate for the type of affected EGU(s).

(i) Determine P_{net} the hourly net energy output in MWh. For rate-based standards, perform this calculation only for valid operating hours (as defined in paragraph (a)(2) of this section). For mass-based standards, perform this calculation for all unit (or stack) operating hours, *i.e.*, full or partial hours in which any fuel is combusted.

(ii) If there is no net electrical output, but there is mechanical or useful thermal output, either for a particular valid operating hour (for rate-based

applications), or for a particular operating hour (for mass-based applications), the owner or operator of the affected EGU must still determine the net energy output for that hour.

(iii) For rate-based applications, if there is no (*i.e.*, zero) gross electrical, mechanical, or useful thermal output for a particular valid operating hour, that

hour must be used in the compliance determination. For hours or partial hours where the gross electric output is equal to or less than the auxiliary loads, net electric output shall be counted as zero for this calculation.

(iv) Calculate P_{net} for your affected EGU (or group of affected EGUs that share a monitored common stack) using

the following equation. All terms in the equation must be expressed in units of MWh. To convert each hourly net energy output value reported under part 75 of this chapter to MWh, multiply by the corresponding EGU or stack operating time.

$$P_{net} = \frac{(Pe)_{ST} + (Pe)_{CT} + (Pe)_{IE} - (Pe)_A}{TDF} + [(Pt)_{PS} + (Pt)_{HR} + (Pt)_{IE}]$$

Where:

P_{net} = Net energy output of your affected EGU for each valid operating hour (as defined in 60.5860(a)(2)) in MWh.

$(Pe)_{ST}$ = Electric energy output plus mechanical energy output (if any) of steam turbines in MWh.

$(Pe)_{CT}$ = Electric energy output plus mechanical energy output (if any) of stationary combustion turbine(s) in MWh.

$(Pe)_{IE}$ = Electric energy output plus mechanical energy output (if any) of your affected EGU's integrated equipment that provides electricity or mechanical energy to the affected EGU or auxiliary equipment in MWh.

$(Pe)_A$ = Electric energy used for any auxiliary loads in MWh.

$(Pt)_{PS}$ = Useful thermal output of steam (measured relative to SATP conditions, as applicable) that is used for applications that do not generate additional electricity, produce mechanical energy output, or enhance the performance of the affected EGU. This is calculated using the equation specified in paragraph (a)(5)(v) of this section in MWh.

$(Pt)_{HR}$ = Non-steam useful thermal output (measured relative to SATP conditions, as applicable) from heat recovery that is used for applications other than steam generation or performance enhancement of the affected EGU in MWh.

$(Pt)_{IE}$ = Useful thermal output (relative to SATP conditions, as applicable) from any integrated equipment is used for applications that do not generate additional steam, electricity, produce mechanical energy output, or enhance the performance of the affected EGU in MWh.

TDF = Electric Transmission and Distribution Factor of 0.95 for a combined heat and power affected EGU where at least on an annual basis 20.0 percent of the total gross or net energy output consists of electric or direct mechanical output and 20.0 percent of the total net energy output consist of useful thermal output on a 12-operating month rolling average basis, or 1.0 for all other affected EGUs.

(v) If applicable to your affected EGU (for example, for combined heat and power), you must calculate $(Pt)_{PS}$ using the following equation:

$$(Pt)_{PS} = \frac{Q_m \times H}{CF}$$

Where:

Q_m = Measured steam flow in kilograms (kg) (or pounds (lbs)) for the operating hour.

H = Enthalpy of the steam at measured temperature and pressure (relative to SATP conditions or the energy in the condensate return line, as applicable) in Joules per kilogram (J/kg) (or Btu/lb).

CF = Conversion factor of 3.6×10^9 J/MWh or 3.413×10^6 Btu/MWh.

(vi) For rate-based standards, sum all of the values of P_{net} for the valid operating hours (as defined in paragraph (a)(2) of this section), over the entire compliance period. Then, divide the total CO₂ mass emissions for the valid operating hours from paragraph (a)(3)(v) or (a)(4)(v) of this section, as applicable, by the sum of the P_{net} values for the valid operating hours plus any ERC replacement generation (as shown in § 60.5790(c)), to determine the CO₂ emissions rate (lb/net MWh) for the compliance period.

(vii) For mass-based standards, sum all of the values of P_{net} for all operating hours, over the entire compliance period.

(6) In accordance with § 60.13(g), if two or more affected EGUs implementing the continuous emissions monitoring provisions in paragraph (a)(2) of this section share a common exhaust gas stack and are subject to the same emissions standard, the owner or operator may monitor the hourly CO₂ mass emissions at the common stack in lieu of monitoring each EGU separately. If an owner or operator of an affected EGU chooses this option, the hourly net electric output for the common stack must be the sum of the hourly net electric output of the individual affected EGUs and the operating time must be expressed as "stack operating hours" (as defined in § 72.2 of this chapter).

(7) In accordance with § 60.13(g), if the exhaust gases from an affected EGU implementing the continuous emissions monitoring provisions in paragraph (a)(2) of this section are emitted to the

atmosphere through multiple stacks (or if the exhaust gases are routed to a common stack through multiple ducts and you elect to monitor in the ducts), the hourly CO₂ mass emissions and the "stack operating time" (as defined in § 72.2 of this chapter) at each stack or duct must be monitored separately. In this case, the owner or operator of an affected EGU must determine compliance with an applicable emissions standard by summing the CO₂ mass emissions measured at the individual stacks or ducts and dividing by the net energy output for the affected EGU.

(8) Consistent with § 60.5775 or § 60.5780, if two or more affected EGUs serve a common electric generator, you must apportion the combined hourly net energy output to the individual affected EGUs according to the fraction of the total steam load contributed by each EGU. Alternatively, if the EGUs are identical, you may apportion the combined hourly net electrical load to the individual EGUs according to the fraction of the total heat input contributed by each EGU.

(b) For mass-based standards, the owner or operator of an affected EGU must determine the CO₂ mass emissions (tons) for the compliance period as follows:

(1) For each operating hour, calculate the hourly CO₂ mass (tons) according to paragraph (a)(3) or (4) of this section, except that a complete data record is required, *i.e.*, CO₂ mass emissions must be reported for each operating hour. Therefore, substitute data values recorded under part 75 of this chapter for CO₂ concentration, stack gas flow rate, stack gas moisture content, fuel flow rate and/or GCV shall be used in the calculations; and

(2) Sum all of the hourly CO₂ mass emissions values over the entire compliance period.

(3) The owner or operator of an affected EGU must install, calibrate, maintain, and operate a sufficient number of watt meters to continuously

measure and record on an hourly basis net electric output. Measurements must be performed using 0.2 accuracy class electricity metering instrumentation and calibration procedures as specified under ANSI Standards No. C12.20. Further, the owner or operator of an affected EGU that is a combined heat and power facility must install, calibrate, maintain and operate equipment to continuously measure and record on an hourly basis useful thermal output and, if applicable, mechanical output, which are used with net electric output to determine net energy output (P_{net}). The owner or operator must calculate net energy output according to paragraphs (a)(5)(i)(A) and (B) of this section.

(c) Your plan must require the owner or operator of each affected EGU covered by your plan to maintain the records, as described in paragraphs (b)(1) and (2) of this section, for at least 5 years following the date of each compliance period, occurrence, measurement, maintenance, corrective action, report, or record.

(1) The owner or operator of an affected EGU must maintain each record on site for at least 2 years after the date of each compliance period, occurrence, measurement, maintenance, corrective action, report, or record, whichever is latest, according to § 60.7. The owner or operator of an affected EGU may maintain the records off site and electronically for the remaining year(s).

(2) The owner or operator of an affected EGU must keep all of the following records, in a form suitable and readily available for expeditious review:

(i) All documents, data files, and calculations and methods used to demonstrate compliance with an affected EGU's emission standard under § 60.5775.

(ii) Copies of all reports submitted to the State under paragraph (c) of this section.

(iii) Data that are required to be recorded by 40 CFR part 75 subpart F.

(iv) Data with respect to any ERCs generated by the affected EGU or used by the affected EGU in its compliance demonstration including the information in paragraphs (c)(2)(iv)(A) and (B) of this section.

(A) All documents related to any ERCs used in a compliance demonstration, including each eligibility application, EM&V plan, M&V report, and independent verifier verification report associated with the issuance of each specific ERC.

(B) All records and reports relating to the surrender and retirement of ERCs for compliance with this regulation, including the date each individual ERC

with a unique serial identification number was surrendered and/or retired.

(d) Your plan must require the owner or operator of an affected EGU covered by your plan to include in a report submitted to you at the end of each compliance period the information in paragraphs (d)(1) through (5) of this section.

(1) Owners or operators of an affected EGU must include in the report all hourly CO₂ emissions, for each affected EGU (or group of affected EGUs that share a monitored common stack).

(2) For rate-based standards, each report must include:

(i) The hourly CO₂ mass emission rate values (tons/hr) and unit (or stack) operating times, (as monitored and reported according to part 75 of this chapter), for each valid operating hour in the compliance period;

(ii) The net electric output and the net energy output (P_{net}) values for each valid operating hour in the compliance period;

(iii) The calculated CO₂ mass emissions (lb) for each valid operating hour in the compliance period;

(iv) The sum of the hourly net energy output values and the sum of the hourly CO₂ mass emissions values, for all of the valid operating hours in the compliance period;

(v) ERC replacement generation (if any), properly justified (see paragraph (c)(5) of this section); and

(vi) The calculated CO₂ mass emission rate for the compliance period (lbs/net MWh).

(3) For mass-based standards, each report must include:

(i) The hourly CO₂ mass emission rate value (tons/hr) and unit (or stack) operating time, as monitored and reported according to part 75 of this chapter, for each unit or stack operating hour in the compliance period;

(ii) The calculated CO₂ mass emissions (tons) for each unit or stack operating hour in the compliance period;

(iii) The sum of the CO₂ mass emissions (tons) for all of the unit or stack operating hours in the compliance period;

(iv) The net electric output and the net energy output (P_{net}) values for each unit or stack operating hour in the compliance period; and

(v) The sum of the hourly net energy output values for all of the unit or stack operating hours in the compliance period.

(vi) Notwithstanding the requirements in paragraphs (c)(3)(i) through (c)(3)(iii) of this section, if the compliance period is a discrete number of calendar years (e.g., one year, three years), in lieu of

reporting the information specified in those paragraphs, the owner or operator may report:

(A) The cumulative annual CO₂ mass emissions (tons) for each year of the compliance period, derived from the electronic emissions report for the fourth calendar quarter of that year, submitted to EPA under § 75.64(a) of this chapter; and

(B) The sum of the cumulative annual CO₂ mass emissions values from paragraph (c)(3)(v)(A) of this section, if the compliance period includes multiple years.

(4) For each affected EGU's compliance period, the report must also include the applicable emission standard and demonstration that it met the emission standard. An owner or operator must also include in the report the affected EGU's calculated emission performance as a CO₂ emission rate or cumulative mass in units of the emission standard required in §§ 60.5790(b) through (c) and 60.5855, as applicable.

(5) If the owner or operator of an affected EGU is complying with an emission standard by using ERCs, they must include in the report a list of all unique ERC serial numbers that were retired in the compliance period, and, for each ERC, the date an ERC was surrendered and retired and eligible resource identification information sufficient to demonstrate that it meets the requirements of § 60.5800 and qualifies to be issued ERCs (including location, type of qualifying generation or savings, date commenced generating or saving, and date of generation or savings for which the ERC was issued).

(6) If the owner or operator of an affected EGU is complying with an emission standard by using allowances, they must include in the report a list of all unique allowance serial numbers that were retired in the compliance period, and, for each allowance, the date an allowance was surrendered and retired and if the allowance was a set-aside allowance the eligible resource identification information sufficient to demonstrate that it meets the requirements of § 60.5815(c) and qualifies to be issued set-aside allowances (including location, type of qualifying generation or savings, date commenced generating or saving, and date of generation or savings for which the allowance was issued).

(e) The owner or operator of an affected EGU must follow any additional requirements for monitoring, recordkeeping and reporting in a plan that are required under § 60.5745(a)(4), if applicable.

(f) If an affected EGU captures CO₂ to meet the applicable emission limit, the owner or operator must report in accordance with the requirements of 40 CFR part 98 subpart PP and either:

(1) Report in accordance with the requirements of 40 CFR part 98 subpart RR, if injection occurs on-site;

(2) Transfer the captured CO₂ to an EGU or facility that reports in accordance with the requirements of 40 CFR part 98 subpart RR, if injection occurs off-site; or

(3) Transfer the captured CO₂ to a facility that has received an innovative technology waiver from EPA pursuant to paragraph (g) of this section.

(g) Any person may request the Administrator to issue a waiver of the requirement that captured CO₂ from an affected EGU be transferred to a facility reporting under 40 CFR part 98 subpart RR. To receive a waiver, the applicant must demonstrate to the Administrator that its technology will store captured CO₂ as effectively as geologic sequestration, and that the proposed technology will not cause or contribute to an unreasonable risk to public health, welfare, or safety. In making this determination, the Administrator shall consider (among other factors) operating history of the technology, whether the technology will increase emissions or other releases of any pollutant other than CO₂, and permanence of the CO₂ storage. The Administrator may test the system itself, or require the applicant to perform any tests considered by the Administrator to be necessary to show the technology's effectiveness, safety, and ability to store captured CO₂ without release. The Administrator may grant conditional approval of a technology, the approval conditioned on monitoring and reporting of operations. The Administrator may also withdraw approval of the waiver on evidence of releases of CO₂ or other pollutants. The Administrator will provide notice to the public of any application under this provision, and provide public notice of any proposed action on a petition before the Administrator takes final action.

Recordkeeping and Reporting Requirements

§ 60.5865 What are my recordkeeping requirements?

(a) You must keep records of all information relied upon in support of any demonstration of plan components, plan requirements, supporting documentation, State measures, and the status of meeting the plan requirements defined in the plan for each interim step and the interim period. After 2029, States must keep records of all

information relied upon in support of any continued demonstration that the final CO₂ emission performance rates or CO₂ emissions goals are being achieved.

(b) You must keep records of all data submitted by the owner or operator of each affected EGU that is used to determine compliance with each affected EGU emissions standard or requirements in an approved State plan, consistent with the affected EGU requirements listed in § 60.5860.

(c) If your State has a requirement for all hourly CO₂ emissions and net generation information to be used to calculate compliance with an annual emissions standard for affected EGUs, any information that is submitted by the owners or operators of affected EGUs to the EPA electronically pursuant to requirements in Part 75 meets the recordkeeping requirement of this section and you are not required to keep records of information that would be in duplicate of paragraph (b) of this section.

(d) You must keep records at a minimum for 10 years, for the interim period, and 5 years, for the final period, from the date the record is used to determine compliance with an emissions standard, plan requirement, CO₂ emission performance rate or CO₂ emissions goal. Each record must be in a form suitable and readily available for expeditious review.

§ 60.5870 What are my reporting and notification requirements?

(a) In lieu of the annual report required under § 60.25(e) and (f) of this part, you must report the information in paragraphs (b) through (f) of this section.

(b) You must submit a report covering each interim step within the interim period and each of the final 2-calendar year periods due no later than July 1 of the year following the end of the period. The interim period reporting starts with a report covering interim step 1 due no later than July 1, 2025. The final period reports start with a biennial report covering the first final reporting period (which is due by July 1, 2032), a 2-calendar year average of emissions or cumulative sum of emissions used to determine compliance with the final CO₂ emission performance rate or CO₂ emission goal (as applicable). The report must include the information in paragraphs (b)(1) through (4) of this section.

(1) The report must include the emissions performance achieved by all affected EGUs during the reporting period, consistent with the plan approach according to § 60.5745(a), and identification of whether each affected

EGU is in compliance with its emission standard and whether the collective of all affected EGUs covered by the State are on schedule to meet the applicable CO₂ emission performance rate or emission goal during the performance periods and compliance periods, as specified in the plan.

(2) The report must include a comparison of the CO₂ emission performance rate or CO₂ emission goal identified in the State plan for the applicable interim step period versus the actual average, cumulative, or adjusted CO₂ emission performance (as applicable) achieved by all affected EGUs.

(i) For interim step 3, you do not need to include a comparison between the applicable interim step 3 CO₂ emission performance rate or emission goal; you must only submit the average, cumulative or adjusted CO₂ emission performance (as applicable) of your affected EGUs during that period in units of your applicable CO₂ emission performance rate or emission goal.

(3) The report must include all other required information, as specified in your State plan according to § 60.5740(a)(5).

(4) If applicable, the report must include a program review that your State has conducted that addresses all aspects of the administration of the State plan and overall program, including State evaluations and regulatory decisions regarding eligibility applications for ERC resources and M&V reports (and associated EM&V activities), and State issuance of ERCs. The program review must assess whether the program is being administered properly in accordance with the approved plan, whether reported annual MWh of generation and savings from qualified ERC resources are being properly quantified, verified, and reported in accordance with approved EM&V plans, and whether appropriate records are being maintained. The program review must also address determination of the eligibility of verifiers by the State and the conduct of independent verifiers, including the quality of verifier reviews.

(c) If your plan relies upon State measures, in lieu of or in addition to emission standards, then you must submit an annual report to the EPA in addition to the reports required under paragraph (b) of this section for the interim period. In the final period, you must submit biennial reports consistent with those required under paragraph (b) of this section. The annual reports in the interim period must be submitted no later than July 1 following the end of each calendar year starting with 2022.

The annual and biennial reports must include the information in paragraphs (c)(1) and (2) of this section for the preceding year or two years, as applicable.

(1) You must include in your report the status of implementation of federally enforceable emission standards (if applicable) and State measures.

(2) You must include information regarding the status of the periodic programmatic milestones to show progress in program implementation. The programmatic milestones with specific dates for achievement must be consistent with the State measures included in the State plan submittal.

(d) If your plan includes the requirement for emission standards on your affected EGUs, then you must submit a notification, if applicable, in the report required under paragraph (b) of this section to the EPA if your affected EGUs trigger corrective measures as described in § 60.5740(a)(2)(i). If corrective measures are required and were not previously submitted with your state plan, you must follow the requirements in § 60.5785 for revising your plan to implement the corrective measures.

(e) If your plan relies upon State measures, in lieu of or in addition to emission standards, than you must submit a notification as required under paragraphs (e)(1) and (2) of this section.

(1) You must submit a notification in the report required under paragraph (c) of this section to the EPA if at the end of the calendar year your State did not meet a programmatic milestone included in your plan submittal. This notification must detail the implementation of the backstop required in your plan to be fully in place within 18 months of the due date of the report required in paragraph (b) of this section. In addition, the notification must describe the steps taken by the State to inform the affected EGUs in its State that the backstop has been triggered.

(2) You must submit a notification in the report required under paragraph (b) of this section to the EPA if you trigger the backstop as described in § 60.5740(a)(3)(i). This notification must detail the steps that will be taken by you to implement the backstop so that it is fully in place within 18 months of the due date of the report required in paragraph (b) of this section. In addition, the notification must describe the steps taken by the State to inform the affected EGUs that the backstop has been triggered.

(f) You must include in your 2029 report (which is due by July 1, 2030) the calculation of average CO₂ emissions

rate, cumulative sum of CO₂ emissions, or adjusted CO₂ emissions rate (as applicable) over the interim period and a comparison of those values to your interim CO₂ emission performance rate or emission goal. The calculated value must be in units consistent with the approach you set in your plan for the interim period.

(g) The notifications listed in paragraphs (g)(1) through (3) of this section are required for the reliability safety valve allowed in § 60.5785(e).

(1) As required under § 60.5785(e), you must submit an initial notification to the appropriate EPA regional office within 48 hours of an unforeseen, emergency situation. The initial notification must:

(i) Include a full description, to the extent that it is known, of the emergency situation that is being addressed;

(ii) Identify the affected EGU or EGUs that are required to run to assure reliability; and

(iii) Specify the modified emission standards at which the identified EGU or EGUs will operate.

(2) Within 7 days of the initial notification in § 60.5870(g)(1), the State must submit a second notification to the appropriate EPA regional office that documents the initial notification. If the State fails to submit this documentation on a timely basis, the EPA will notify the State, which must then notify the affected EGU(s) that they must operate or resume operations under the original approved State plan emission standards. This notification must include the following:

(i) A full description of the reliability concern and why an unforeseen, emergency situation that threatens reliability requires the affected EGU or EGUs to operate under modified emission standards from those originally required in the State plan including discussion of why the flexibilities provided under the state's plan are insufficient to address the concern;

(ii) A description of how the State is coordinating or will coordinate with relevant reliability coordinators and planning authorities to alleviate the problem in an expedited manner;

(iii) An indication of the maximum time that the State anticipates the affected EGU or EGUs will need to operate in a manner inconsistent with its or their obligations under the State's approved plan;

(iv) A written concurrence from the relevant reliability coordinator and/or planning authority confirming the existence of the imminent reliability threat and supporting the temporary

modification request or an explanation of why this kind of concurrence cannot be provided;

(v) The modified emission standards or levels that the affected EGU or EGU will be operating at for the remainder of the 90-day period if it has changed from the initial notification; and

(vi) Information regarding any system-wide or other analysis of the reliability concern conducted by the relevant planning authority, if any.

(3) At least 7 days before the end of the 90-day reliability safety valve period, the State must notify the appropriate EPA regional office that either:

(i) The reliability concern has been addressed and the affected EGU or EGUs can resume meeting the original emission standards in the State plan approved prior to the short-term modification; or

(ii) There still is a serious, ongoing reliability issue that necessitates the affected EGU or EGUs to emit beyond the amount allowed under the State plan. In this case, the State must provide a notification to the EPA that it will be submitting a State plan revision according to paragraph § 60.5785(a) of this section to address the reliability issue. The notification must provide the date by which a revised State plan will be submitted to EPA and documentation of the ongoing emergency with a written concurrence from the relevant reliability coordinator and/or planning authority confirming the continuing urgent need for the affected EGU or EGUs to operate beyond the requirements of the State plan and that there is no other reasonable way of addressing the ongoing reliability emergency but for the affected EGU or EGUs to operate under an alternative emission standard than originally approved under the State plan. After the initial 90-day period, any excess emissions beyond what is authorized in the original approved State plan will count against the State's overall CO₂ emission goal or emission performance rate for affected EGUs.

§ 60.5875 How do I submit information required by these Emission Guidelines to the EPA?

(a) You must submit to the EPA the information required by these emission guidelines following the procedures in paragraphs (b) through (e) of this section.

(b) All negative declarations, State plan submittals, supporting materials that are part of a State plan submittal, any plan revisions, and all State reports required to be submitted to the EPA by the State plan must be reported through EPA's State Plan Electronic Collection

System (SPeCS). SPeCS is a web accessible electronic system accessed at the EPA's Central Data Exchange (CDX) (<http://www.epa.gov/cdx/>). States who claim that a State plan submittal or supporting documentation includes confidential business information (CBI) must submit that information on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: State and Local Programs Group, MD C539-01, 4930 Old Page Rd., Durham, NC 27703.

(c) Only a submittal by the Governor or the Governor's designee by an electronic submission through SPeCS shall be considered an official submittal to the EPA under this subpart. If the Governor wishes to designate another responsible official the authority to submit a State plan, the EPA must be notified via letter from the Governor prior to the September 6, 2016, deadline for plan submittal so that the official will have the ability to submit the initial or final plan submittal in the SPeCS. If the Governor has previously delegated authority to make CAA submittals on the Governor's behalf, a State may submit documentation of the delegation in lieu of a letter from the Governor. The letter or documentation must identify the designee to whom authority is being designated and must include the name and contact information for the designee and also identify the State plan preparers who will need access to SPeCS. A State may also submit the names of the State plan preparers via a separate letter prior to the designation letter from the Governor in order to expedite the State plan administrative process. Required contact information for the designee and preparers includes the person's title, organization and email address.

(d) The submission of the information by the authorized official must be in a non-editable format. In addition to the non-editable version all plan components designated as federally enforceable must also be submitted in an editable version. Following initial plan approval, States must provide the EPA with an editable copy of any submitted revision to existing approved federally enforceable plan components, including State plan backstop measures. The editable copy of any such submitted plan revision must indicate the changes made at the State level, if any, to the existing approved federally enforceable plan components, using a mechanism such as redline/strikethrough. These changes are not part of the State plan until formal approval by EPA.

(e) You must provide the EPA with non-editable and editable copies of any submitted revision to existing approved federally enforceable plan components, including State plan backstop measures. The editable copy of any such submitted plan revision must indicate the changes made at the State level, if any, to the existing approved federally enforceable plan components, using a mechanism such as redline/strikethrough. These changes are not part of the State plan until formal approval by EPA.

Definitions

§ 60.5880 What definitions apply to this subpart?

As used in this subpart, all terms not defined herein will have the meaning given them in the Clean Air Act and in subparts A, B, and TTTT, of this part.

Adjusted CO₂ Emission Rate Means

(1) For an affected EGU, the reported CO₂ emission rate of an affected EGU, adjusted as described in § 60.5790(c)(1) to reflect any ERCs used by an affected EGU to demonstrate compliance with its CO₂ emission standards; or

(2) For a State (or states in a multi-state plan) calculating a collective CO₂ emission rate achieved under the plan, the actual CO₂ emission rate during a plan reporting period of the affected EGUs subject to the rate specified in the plan, adjusted by the ERCs used for compliance by those EGUs (total CO₂ mass divided by the sum of the total MWh and ERCs).

Affected electric generating unit or Affected EGU means a steam generating unit, integrated gasification combined cycle (IGCC), or stationary combustion turbine that meets the relevant applicability conditions in section § 60.5845.

Allowance means an authorization for each specified unit of actual CO₂ emitted from an affected EGU or a facility during a specified period.

Allowance system means a control program under which the owner or operator of each affected EGU is required to hold an allowance for each specified unit of CO₂ emitted from that affected EGU or facility during a specified period and which limits the total amount of such allowances for a specified period and allows the transfer of such allowances.

Annual capacity factor means the ratio between the actual heat input to an EGU during a calendar year and the potential heat input to the EGU had it been operated for 8,760 hours during a calendar year at the base load rating.

Base load rating means the maximum amount of heat input (fuel) that an EGU can combust on a steady-state basis, as

determined by the physical design and characteristics of the EGU at ISO conditions. For a stationary combustion turbine, *base load rating* includes the heat input from duct burners.

Biomass means biologically based material that is living or dead (e.g., trees, crops, grasses, tree litter, roots) above and below ground, and available on a renewable or recurring basis. Materials that are biologically based include non-fossilized, biodegradable organic material originating from modern or contemporarily grown plants, animals, or microorganisms (including plants, products, byproducts and residues from agriculture, forestry, and related activities and industries, as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

CO₂ emission goal means a statewide rate-based CO₂ emission goal or mass-based CO₂ emission goal specified in § 60.5855.

Combined cycle unit means an electric generating unit that uses a stationary combustion turbine from which the heat from the turbine exhaust gases is recovered by a heat recovery steam generating unit to generate additional electricity.

Combined heat and power unit or CHP unit, (also known as "cogeneration") means an electric generating unit that uses a steam-generating unit or stationary combustion turbine to simultaneously produce both electric (or mechanical) and useful thermal output from the same primary energy source.

Compliance period means a discrete time period for an affected EGU to comply with either an emission standard or State measure.

Demand-side energy efficiency project means an installed piece of equipment or system, a modification of an existing piece of equipment or system, or a strategy intended to affect consumer electricity-use behavior, that results in a reduction in electricity use (in MWh) at an end-use facility, premises, or equipment connected to the electricity grid.

Derate means a decrease in the available capacity of an electric generating unit, due to a system or equipment modification or to discounting a portion of a generating unit's capacity for planning purposes.

Eligible resource means a resource that meets the requirements of § 60.5800(a).

Emission Rate Credit or ERC means a tradable compliance instrument that meets the requirements of § 60.5790(c).

EM&V plan means a plan that meets the requirements of § 60.5830.

ERC tracking system means a system for the issuance, surrender and retirement of ERCs that meets the requirements of § 60.5810.

Final period means the period that begins on January 1, 2030, and continues thereafter. The final period is comprised of final reporting periods, each of which may be no longer than two calendar years (with a calendar year beginning on January 1 and ending on December 31).

Final reporting period means an increment of plan performance within the final period, with each final reporting period being no longer than two calendar years (with a calendar year beginning on January 1 and ending on December 31), with the first final reporting period in the final period beginning on January 1, 2030, and ending no later than December 31, 2031.

Fossil fuel means natural gas, petroleum, coal, and any form of solid fuel, liquid fuel, or gaseous fuel derived from such material for the purpose of creating useful heat.

Heat recovery steam generating unit (HRSG) means a unit in which hot exhaust gases from the combustion turbine engine are routed in order to extract heat from the gases and generate useful output. Heat recovery steam generating units can be used with or without duct burners.

Independent verifier means a person (including any individual, corporation, partnership, or association) who has the appropriate technical and other qualifications to provide verification reports. The independent verifier must not have, or have had, any direct or indirect financial or other interest in the subject of its verification report or ERCs that could impact their impartiality in performing verification services.

Integrated gasification combined cycle facility or IGCC means a combined cycle facility that is designed to burn fuels containing 50 percent (by heat input) or more solid-derived fuel not meeting the definition of natural gas plus any integrated equipment that provides electricity or useful thermal output to either the affected facility or auxiliary equipment. The Administrator may waive the 50 percent solid-derived fuel requirement during periods of the gasification system construction, startup and commissioning, shutdown, or repair. No solid fuel is directly burned in the unit during operation.

Interim period means the period of eight calendar years from January 1,

2022, to December 31, 2029. The interim period is composed three interim steps, interim step 1, interim step 2, and interim step 3.

Interim step means an increment of plan performance within the interim period.

Interim step 1 means the period of three calendar years from January 1, 2022, to December 31, 2024.

Interim step 2 means the period of three calendar years from January 1, 2025, to December 31, 2027.

Interim step 3 means the period of two calendar years from January 1, 2028, to December 31, 2029.

ISO conditions means 288 Kelvin (15 °C), 60 percent relative humidity and 101.3 kilopascals pressure.

M&V report means a report that meets the requirements of § 60.5835.

Mechanical output means the useful mechanical energy that is not used to operate the affected facility, generate electricity and/or thermal output, or to enhance the performance of the affected facility. Mechanical energy measured in horsepower hour must be converted into MWh by multiplying it by 745.7 then dividing by 1,000,000.

Nameplate capacity means, starting from the initial installation, the maximum electrical generating output that a generator, prime mover, or other electric power production equipment under specific conditions designated by the manufacturer is capable of producing (in MWe, rounded to the nearest tenth) on a steady-state basis and during continuous operation (when not restricted by seasonal or other deratings) as of such installation as specified by the manufacturer of the equipment, or starting from the completion of any subsequent physical change resulting in an increase in the maximum electrical generating output that the equipment is capable of producing on a steady-state basis and during continuous operation (when not restricted by seasonal or other deratings), such increased maximum amount (in MWe, rounded to the nearest tenth) as of such completion as specified by the person conducting the physical change.

Natural gas means a fluid mixture of hydrocarbons (e.g., methane, ethane, or propane), composed of at least 70 percent methane by volume or that has a gross calorific value between 35 and 41 megajoules (MJ) per dry standard cubic meter (950 and 1,100 Btu per dry standard cubic foot), that maintains a gaseous State under ISO conditions. In addition, natural gas contains 20.0 grains or less of total sulfur per 100 standard cubic feet. Finally, natural gas does not include the following gaseous

fuels: Landfill gas, digester gas, refinery gas, sour gas, blast furnace gas, coal-derived gas, producer gas, coke oven gas, or any gaseous fuel produced in a process which might result in highly variable sulfur content or heating value.

Net allowance export/import means a net transfer of CO₂ allowances during an interim step, the interim period, or a final reporting period which represents the net number of CO₂ allowances (issued by a State) that are transferred from the compliance accounts of affected EGUs in that state to the compliance accounts of affected EGUs in another State. This net transfer is determined based on compliance account holdings at the end of the plan performance period. Compliance account holdings, as used here, refer to the number of CO₂ allowances surrendered for compliance during a plan performance period, as well as any remaining CO₂ allowances held in a compliance account as of the end of a plan performance period.

Net electric output means the amount of gross generation the generator(s) produce (including, but not limited to, output from steam turbine(s), combustion turbine(s), and gas expander(s)), as measured at the generator terminals, less the electricity used to operate the plant (i.e., auxiliary loads); such uses include fuel handling equipment, pumps, fans, pollution control equipment, other electricity needs, and transformer losses as measured at the transmission side of the step up transformer (e.g., the point of sale).

Net energy output means:

(1) The net electric or mechanical output from the affected facility, plus 100 percent of the useful thermal output measured relative to SATP conditions that is not used to generate additional electric or mechanical output or to enhance the performance of the unit (e.g., steam delivered to an industrial process for a heating application).

(2) For combined heat and power facilities where at least 20.0 percent of the total gross or net energy output consists of electric or direct mechanical output and at least 20.0 percent of the total gross or net energy output consists of useful thermal output on a 12-operating month rolling average basis, the net electric or mechanical output from the affected EGU divided by 0.95, plus 100 percent of the useful thermal output; (e.g., steam delivered to an industrial process for a heating application).

Programmatic milestone means the implementation of measures necessary for plan progress, including specific dates associated with such

implementation. Prior to January 1, 2022, programmatic milestones are applicable to all state plan approaches and measures. Subsequent to January 1, 2022, programmatic milestones are applicable to state measures.

Qualified biomass means a biomass feedstock that is demonstrated as a method to control increases of CO₂ levels in the atmosphere.

Standard ambient temperature and pressure (SATP) conditions means 298.15 Kelvin (25 °C, 77 °F) and 100.0 kilopascals (14.504 psi, 0.987 atm) pressure. The enthalpy of water at SATP conditions is 50 Btu/lb.

State agent means an entity acting on behalf of the State, with the legal authority of the State.

State measures means measures that are adopted, implemented, and enforced as a matter of State law. Such measures are enforceable only per State law, and are not included in and codified as part of the federally enforceable State plan.

Stationary combustion turbine means all equipment, including but not limited to the turbine engine, the fuel, air, lubrication and exhaust gas systems, control systems (except emissions control equipment), heat recovery system, fuel compressor, heater, and/or pump, post-combustion emissions control technology, and any ancillary components and sub-components comprising any simple cycle stationary combustion turbine, any combined cycle combustion turbine, and any combined heat and power combustion turbine based system plus any integrated equipment that provides electricity or useful thermal output to the combustion turbine engine, heat recovery system or auxiliary equipment.

Stationary means that the combustion turbine is not self-propelled or intended to be propelled while performing its function. It may, however, be mounted on a vehicle for portability. If a stationary combustion turbine burns any solid fuel directly it is considered a steam generating unit.

Steam generating unit means any furnace, boiler, or other device used for combusting fuel and producing steam (nuclear steam generators are not included) plus any integrated equipment that provides electricity or useful thermal output to the affected facility or auxiliary equipment.

Uprate means an increase in available electric generating unit power capacity due to a system or equipment modification.

Useful thermal output means the thermal energy made available for use in any heating application (e.g., steam delivered to an industrial process for a heating application, including thermal cooling applications) that is not used for electric generation, mechanical output at the affected EGU, to directly enhance the performance of the affected EGU (e.g., economizer output is not useful thermal output, but thermal energy used to reduce fuel moisture is considered useful thermal output), or to supply energy to a pollution control device at the affected EGU. Useful thermal output for affected EGU(s) with no condensate return (or other thermal energy input to the affected EGU(s)) or where measuring the energy in the condensate (or other thermal energy input to the affected EGU(s)) would not meaningfully impact the emission rate calculation is measured against the energy in the thermal output at SATP conditions.

Affected EGU(s) with meaningful energy in the condensate return (or other thermal energy input to the affected EGU) must measure the energy in the condensate and subtract that energy relative to SATP conditions from the measured thermal output.

Valid data means quality-assured data generated by continuous monitoring systems that are installed, operated, and maintained according to part 75 of this chapter. For CEMS, the initial certification requirements in § 75.20 of this chapter and appendix A to part 75 of this chapter must be met before quality-assured data are reported under this subpart; for on-going quality assurance, the daily, quarterly, and semiannual/annual test requirements in sections 2.1, 2.2, and 2.3 of appendix B to part 75 of this chapter must be met and the data validation criteria in sections 2.1.5, 2.2.3, and 2.3.2 of appendix B to part 75 of this chapter apply. For fuel flow meters, the initial certification requirements in section 2.1.5 of appendix D to part 75 of this chapter must be met before quality-assured data are reported under this subpart (except for qualifying commercial billing meters under section 2.1.4.2 of appendix D), and for on-going quality assurance, the provisions in section 2.1.6 of appendix D to part 75 of this chapter apply (except for qualifying commercial billing meters).

Waste-to-Energy means a process or unit (e.g., solid waste incineration unit) that recovers energy from the conversion or combustion of waste stream materials, such as municipal solid waste, to generate electricity and/or heat.

TABLE 1 TO SUBPART UUUU OF PART 60—CO₂ EMISSION PERFORMANCE RATES

[Pounds of CO₂ per net MWh]

Affected EGU	Interim rate	Final rate
Steam generating unit or integrated gasification combined cycle (IGCC)	1,534	1,305
Stationary combustion turbine	832	771

TABLE 2 TO SUBPART UUUU OF PART 60—STATEWIDE RATE-BASED CO₂ EMISSION GOALS

[Pounds of CO₂ per net MWh]

State	Interim emission goal	Final emission goal
Alabama	1,157	1,018
Arizona	1,173	1,031
Arkansas	1,304	1,130
California	907	828
Colorado	1,362	1,174
Connecticut	852	786
Delaware	1,023	916
Florida	1,026	919
Georgia	1,198	1,049
Idaho	832	771
Illinois	1,456	1,245

TABLE 2 TO SUBPART UUUU OF PART 60—STATEWIDE RATE-BASED CO₂ EMISSION GOALS—Continued
 [Pounds of CO₂ per net MWh]

State	Interim emission goal	Final emission goal
Indiana	1,451	1,242
Iowa	1,505	1,283
Kansas	1,519	1,293
Kentucky	1,509	1,286
Lands of the Fort Mojave Tribe	832	771
Lands of the Navajo Nation	1,534	1,305
Lands of the Uintah and Ouray Reservation	1,534	1,305
Louisiana	1,293	1,121
Maine	842	779
Maryland	1,510	1,287
Massachusetts	902	824
Michigan	1,355	1,169
Minnesota	1,414	1,213
Mississippi	1,061	945
Missouri	1,490	1,272
Montana	1,534	1,305
Nebraska	1,522	1,296
Nevada	942	855
New Hampshire	947	858
New Jersey	885	812
New Mexico	1,325	1,146
New York	1,025	918
North Carolina	1,311	1,136
North Dakota	1,534	1,305
Ohio	1,383	1,190
Oklahoma	1,223	1,068
Oregon	964	871
Pennsylvania	1,258	1,095
Rhode Island	832	771
South Carolina	1,338	1,156
South Dakota	1,352	1,167
Tennessee	1,411	1,211
Texas	1,188	1,042
Utah	1,368	1,179
Virginia	1,047	934
Washington	1,111	983
West Virginia	1,534	1,305
Wisconsin	1,364	1,176
Wyoming	1,526	1,299

TABLE 3 TO SUBPART UUUU OF PART 60—STATEWIDE MASS-BASED CO₂ EMISSION GOALS
 [Short tons of CO₂]

State	Interim emission goal (2022–2029)	Final emission goals (2 year blocks starting with 2030–2031)
Alabama	497,682,304	113,760,948
Arizona	264,495,976	60,341,500
Arkansas	269,466,064	60,645,264
California	408,216,600	96,820,240
Colorado	267,103,064	59,800,794
Connecticut	57,902,920	13,883,046
Delaware	40,502,952	9,423,650
Florida	903,877,832	210,189,408
Georgia	407,408,672	92,693,692
Idaho	12,401,136	2,985,712
Illinois	598,407,008	132,954,314
Indiana	684,936,520	152,227,670
Iowa	226,035,288	50,036,272
Kansas	198,874,664	43,981,652
Kentucky	570,502,416	126,252,242
Lands of the Fort Mojave Tribe	4,888,824	1,177,038
Lands of the Navajo Nation	196,462,344	43,401,174
Lands of the Uintah and Ouray Reservation	20,491,560	4,526,862
Louisiana	314,482,512	70,854,046
Maine	17,265,472	4,147,884
Maryland	129,675,168	28,695,256
Massachusetts	101,981,416	24,209,494
Michigan	424,457,200	95,088,128

TABLE 3 TO SUBPART UUUU OF PART 60—STATEWIDE MASS-BASED CO₂ EMISSION GOALS—Continued
 [Short tons of CO₂]

State	Interim emission goal (2022–2029)	Final emission goals (2 year blocks starting with 2030–2031)
Minnesota	203,468,736	45,356,736
Missouri	500,555,464	110,925,768
Mississippi	218,706,504	50,608,674
Montana	102,330,640	22,606,214
Nebraska	165,292,128	36,545,478
Nevada	114,752,736	27,047,168
New Hampshire	33,947,936	7,995,158
New Jersey	139,411,048	33,199,490
New Mexico	110,524,488	24,825,204
New York	268,762,632	62,514,858
North Carolina	455,888,200	102,532,468
North Dakota	189,062,568	41,766,464
Ohio	660,212,104	147,539,612
Oklahoma	356,882,656	80,976,398
Oregon	69,145,312	16,237,308
Pennsylvania	794,646,616	179,644,616
Rhode Island	29,259,080	7,044,450
South Carolina	231,756,984	51,997,936
South Dakota	31,591,600	7,078,962
Tennessee	254,278,880	56,696,792
Texas	1,664,726,728	379,177,684
Utah	212,531,040	47,556,386
Virginia	236,640,576	54,866,222
Washington	93,437,656	21,478,344
West Virginia	464,664,712	102,650,684
Wisconsin	250,066,848	55,973,976
Wyoming	286,240,416	63,268,824

TABLE 4 TO SUBPART UUUU OF PART 60— STATEWIDE MASS-BASED CO₂ GOALS PLUS NEW SOURCE CO₂ EMISSION
 COMPLEMENT
 [Short tons of CO₂]

State	Interim emission goal (2022–2029)	Final emission goals (2 year blocks starting with 2030–2031)
Alabama	504,534,496	115,272,348
Arizona	275,895,952	64,760,392
Arkansas	272,756,576	61,371,058
California	430,988,824	105,647,270
Colorado	277,022,392	63,645,748
Connecticut	58,986,192	14,121,986
Delaware	41,133,688	9,562,772
Florida	917,904,040	213,283,190
Georgia	412,826,944	93,888,808
Idaho	13,155,256	3,278,026
Illinois	604,953,792	134,398,348
Indiana	692,451,256	153,885,208
Iowa	228,426,760	50,563,762
Kansas	200,960,120	44,441,644
Kentucky	576,522,048	127,580,002
Lands of the Fort Mojave Tribe	5,186,112	1,292,276
Lands of the Navajo Nation	202,938,832	45,911,608
Lands of the Uintah and Ouray Reservation	21,167,080	4,788,708
Louisiana	318,356,976	71,708,642
Maine	17,592,128	4,219,936
Maryland	131,042,600	28,996,872
Massachusetts	103,782,424	24,606,744
Michigan	429,446,408	96,188,604
Minnesota	205,761,008	45,862,346
Mississippi	221,990,024	51,332,926
Missouri	505,904,560	112,105,626
Montana	105,704,024	23,913,816
Nebraska	167,021,320	36,926,888
Nevada	120,916,064	29,436,214
New Hampshire	34,519,280	8,121,182
New Jersey	141,919,248	33,752,728
New Mexico	114,741,592	26,459,850

TABLE 4 TO SUBPART UUUU OF PART 60— STATEWIDE MASS-BASED CO₂ GOALS PLUS NEW SOURCE CO₂ EMISSION
COMPLEMENT—Continued
[Short tons of CO₂]

State	Interim emission goal (2022–2029)	Final emission goals (2 year blocks starting with 2030–2031)
New York	272,940,440	63,436,364
North Carolina	461,424,928	103,753,712
North Dakota	191,025,152	42,199,354
Ohio	667,812,080	149,215,950
Oklahoma	361,531,056	82,001,704
Oregon	72,774,608	17,644,106
Pennsylvania	804,705,296	181,863,274
Rhode Island	29,819,360	7,168,032
South Carolina	234,516,064	52,606,510
South Dakota	31,963,696	7,161,036
Tennessee	257,149,584	57,329,988
Texas	1,707,356,792	396,210,498
Utah	220,386,616	50,601,386
Virginia	240,240,880	55,660,348
Washington	97,691,736	23,127,324
West Virginia	469,488,232	103,714,614
Wisconsin	252,985,576	56,617,764
Wyoming	295,724,848	66,945,204

[FR Doc. 2015–22842 Filed 10–22–15; 8:45 am]

BILLING CODE 6560–50–P

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of April 2016, a copy of the foregoing final form Addendum Pursuant to Circuit Rule 28(a)(5) to Opening Brief of Petitioners on Core Legal Issues was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin

Elbert Lin

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1381 (and consolidated cases)

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

STATE OF NORTH DAKOTA, *et al.*,*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,*Respondents.*

**On Petition for Review of Final Agency Actions of the
United States Environmental Protection Agency
80 Fed. Reg. 64,510 (Oct. 23, 2015) and
81 Fed. Reg. 27,442 (May 6, 2016)**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), State Petitioners state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 15-1381: State of North Dakota.

No. 15-1396: Murray Energy Corporation.

No. 15-1397: Energy & Environment Legal Institute.

No. 15-1399: State of West Virginia; State of Alabama; State of Arizona

Corporation Commission; State of Arkansas; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; The North Carolina Department of Environmental Quality; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of Wisconsin; and State of Wyoming.

No. 15-1434: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO.

No. 15-1438: Peabody Energy Corporation.

No. 15-1448: Utility Air Regulatory Group and American Public Power Association.

No. 15-1456: National Mining Association.

No. 15-1458: Indiana Utility Group.

No. 15-1463: United Mine Workers of America, AFL-CIO.

No. 15-1468: Alabama Power Company; Georgia Power Company; Gulf Power Company; Mississippi Power Company; and Southern Power Company.

No. 15-1469: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron and Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

No. 15-1481: American Coalition for Clean Coal Electricity.

No. 15-1482: Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC.

No. 15-1484: National Rural Electric Cooperative Association; Basin Electric Power Cooperative; East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Minnkota Power Cooperative, Inc.; Sunflower

Electric Power Corporation; and Tri-State Generation and Transmission Association, Inc.

No. 16-1218: Murray Energy Corporation.

No. 16-1220: State of West Virginia; State of Alabama; State of Arizona Corporation Commission; State of Arkansas; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; The North Carolina Department of Environmental Quality; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of Wisconsin; and State of Wyoming.

No. 16-1221: Utility Air Regulatory Group and American Public Power Association.

No. 16-1227: Energy & Environment Legal Institute.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1381, 15-1397, 15-1434, 15-1448, 15-1456, 15-1463, 15-1481, 15-1484, 16-1221, 16-1227) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1396, 15-1399, 15-1438, 15-1458, 15-1468, 15-1469, 15-1480, 15-1482, 16-1218, 16-1220).

Intervenors and *Amici Curiae*:

Lignite Energy Council and Gulf Coast Lignite Coalition are Petitioner-Intervenors.

American Lung Association; Center for Biological Diversity; Clean Air Council; Clean Wisconsin; Conservation Law Foundation; Environmental Defense Fund; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; State of California by and through Governor Edmund G. Brown, Jr., and the California Air Resources Board, and Attorney General Kamala D. Harris; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota by and through the Minnesota Pollution Control Agency; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Commonwealth of Massachusetts; Commonwealth of Virginia; District of Columbia; City of New York; Golden Spread Electric Cooperative, Inc.; NextEra Energy, Inc.; Calpine Corporation; The City of Austin d/b/a Austin Energy; The City of Los Angeles, by and through its Department of Water and Power; The City of Seattle, by and through its City Light Department; National Grid Generation, LLC; New York Power Authority; Pacific Gas and Electric Company; Sacramento Municipal Utility District; Tri-State Generation and Transmission Association, Inc. are Respondent-Intervenors.

There are no *amici curiae* in these consolidated cases.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency entitled, “Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” published on October 23, 2015, at 80 Fed. Reg. 64,510, and “Reconsideration of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” published on May 6, 2016, at 81 Fed. Reg. 27,442.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court.

Per the Court’s order of March 24, 2016, the following case was severed and is being held in abeyance pending potential administrative resolution of biogenic carbon dioxide emissions issues in the Final Rule: *Biogenic CO₂ Coalition v. EPA*, No. 15-1480.

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79 Fed. Reg. 10,750 (Feb. 26, 2014)	8, 25

*80 Fed. Reg. 64,510 (Oct. 23, 2015)....1, 6, 8-9, 16, 19-20, 22-23, 25, 26, 28-29, 31-32,
35, 36

80 Fed. Reg. 64,600 (Dec. 22, 2015) 8, 11, 17, 19

81 Fed. Reg. 27,442 (May 6, 2016) 1

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

BSER	Best System of Emission Reduction
CAA	Clean Air Act
CCS	Carbon Capture and Storage
DOE	Department of Energy
EGU	Electric Generating Unit
EPAct	Energy Policy Act of 2005
EPAct TSD	Technical Support Document-Effect of EPAct05 on BSER for New Fossil Fuel-fired Boilers and IGCCs
SCPC	Supercritical Pulverized Coal

JURISDICTIONAL STATEMENT

Petitioners seek review of U.S. Environmental Protection Agency (“EPA”) final agency actions entitled “Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,510 (Oct. 23, 2015), Joint Appendix (“JA”) ____-____ (the “Rule”), and “Reconsideration of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 81 Fed. Reg. 27,442 (May 6, 2016). Petitions for review were timely filed in this Court under section 307(b)(1) of the Clean Air Act (the “CAA”), 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether EPA failed to apply the correct legal standard when determining whether its “best system of emission reduction” had been “adequately demonstrated” under CAA section 111(b), 42 U.S.C. § 7411(b), namely, whether the entire selected “system” is commercially available at full-scale facilities;

2. Whether EPA exceeded its authority under the CAA because, regardless of the legal standard applied, it failed to meet its burden of showing that efficient new supercritical pulverized coal (“SCPC”) utility boilers implementing partial carbon capture and storage (“CCS”) in deep saline formations is in fact the “best system of emission reduction” for CO₂ at fossil-fuel-fired steam generating units;

3. Whether EPA exceeded its authority under the CAA in selecting its “best system of emission reduction” by failing to adequately consider the costs and benefits of the Rule; and

4. Whether EPA failed to properly consider whether CO₂ emissions are “reasonably ... anticipated to endanger public health or welfare,” and whether fossil-fuel-fired steam generating units “contribute[] significantly” to that endangerment, as required for EPA to regulate under the CAA § 111(b), 42 U.S.C. § 7411(b).

STATUTES AND REGULATIONS

The Rule is codified in 40 C.F.R. Part 60, Subpart TTTT and Parts 70, 71, and 98. The Statutory and Regulatory Addendum reproduces pertinent portions of cited statutes and regulations.

INTRODUCTION

This Rule is a cornerstone of EPA’s agenda to eliminate coal-fired power plants from the mix of energy generation relied on by States. It is designed—by virtue of an impossibly high technology standard—to eliminate the construction of *new* coal-fired power plants. It is also a statutory predicate for the 111(d) Rule (“Power Plan Rule”), which is EPA’s tool to eliminate *existing* coal-fired power plants.

But like the Power Plan Rule, which has been separately challenged before this Court, this Rule far exceeds the agency’s authority. Congress has not granted EPA the power to choose winners and losers in the energy marketplace. Indeed, even the Federal Energy Regulatory Commission is prohibited under the Federal Power Act

from exercising such authority. The CAA grants EPA the authority to regulate air pollution, but specifically requires that EPA's standards reflect "demonstrated" levels of technology that are also cost-effective, precisely so that pollution regulation does not become a cudgel for EPA to force unwanted industries out of business.

Among many deficiencies, the Rule fails to satisfy the statutory requirement that EPA select a "best system of emission reduction" ("BSER") that has been "adequately demonstrated." Under this Court's case law, EPA must show that the entire selected system is *commercially available* for implementation at new, full-scale facilities. As counsel for EPA recently conceded to this Court, sitting *en banc* to hear challenges to the Power Plan Rule, "the statute directly requires that any system of emission reduction be adequately demonstrated," which means that "*any emission reduction system that isn't already in place and successful within an industry can't be used*" Transcript of Oral Argument, *State of West Virginia v. EPA*, No. 15-1363, 61 (emphasis added).

Relatedly, EPA is prohibited under the Energy Policy Act of 2005 ("EPAAct") from considering facilities that receive certain federal subsidies or tax credits when determining whether a system has been "adequately demonstrated"—for the very reason that subsidized, emergent technologies have not proven to be commercially viable.

But instead of attempting to show that its BSER is a demonstrated, commercially available technology, EPA employs various sleights of hand to attempt

to reduce its statutory burden. *First*, it erroneously asserts that it need only show that its BSER is “technically feasible,” rather than commercially available. *Second*, EPA claims that it need not demonstrate the operation of its “system” as an integrated whole, but need only show the feasibility of each component part of the system. *Third*, EPA relies on a plainly erroneous interpretation of EPCA to conclude that it may consider covered, subsidized facilities to support its adequate demonstration analysis so long as it also considers even a scintilla of other evidence.

EPA cannot cobble together various component technologies that exist only in highly-subsidized, pilot-scale, or experimental form and declare the amalgam “adequately demonstrated.” Much like the griffin, which combines parts of the bodies of different animals into one mythical creature, EPA’s BSER does not exist in the integrated form mandated by the agency anywhere in the world, and the closest analogues are either small-scale plants or plants that receive significant government funding.

EPA’s purpose behind imposing its unproven BSER on regulated plants is clear—to ensure that coal-fired energy has no future in the energy landscape. But EPA cannot set unachievable national emissions standards for new fossil-fuel-fired steam generating units to transform the energy economy in this manner. The Rule is not a faithful application of section 111 and must be vacated.

STATEMENT OF THE CASE

I. Section 111 Of The CAA

Enacted in 1970 and amended in 1977 and 1990, CAA section 111 authorizes EPA to impose nationwide emission limits—a “standard of performance”—on any category of new and modified stationary sources that the agency has found “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A).

CAA section 111(a)(1) defines “standard of performance” to include several important statutory limitations on EPA’s power to set emission standards on stationary sources. A “standard of performance” means:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

II. The President’s Climate Action Plan

After Congress repeatedly rejected legislation authorizing greenhouse gas reduction programs, President Obama ordered EPA to use CAA section 111 to force steam generating units to make steep reductions in CO₂ emissions. *See Power Sector Carbon Pollution Standards: Memorandum for the Administrator of the Environmental Protection Agency*, 78 Fed. Reg. 39,535 (June 25, 2013), JA____-____. On October 23, 2015, EPA

did as directed, simultaneously adopting two major rules under CAA section 111(b) and section 111(d), regulating CO₂ emissions from new, modified, reconstructed, and existing fossil-fuel-fired steam generating units, respectively. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015), JA____-____; *Id.* at 64,662 (Oct. 23, 2015), JA____-____.

A. The Rule

The Rule requires, among other things, that new fossil-fuel-fired steam generating units limit CO₂ emissions to 1,400 lb. CO₂/MWh-g.¹ To justify this standard, EPA selected as the BSER “a new highly efficient SCPC [electric generating unit (‘EGU’)] implementing partial post-combustion CCS”, 80 Fed. Reg. at 64,542, JA____, in “deep saline formations,” *id.* at 64,579 (“the determination that the BSER is adequately demonstrated ... relies on [geologic sequestration] in deep saline formations”), JA____. EPA claims that new units can achieve this standard by implementing a SCPC unit that captures CO₂ post-combustion. *Id.* at 64,513, JA____. EPA concedes in the Rule that even the most efficient, commercially-available new fossil-fuel-fired steam generating units will be unable to meet a 1,400 lb. CO₂/MWh-g standard in the absence of CCS. *Id.* at 64,548, JA____. EPA also notes that Integrated Gasification Combined Cycle technology—though not part of its BSER—can either

¹ The Rule also establishes a standard for reconstructed and modified steam generating units. 80 Fed. Reg. at 64,512, JA____. State Petitioners focus here on the requirements for new sources, but agree with Non-State Petitioners that the modified and reconstructed standards are unlawful. Non-State Br. III.

implement CCS or natural gas co-firing as an alternative method of compliance with the Rule. *Id.* at 64,514, JA____.

In the preamble to the Rule, EPA acknowledges that it must show that its BSER is “adequately demonstrated.” *Id.* at 64,512, JA____. But contrary to case law, EPA concludes that, to satisfy this standard, it need only show that its proposed system is “technically feasible.” *See, e.g., id.* at 64,513, 64,527, 64,538, JA____, ____, _____. EPA reasoned that “[t]here is no requirement, as part of the BSER determination, that the EPA finds that the technology in question is ‘commercially available.’” *Id.* at 64,556, JA____. EPA also rejected the conclusion that it must show that a BSER’s component parts can operate as a fully-integrated system. *Id.* EPA instead construed the CAA as allowing it to “legitimately infer that a technology is demonstrated as a whole based on operation of component parts which have not, as yet, been fully integrated.” *Id.*

EPA also relied on a host of federally-subsidized facilities in support of its analysis that its BSER had been adequately demonstrated. *Id.* at 64,548, 64,551-55, JA____, ____-____. While EPA did not address EPAct when it proposed the Rule, *see* 79 Fed. Reg. 1,430 (Jan. 8, 2014), JA____, that statute has prohibited the agency since 2005 from even “consider[ing]” technology as adequately demonstrated under CAA section 111 where the technology is used at a facility receiving certain federal subsidies or tax credits. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). But rather than withdraw the Rule, as State Petitioners requested in comments,

Comments of West Virginia, et al., EPA-HQ-OAR-2013-0495-9505, at 8 (May 9, 2014) (“West Virginia Comments”) (requesting that EPA withdraw its proposal because it violated EPCRA on its face), JA____, EPA issued a separate request for comment on the effect of EPCRA, 79 Fed. Reg. 10,750 (Feb. 26, 2014), JA____. And in the final Rule, EPA construed the limitations of EPCRA narrowly, concluding that EPCRA “preclude[s] [it] from relying solely on the experience of facilities that received [Department of Energy (“DOE”)] assistance, but [does] not [] preclude [it] from relying on the experience of such facilities in conjunction with other information.” 80 Fed. Reg. at 64,541, JA____.

Despite imposition of this novel BSER on regulated entities, EPA concluded that any costs and benefits associated with the Rule would be negligible because “existing and anticipated economic conditions are such that few, if any, fossil-fuel-fired steam-generating EGUs will be built in the foreseeable future.” *Id.* at 64,515, JA____. EPA thus concluded that the Rule would not produce “notable CO₂ emission changes, energy impacts, monetized benefits, costs, or economic impacts.” *Id.* at 64,642, JA____.

B. The Power Plan Rule

Having established a section 111(b) rule, EPA then invoked section 111(d) to promulgate its Power Plan Rule, which unlawfully set binding emission limitations that require sharp CO₂ reductions for *existing* fossil-fuel-fired steam generating units. 80 Fed. Reg. at 64,662, JA____.

State Petitioners challenged the Power Plan Rule in a separate proceeding before this Court and sought a stay pending judicial review. *See West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir. filed Oct. 23, 2015). On February 9, 2016, the Supreme Court stayed the Power Plan, halting its enforceability and its deadlines pending Supreme Court review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); *see Nken v. Holder*, 556 U.S. 418, 428 (2009).

SUMMARY OF ARGUMENT

I. In adopting the Rule, EPA far exceeded the authority provided by Congress under section 111(b) of the CAA to set emission standards for new fossil-fuel-fired steam generating units. The CAA requires a rigorous showing that the selected “best system of emission reduction” be “adequately demonstrated.” The text and structure of the CAA, and its consistent interpretation by this Court, make clear that EPA must demonstrate that its preferred “system” is commercially available. *Sierra Club v. Costle*, 657 F.2d 298, 319 (D.C. Cir. 1981); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973).

Rather than hold itself to this well-established standard, EPA has impermissibly “relaxed” its statutory burden. *Costle*, 657 F.2d at 341 n.157. The agency claims that it need only show that the individual component parts of its selected system are “technically feasible.” 80 Fed. Reg. at 64,513, JA____. Worse, EPA’s reliance on facilities that receive government funding violates Congress’s explicit instruction in

EPAct that such facilities shall not be “considered” in determining whether a particular system has been “adequately demonstrated.” 26 U.S.C. § 48A(g).

If permitted to stand, EPA’s interpretation would eliminate an important check on the agency’s authority under section 111(b). If EPA can require emission reductions based on a system that does not exist at commercial scale anywhere in the world, it has the power to deter the construction of new coal-fired plants in favor of EPA’s preferred energy sources. That is inconsistent with the statutory text and this Court’s cases. And at a minimum, it is a direct intrusion on the States’ traditional authority over electricity generation that requires a clear statement from Congress.

II. Applying the correct legal standard here, there can be no doubt that EPA’s BSER has not been adequately demonstrated. Without small-scale pilot programs and facilities that have received federal funding under EPAct, EPA can only identify one facility where it claims its BSER is fully operational—Canada’s Boundary Dam. But that facility receives substantial government funding, like the EPAct facilities. It is also less than one-quarter the size of a full-scale power plant, has suffered massive cost overruns, and does not sequester in deep saline formations. It is not sufficient to carry EPA’s burden to show adequate demonstration.

III. EPA has also failed to adequately consider the costs and benefits of the new Rule, as required by the CAA. The Supreme Court and this Court have required that EPA engage in a reasoned analysis of costs before engaging in significant rulemaking. *See Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015); *infra* III.A. Here, EPA

ignored the significant costs that imposing a nationwide CCS-based standard would have in deterring the creation of new plants. And EPA adopted the Rule despite admitting that it would result in negligible CO₂ savings. It violates the CAA for EPA to adopt a costly Rule while conceding that the Rule is unlikely to result in any discernible benefit.

IV. Finally, EPA bypassed critical statutory conditions that it must satisfy before it can even consider the specifics of any 111(b) rule. Specifically, Congress required that EPA find that the air pollutant it seeks to regulate “may reasonably be anticipated to endanger public health or welfare,” and that the source category to be regulated actually “contributes significantly” to that endangerment. 42 U.S.C. § 7411(b)(1)(A). Yet EPA failed to comply with these straightforward prerequisites in promulgating the Rule. It erred in concluding that the source category here had already been listed, and even assuming the source category had been listed, EPA was wrong in asserting that it only needs a “rational basis” to regulate a new pollutant from a previously-listed source category.

STANDING

State Petitioners have standing because the Rule is a necessary legal predicate for EPA’s Power Plan Rule, which requires States to create and submit state plans to implement EPA’s CO₂ emission limits. 80 Fed. Reg. at 64,669, JA____. The Rule is a but-for cause of the States’ obligation to revise or create a section 111(d) state plan,

which is an injury-in-fact sufficient for standing. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

State Petitioners also have standing because the Rule mandates a BSER that is not commercially available, which will deter the construction of new coal-fired steam generating units within the States. This intrudes on the States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983).

STANDARD OF REVIEW

This Court's decisions "have established a rigorous standard of review under section 111." *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 429 (D.C. Cir. 1980). "EPA must affirmatively show" during the rulemaking process that its BSER is adequately demonstrated. *See id.* at 433. This Court must set aside final EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9)(A)–(C).

ARGUMENT

I. EPA Failed To Apply The Correct Legal Standard When Concluding That Its BSER Was Adequately Demonstrated.

In the Rule, EPA concocts a new legal standard that impermissibly and significantly reduces its statutory burden. As noted, section 111 requires that a standard of performance “reflect[] the degree of emission limitation achievable through the application of the [BSER] which ... has been adequately demonstrated.” *Id.* § 7411(a)(1). But EPA concluded that it only needed to show that each individual component of its BSER was “technically feasible.” This new standard conflicts with the text, history, and structure of the CAA and this Court’s longstanding interpretation of section 111(b). As further explained in Part B, EPA’s flawed legal analysis renders most of EPA’s supporting evidence inadmissible, and what little evidence remains is insufficient to show that its BSER is adequately demonstrated.

A. Adequate Demonstration Requires Full Commercial-Scale Operation Of The Entire Integrated System.

Contrary to EPA’s assertion, the CAA’s “adequate demonstration” standard requires EPA to show commercial availability. As this Court has explained, this standard first appeared prior to enactment of the original 1970 CAA in Conference Committee, which rejected earlier versions proposed by both the House and Senate. *Portland Cement*, 486 F.2d at 391. The House had initially proposed a standard similar to what EPA advocates here, namely, that EPA give “appropriate consideration to

technological and economic *feasibility*.” *Id.* (emphases added). But that did not become law.

In parsing the legislative history of the “adequate demonstration” requirement, this Court identified the “essential question” as “whether the technology would be available for installation in new plants.” *Id.* Thus, under the “final language adopted, ... it must be ‘adequately demonstrated’ that there will be ‘available technology.’” *Id.*

In decisions following the CAA’s enactment, this Court confirmed and elaborated on the commercial availability requirement. Notably, in *American Petroleum Institute v. EPA*, this Court rejected the EPA’s reliance on “pilot plant data” to demonstrate the effectiveness of carbon adsorption technology, which the EPA conceded “needs further development before [the technology] will show the high degree of effectiveness in large-scale operation that it has already shown in pilot plant demonstrations.” 540 F.2d 1023, 1038 (D.C. Cir. 1976).

Similarly, in *Costle*, this Court noted a distinction between an “innovative or emerging technology” and an “adequately demonstrated” system. *Costle*, 657 F.2d at 341 n.157. In that case, the record indicated that dry scrubbing was *not* an “adequately demonstrated” technology because the record reflected that “crucial issues such as waste disposal and demonstration of commercial-scale systems, which may continue to limit the overall acceptability of this technology, remain to be answered.” *Id.* (internal citation omitted). There, EPA conceded that there were “no full scale dry scrubbers ... presently in operation,” and relied instead on pilot scale test data. *Id.*

(internal citation omitted). But this Court concluded that this evidence provided “no basis” to conclude “that dry scrubbing is adequately demonstrated for full scale plants throughout this industry.” *Id.*²

The distinction drawn in *Costle* finds additional support in section 111(j) of the CAA, which specifically refers to an “innovative technological system” as one which has “*not* been adequately demonstrated.” 42 U.S.C. § 7411(j) (emphasis added). New sources may employ such systems only if they show that use of the “innovative” system would achieve a “greater” degree of emission reduction and if they can demonstrate that the system “will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction.” *Id.* Because such vanguard technologies would *not* be in ordinary commercial use, and would therefore be untested, Congress required additional safeguards before new sources could adopt them.

Furthermore, Congress is “presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S.

² In those instances when this Court *has* permitted EPA to rely in part on pilot-scale data, it is only because EPA has proven that such data is “representative of full-scale performance.” *Id.* at 382. And EPA has typically supplemented this data with further evidence of full-scale commercial use. *See, e.g., id.* at 380 (record for achievability of standard for baghouse technology included “limited data from one full scale commercial sized operation,” among other evidence); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 440 (D.C. Cir. 1973) (record included “tests of prototype *and full-scale* control systems,” among other evidence).

353, 382 n.66 (1982). Here, Congress amended the CAA in 1977 and 1990, but on neither occasion changed the “adequately demonstrated” standard.

Indeed, if anything, Congress reinforced the commercial availability test when it enacted EPCA in 2005. That statute instructed EPA that no facility that received certain forms of government funding “shall be considered to be ... adequately demonstrated.” 42 U.S.C. § 15962(i). Congress explained that those projects “advance efficiency, environmental performance, and cost competitiveness *well beyond* the level of technologies that are *in commercial service or have been demonstrated* on a scale” that DOE “determine[s] is sufficient to demonstrate that commercial service is viable as of [the date of enactment].” 42 U.S.C. § 15962(a) (emphasis added). The statute is clear: If a facility requires subsidies to exist, it is unlikely to be commercially viable at the present time, and therefore, is not “adequately demonstrated.”

B. EPA’s Attempts To Change The “Adequate Demonstration” Standard Are Unlawful.

EPA attempts to lighten its burden to “affirmatively show” that its BSER is adequately demonstrated. *See Nat’l Lime Ass’n*, 627 F.2d at 433. But none of its maneuvers are permitted under the CAA.

1. The Adequate Demonstration Analysis Requires More Than Showing That The System Is Merely Technically Feasible.

First, EPA improperly attempts to replace the adequately demonstrated standard with a completely novel “technical feasibility” standard. *See, e.g.*, 80 Fed. Reg. at 64,513, JA____. As noted above, Congress specifically considered and rejected a

“technological ... feasibility” standard in drafting the CAA. And unsurprisingly, no federal case interpreting section 111 uses the phrases “technically feasible” or “technical feasibility” in the context of adequate demonstration of its BSER.

To be sure, this Court has discussed whether the system EPA selected had the “technological feasibility” “to achieve mandated pollution control.” *Portland Cement*, 486 F.2d at 388 (examining both adequate demonstration and achievability); *see also Costle*, 657 F.2d at 318-19. But these discussions deal with the separate statutory requirement that the emission limits set by EPA be “achievable” by the source. *See Essex*, 486 F.2d at 433. That is, assuming EPA has shown that its BSER is adequately demonstrated, EPA must also show that its selected BSER has the ability to “achiev[e]” the selected “standard for emissions of air pollutants” set by EPA, *id.* at 433.³ That independent limitation on EPA’s authority must not be conflated with the prior, foundational inquiry that the selected BSER be “available for installation in new plants.” *Portland Cement*, 486 F.2d at 391. EPA ignores that requirement here.

EPA suggests that the CAA permits it to adopt unproven systems under the guise of “promot[ing] technological development.” *See* 80 Fed. Reg. at 64,600, JA____. That too is incorrect. While this Court has acknowledged that “Section 111 looks toward what may fairly be projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants,” this Court noted

³ For other, independently sufficient reasons, EPA has failed to show that its BSER can “achieve” the standard. *See* Non-State Br. I.C. & III.B.

in the same breath that “[t]he essential question [i]s ... whether the technology [is] available for installation in new plants.” *Portland Cement*, 486 F.2d at 391; *Costle*, 657 F.2d at 364 n.276 (quoting *Portland Cement*). Therefore, while EPA need not select a technology that represents the current industry standard, it must select a technology that *currently exists* and is *commercially viable*. It has failed to do so here.

2. The Adequate Demonstration Analysis Requires System-Wide Demonstration, Not Demonstration of Individual Components.

EPA also impermissibly attempts to undermine the CAA by applying its invented “technical feasibility” standard not to the CCS system as a whole, but to each of its “components,” asserting that it is “[un]necessary that the major components be demonstrated in an integrated process in order to determine the technical feasibility of each component.” See EPA, Docket EPA-HQ-OAR-2013-0495, *Technical Support Document-Effect of EPA Act 05 on BSER for New Fossil Fuel-fired Boilers and IGCCs* (2014) at 4, https://www.epa.gov/sites/production/files/2014-01/documents/2013_proposed_cps_for_new_power_plants_tsd.pdf (“EPA Act TSD”), JA____; see also 79 Fed. Reg. 1471, JA____.

EPA’s component approach, however, conflicts with EPA’s own understanding of the word “system.” As EPA argued in the preamble to the Power Plan Rule, the “ordinary, everyday meaning of ‘system’” includes “a set of things or parts forming a complex whole;” “a group of interacting, interrelated, or interdependent elements;” and “an assemblage or combination of things or parts

forming a complex or unitary whole.”⁴ 80 Fed. Reg. at 64,720 & n.314 (collecting dictionaries), JA____. These definitions, coupled with the statutory text, confirm that EPA must show that the entire, integrated “*system* ... has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1) (emphasis added).

This conclusion comports with this Court’s precedents instructing that “EPA may not base its determination that a technology is adequately demonstrated ... on mere speculation or conjecture.” *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999). By purporting to show merely that components of a system are technically feasible without proving that they can be successfully integrated in a full-scale commercial plant, EPA impermissibly relies on “‘crystal-ball’ inquiry” to attempt to demonstrate its system. *Portland Cement*, 486 F.2d at 391.

3. EPA Cannot Rely On EPCa-Subsidized Facilities To Meet The Adequate Demonstration Standard.

Finally, EPA improperly purports to reduce its statutory burden by explicitly considering facilities to support its adequate demonstration analysis that are excluded under federal law. EPCa authorizes federal assistance in the form of grants, loan guarantees, and federal tax credits for investment in certain types of energy technology. 80 Fed. Reg. at 64,541, JA____. But it also contains three separate provisions—sections 402(i) (covering facilities receiving assistance under the Energy

⁴ Although not relevant here, State Petitioners demonstrated in their briefs challenging EPA’s Power Plan Rule that there are other independent limitations on what can qualify as a “system” under CAA. Dkt. 1608991, at *13-15, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed April 15, 2016).

Policy Act of 2005), 421(a) (adding sections 3103(e) and 3104(d) to the Energy Policy Act of 1992 to cover facilities receiving assistance under the Clean Air Coal Program), and 1307(b) (adding section 48A(g) to the Internal Revenue Code to cover facilities receiving the Qualifying Advanced Coal Project Credit)—that contain substantively identical language prohibiting EPA from considering any EPCRA-assisted facilities when determining whether a particular system has been adequately demonstrated.

EPA admits that these related provisions “were part of the same legislation and address the same issue,” and that there is no “indicati[on] that they were meant to have different meanings.” EPCRA TSD at 13, JA____. One representative section, and the last to be enacted into law, provides that:

No use of technology (or level of emission reduction solely by reason of the use of the technology), and no achievement of any emission reduction by the demonstration of any technology or performance level, by or at one or more facilities with respect to which a credit is allowed under this section, shall be considered to indicate that the technology or performance level is ... adequately demonstrated for purposes of section 111 of the Clean Air Act

26 U.S.C. § 48A(g); *see also* 42 U.S.C. §§ 13573(e), 13574(d), 15962(i).

In interpreting this statute, EPA admits that the provisions collectively cover any “technology or emissions reduction for which assistance was given” or the “credit is allowed.” 80 Fed. Reg. at 64,541, JA____. EPA nonetheless attempts to parse each of these provisions to reach its strained and implausible reading of the statute. That is, EPA concludes that these provisions merely “bar[] consideration where EPCRA[-]assisted facilities were the sole support for the BSER determination,” but permit

consideration to “support a BSER determination so long as there is additional evidence supporting the determination.” *Id.*⁵ EPA makes two arguments in support of this reading, neither of which comport with the plain language of the statute.

First, EPA argues that the phrase “considered to indicate,” which appears only in section 48A(g), should be interpreted to mean “*deemed to prove*.” Response to Comment at 2-122, EPA-HQ-OAR-2013-0495-11861, JA____; Chloe Kolman Memorandum to Section 111(b) Docket on EPLAct05 at 5 (July 29, 2015), EPA-HQ-OAR-2013-0495-11334, JA____. This reading, however, is plainly erroneous. The term “considered,” when directed at EPA, has been interpreted as a direction *to that agency* to take a particular factor into account. *Ethyl Corp. v. EPA*, 541 F.2d 1, 32 n.66 (D.C. Cir. 1976) (mandatory “consideration” of factors requires “actual good faith consideration of the specified evidence and options”). EPA’s contorted interpretation, which would permit it to “consider” EPLAct-assisted facilities so long they are not “deemed to prove” a technology is adequately demonstrated, cannot be accepted.

Second, EPA argues that the phrase “solely by reason of,” as it appears in sections 402(i) and 421(a) (but not section 48A(g)), indicates that EPA can “rely on information from EPLAct[] facilities even where that information is a *necessary* component of its determination, so long as the information from these facilities is not

⁵ Contrary to EPA’s assertion, its interpretations of EPLAct are due no deference, because EPLAct is not a statute that EPA has been “entrusted to administer.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *see also SW General, Inc. v. Nat’l Labor Relations Bd.*, 796 F.3d 67, 74 n.4 (D.C. Cir. 2015).

the *sole* support for the determination.” Response to Comments at 2-118 to 2-120, EPA-HQ-OAR-2013-0495-11861, JA____,____; *see also* 80 Fed. Reg. at 64541, JA____. But EPA’s interpretation is contrary to the plain meaning of the statute. If consideration of EPCRA-assisted pilot-scale projects is a deciding factor that tips the balance in favor of EPA finding a technology to be adequately demonstrated, then EPA’s adequate demonstration determination is “solely by reason of” its consideration of the pilot-scale projects. In other words, EPA would not have been able to make a finding of adequate demonstration *but for* the pilot-scale projects. Thus, EPA is prohibited from considering covered facilities to support the Rule.

EPA effectively claims that the phrase “solely by reason of” introduces a “mixed motive” standard of causation, whereby EPA can consider covered facilities as long as it considers *any other* evidence not covered by EPCRA. But courts have rejected this narrow meaning of “solely by reason of” where context shows that Congress intended to adopt a “but-for” causation standard. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (absence of word “solely” in Title VII indicated that Congress intended to adopt mixed-motive standard, rather than but-for standard); *Severino v. N. Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1184-85 (11th Cir. 1991) (prohibition in Rehabilitation Act against discrimination “solely by reason of ... handicap,” 29 U.S.C. § 794(a), must signify “but-for” cause or similar standard). Applying the proper standard, EPA must show that it would have made the same decision in the absence of considering any EPCRA-assisted facilities.

This is the only interpretation that makes sense when reading the words “in ... context and with a view to their place in the overall statutory scheme.” *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Otherwise, EPA could always circumvent EPCa merely by pointing to some small article of additional evidence to support its adequate demonstration analysis. Indeed, EPA does not dispute that under its reading of the statute, it could avoid EPCa’s restrictions by “including a mere scintilla of evidence from non-EPCa05 facilities,” but merely asserts that such an “extreme hypothetical ... is not presented here.” 80 Fed. Reg. at 64,541, JA____. This Court should not allow an interpretation that would undermine Congress’s goal of precluding EPA from relying on government-subsidized facilities.

C. To The Extent That There Is Any Ambiguity As To EPA’s Burden, The CAA And EPCa Should Be Interpreted To Prevent EPA From Intruding On The States’ Traditional Authority Over Energy Production.

If there were any doubt as to the proper interpretation of EPCa or of section 111 of the CAA, such doubt should be resolved in favor of State Petitioners’ reading, which protects the States’ traditional interest in energy policy from federal encroachment. It is a “well-established principle that it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotations omitted). “This principle applies when

Congress ‘intends to pre-empt the historic powers of the States’ or when it legislates in ‘traditionally sensitive areas’ that ‘affec[t] the federal balance.’” *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002).

The statutes, as interpreted by EPA, cannot be squared with that principle. EPA’s interpretation of section 111(b) and EPCa would allow it to promulgate emission requirements premised on technology that is commercially available nowhere in the world. In practical effect, this would require States either to expend enormous sums on highly experimental and costly control technology or else abandon coal in favor of EPA’s preferred forms of energy generation.

Under either option, EPA’s interpretation of section 111 effectively usurps the long-recognized authority that States possess over significant “questions of need, reliability, cost and other related state concerns” in the “field of regulating electrical utilities.” *Pac. Gas*, 461 U.S. at 205. The States’ authority over the intrastate generation and consumption of energy is “one of the most important ... functions traditionally associated with the police powers of the States.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983). And historically, the “economic aspects of electrical generation”—which lie at the very heart of the Rule—“have been regulated for many years and in great detail by the states.” *Pac. Gas*, 461 U.S. at 206.

Thus, any ambiguity in the CAA or EPCa should be read to preserve the States’ traditional authority over energy generation by requiring, at a minimum, that

EPA demonstrate that technology is commercially available before imposing it as a nationwide standard on new sources under section 111(b).

II. EPA Failed To Show In The Record That Its BSER Is Adequately Demonstrated.

A. The Record Does Not Contain Any Evidence Of Fully-Integrated, Commercial-Scale Operations.

Had EPA applied the correct legal standard, it could not have provided an adequate justification for the Rule, because the record reflects that EPA's selected BSER is not commercially available anywhere in the world. Therefore, the Rule must be vacated.

Most of the evidence that EPA cites to support the Rule cannot be considered once the correct legal standard is applied. EPA concedes, as it must, that it "prominently discussed" several facilities in the proposed rule (Kemper, Hydrogen Energy California Project, and Texas Clean Energy Project) that received both Clean Coal Power Initiative funding and section 48A tax credit allocations, and were therefore covered by EPCRA. EPCRA TSD at 20, JA____; 79 Fed. Reg. 10,750 (Feb. 26, 2014), JA____; 80 Fed. Reg. at 64,526 & n.74, JA____. But as explained above, EPA cannot justify the Rule unless it can show that it would have selected the same BSER even had it not unlawfully "considered" these highly-subsidized facilities.⁶

⁶ As Non-State Petitioners explain (Non-State Br. Part I.A.), EPA would not have satisfied its burden even if it could consider EPCRA-funded facilities. None of these projects is fully operational. Additionally, all three would substantially deviate from EPA's BSER, because they would use IGCC technology rather than SCPC, and would

EPA also relies on a handful of small-scale demonstration projects that reflect non-utility operations, include only one component of the CCS system, or have not been completed, in an effort to show that partial CCS is “feasible.” *Id.* at 64,550-56, JA____-____. But as noted above, these small demonstration projects cannot meet the adequate demonstration standard where, as here, they are not “representative of full scale performance,” *Costle*, 657 F.2d at 382, and are not bolstered by other evidence of full-scale viability. *See* Non-State Br. I.A.

EPA also relies on vendor guarantees to support its technical feasibility finding, but admits that “it is unlikely that a single technology vendor would provide a guarantee for ‘the system as a whole.’” 80 Fed. Reg. at 64,555, JA____. EPA cannot rely on vendor guarantees relating to particular component parts to show that the fully-integrated “system” had been adequately demonstrated. *See Essex*, 486 F.2d at 440; *Costle*, 657 F.2d at 364.

Eliminating EPCRA-covered facilities, pilot-scale facilities, and vendor guarantees, EPA’s sole purported evidence of an operating commercial-scale CCS system at an EGU is Boundary Dam.⁷ *See* 80 Fed. Reg. 64,549–50, JA____-____. EPA

inject the CO₂ for enhanced oil recovery purposes rather than into deep saline formations. *See id.*

⁷ EPA identifies Dakota Gasification, which did not receive EPCRA funding, as a “full-scale commercial operation that is successfully implementing pre-combustion CCS technology.” 80 Fed. Reg. at 64,556, JA____. But as a pre-combustion process that manufactures natural gas, Dakota Gasification does not generate power and is not representative of the operations of a full-scale commercial system. *See* Comments of

concludes that Boundary Dam, by itself, shows the “technical feasibility of full-scale, fully integrated implementation of available post-combustion CCS technology, which in this case also appears to be commercially viable.” *Id.* at 64,550, JA____. But Boundary Dam cannot bear the weight that EPA assigns to it. As further discussed by Non-State Petitioners (*see* Non-State Br. at I.A.), Boundary Dam is a small-scale facility that does not incorporate all elements of EPA’s BSER, such as sequestration in deep saline formations. *Id.* at 64,556; JA____. It has also been heavily reliant on financial assistance from both the Canadian federal government and Saskatchewan provincial government. *Id.* at 64,550–51, JA____–____. It therefore implicates the same concerns as the EPC facilities that Congress expressly forbade EPA to consider, namely, it provides no evidence that the enterprise would be commercially viable for full-scale, non-subsidized plants. Because EPA “has relied on factors which Congress has not intended it to consider” in touting Boundary Dam as commercially available technology, it has acted arbitrarily and capriciously. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. EPA Fails To Meet Even Its Incorrect, Reduced Legal Standard.

EPA’s BSER would fail even if its reduced evidentiary burden—showing technical feasibility of component parts—were the law. *See* Non-State Br. I.A. Of

the Utility Air Regulatory Group, EPA-HQ-OAR-2013-0495, at 5 (May 9, 2014), JA____.

particular importance to State Petitioners, EPA has utterly failed to demonstrate the technical feasibility of storage in deep saline formations on a nationwide basis.

For a “system of ... emission reduction” to be “demonstrated,” EPA must show that the system can be implemented on a nation-wide basis. *Costle*, 657 F.2d at 330. But as EPA recognizes, “whether all new steam-generating sources can implement” its BSER is “dependent on the geographic scope,” 80 Fed. Reg. at 64,541, JA____, and large areas of the U.S.—11 States and parts of many more—do not have any identified deep saline formations, *id.* at 64,576-77, JA____-____.

Formations that may be accessible in the remaining States have not been demonstrated to be capable of permanent storage.⁸ In fact, EPA acknowledges that not all formations are suitable for sequestration, that site-specific evaluations are critical to selecting a geological site that can permanently contain injected CO₂, *id.* at 64,573, JA____, and that no effort has been made to identify formations that are capable of permanent sequestration. In addition, there is no established industry sector operating deep saline formations demonstrated to be capable of permanent CO₂ storage. Developers of new fossil-fuel-fired units thus face significant unknowns in determining how and where to site new units.

⁸ The State of Wisconsin filed a Petition for Reconsideration regarding this issue. *See* Request for Reconsideration of New Source Performance Standards (NSPS) for Greenhouse Gas Emissions From Stationary Sources: Electric Utility Steam Generating Units, Docket ID No. EPA-HQ-OAR-2013-0495 (Dec. 22, 2015), <http://dnr.wi.gov/topic/AirQuality/documents/WI111bReconsiderationRequest20151222.pdf> (“WI Petition”), JA____-____.

Furthermore, no CO₂ pipeline system exists to transport CO₂ throughout the country, and the development of any such system will be costly and time-consuming. For States such as Wisconsin that lack proven sequestration resources, EPA failed to consider the costs of transporting captured CO₂ to sequestration sites. WI Petition at 2, JA____; *see also* EPA, Basis for Denial of Petitions to Reconsider CAA Section 111(b) Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Utility Generating Units (April 2016), at 6, JA____. Until deep saline formation disposal sites capable of permanent sequestration are identified, developed, and tested by developers of such facilities, and until the pipeline infrastructure is developed to move CO₂ to such sites, even this component of EPA's system cannot be shown to be "adequately demonstrated."⁹

III. EPA Failed To Adequately Consider The Costs And Benefits Of The Rule.

A. EPA Has A Statutory Obligation To Consider Costs And Benefits Under The CAA.

The CAA requires EPA to consider costs and benefits before imposing a nationwide standard under section 111(b). EPA has failed to adequately satisfy this

⁹ EPA argues that any issue regarding geographic availability of geologic sequestration is "moot[ed]" by EPA's assessment that new utility boilers and IGCC units can "co-fir[e] with natural gas in lieu of installing partial CCS." 80 Fed. Reg. at 64,541, JA____. But EPA admits that co-firing is not part of its BSER, *id.* at 64,514, JA____, and therefore it cannot moot EPA's burden to adequately demonstrate its BSER which specifically includes sequestration in "deep saline formations," *id.* at 64,579, JA____.

statutory prerequisite, which provides another, independent basis for vacating the Rule.

Section 111 requires EPA to “tak[e] into account the costs of achieving such [emission] reduction,” 42 U.S.C. § 7411(a)(1), which “clearly refers to the possible economic impact of the promulgated standards,” *Portland Cement*, 486 F.2d. at 387. To be “adequately demonstrated,” therefore, a system cannot be “exorbitantly costly in an economic ... way.” *Essex*, 486 F.2d at 433; *see also Lignite Energy Council*, 198 F.3d at 933; *Portland Cement Ass’n v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975). EPA must consider not only the costs of installation and maintenance, but also whether those costs would be passed on to consumers. *See, e.g., Portland Cement*, 486 F.2d at 387-88.

EPA cannot simply consider these costs in a vacuum; rather, it must determine whether any costs are justified by corresponding, offsetting benefits. The CAA limits EPA’s authority to “prescrib[ing] such regulations as are *necessary* to carry out” the agency’s functions. 42 U.S.C. § 7601(a)(1) (emphasis added). In interpreting analogous language elsewhere in the CAA, the Supreme Court held that EPA must, as a component of “rational” rulemaking, compare the “economic costs” of a rule to its purported “health or environmental benefits.” *Michigan*, 135 S. Ct. at 2707.

Indeed, the current Administration has required agencies like EPA to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs,” and to “select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits.” Exec. Order No. 13,563, Improving

Regulation and Regulatory Review, 76 Fed. Reg. 3,821 (Jan. 18, 2011), JA____. Similarly, this Court has held in the analogous context of arbitrary and capricious review under the Administrative Procedure Act that it is unlawful for an agency to fail to consider a rule's "cost[s] at the margin," *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011), or to fail to consider the existing regulatory and market "baseline" in considering whether a rule will yield any incremental benefits, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-78 (D.C. Cir. 2009).

In at least two ways discussed below, EPA has failed to engage in this type of reasoned cost-benefit analysis, and therefore, has violated the CAA, requiring that the Rule be vacated.

B. The Rule Should Be Vacated Because EPA Admits That The Rule Is Not Projected To Yield Any Benefits.

First, EPA effectively concedes that the Rule is not "necessary" to carry out the purposes of the CAA (42 U.S.C. § 7601(a)(1)), by admitting that the Rule "will result in negligible CO₂ emission changes, quantified benefits, and costs by 2022 as a result of the performance standards for newly constructed EGUs." 80 Fed. Reg. at 64,515, JA____. EPA predicts that "the owners of newly constructed EGUs will likely choose technologies, primarily [natural gas combined cycle], which meet the standards even in the absence of this rule due to existing economic conditions as normal business practice." *Id.* at 64,640, JA____.

EPA cannot impose a nationwide emission standard on all new fossil-fuel-fired steam generating units if it does not believe that the Rule is likely to actually result in reduced levels of pollution. This Court has rejected similar attempts by agencies to promulgate superfluous rules where the “baseline” level of regulation would produce the same effect. *See, e.g., Am. Equity*, 613 F.3d at 177-78. EPA’s conclusion that the Rule is unnecessary under prevailing economic conditions alone renders it unlawful.

C. The Rule Should Be Vacated Because EPA’s BSER Is Exorbitantly Costly And Therefore Has Not Been Adequately Demonstrated.

A second, independent failure by EPA is that it dramatically underestimated the Rule’s costs. EPA failed to recognize that it would be “exorbitantly costly” for a new source to actually implement EPA’s BSER. *Essex*, 486 F.2d at 433.

EPA claims that any costs will be “negligible” because “substantial new construction of uncontrolled fossil steam units is not anticipated under existing prevailing and anticipated future economic conditions.” 80 Fed. Reg. at 64,563, JA____. But EPA cannot minimize potential costs by arguing that the Rule will not have its intended effect. EPA’s rationale “is tantamount to saying the saving grace of the rule is that it will not entail costs if it is not used,” which this Court has described as “unutterably mindless.” *Bus. Roundtable*, 647 F.3d at 1156.

Assuming that the Rule will actually be *applied* to new sources, as EPA must, the costs to such sources and to energy consumers are prohibitive. The projects cited by EPA that feature some form of CCS technology are more expensive than originally

estimated and depend on government subsidies. For example, at the Kemper facility in Mississippi, total project costs have risen significantly from their original estimates, and, despite receiving substantial federal funding, the project is several years behind schedule. In fact, the facility is not yet fully operational. Moreover, Kemper is dependent on numerous “site-specific characteristics” that “cannot be consistently replicated on a national level.” Comments of Southern Company, EPA-HQ-OAR-2013-0495-10101, at 22 (May 9, 2014), JA____. Boundary Dam, likewise, despite being less than one-quarter the size of a full-scale power plant, has incurred a total cost of C\$1.24 billion and required C\$240 million in subsidies from the Canadian federal and Saskatchewan provincial governments, as well as proceeds from sales of carbon captured, merely to stay afloat. Comments of Utility Air Regulatory Group, EPA-HQ-OAR-2013-0495-10938, at 129 (May 9, 2014), JA____.

Furthermore, Deputy Assistant Secretary of Energy Julio Friedmann confirmed in congressional testimony the exorbitant costs associated with CCS and testified that CCS would increase electricity prices by as much as 80%. West Virginia Comments, at 6, JA____. EPA and the Congressional Budget Office have made similar findings. *See* 77 Fed. Reg. 22,391, 22,415-16 (Apr. 13, 2012), JA____-____; Congressional Budget Office, Federal Efforts to Reduce the Cost of Capturing and Storing Carbon Dioxide, June 2012, at 7-9, JA____-____. EPA’s failure to meaningfully consider these costs, and to reject this system in light of the significant costs to new sources and negligible projected environmental benefits, requires that the Rule be vacated.

The record also reflects that gas-fired units have been treated differently from coal-fired units. “Inter-industry comparison in the case of industries producing substitute or alternative products ... bears on the issue of ‘economic cost.’” *Portland Cement*, 486 F.2d at 390. EPA’s failure to justify its differential treatment of new baseload gas-fired units versus new baseload gas-fired units violates the CAA’s requirement to appropriately consider costs and necessitates vacatur of the Rule. *See* Non-State Br. II (citing *Airmark Corp. v. FAA*, 758 F.2d 685, 691, 694 (D.C. Cir. 1985)).

IV. EPA Failed To Make The Statutorily-Required Endangerment And Significant Contribution Findings.

Finally, EPA exceeded its authority by imposing a new nationwide emission standard without first making two findings required by section 111(b) of the CAA. EPA’s failure to consider these required factors renders the Rule unlawful. *See State Farm*, 463 U.S. at 43.

Section 111(b) requires EPA to make two findings before issuing new emission limits for new sources. *First*, EPA must find that the air pollutant it seeks to regulate “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). *Second*, EPA must find that the source category “contributes significantly” to that endangerment. *Id.*

EPA bypassed these straightforward prerequisites when, for the first time in the Rule, it regulated a *new* pollutant (CO₂) from a *new* source category (fossil-fuel-

fired electricity generating units). To accomplish this sleight-of-hand, EPA first claimed erroneously that it previously regulated this same source category. 80 Fed. Reg. at 64,529, JA____. That is not so. *See* Non-State Br. IV.

Separately, EPA claims that the statute empowers it to regulate *any* pollutant from a previously listed source category so long as it made an endangerment finding with respect to *any* pollutant emitted from the source category at some point in the past. *See id.* But EPA's construction of the statute fails scrutiny. As a textual matter, the endangerment requirement modifies, and relates back to, "air pollution," not "sources." 42 U.S.C. § 7411(b)(1)(A). Only when EPA determines that a particular pollutant poses a threat to health or welfare must the agency inquire whether the "sources" significantly contribute to that pollution. *See id.*

Any other reading, in context, would impermissibly modify and undermine the entire statutory scheme. *Cf. Burnwell*, 135 S. Ct. at 2489. It would make no sense for Congress to have provided EPA with a blank check to regulate multiple pollutants from a given source category so long as it had initially made an endangerment finding with respect to a single, unrelated pollutant. But that is the logical result of EPA's interpretation.

Ultimately, EPA recognizes that its reading of the statute cannot be correct, because it adopts and applies an extra-textual test that it claims should apply when it regulates new pollutants from previously-listed source categories, i.e., that EPA needs

a “rational basis” for the Rule. 80 Fed. Reg. 64,530, JA____. EPA’s invented test exceeds its discretion under the CAA, however, for multiple independent reasons.

First, EPA cannot adopt a new standard that has no mooring whatsoever in the text of the CAA, and indeed, conflicts with the standard that the CAA explicitly adopts for the same analysis.

Second, the “rational basis” test also undermines the structure of the statute in the same way as EPA’s principal position that the CAA imposes no endangerment requirement for new pollutants from previously-listed sources. It is implausible that Congress would have imposed one, more rigorous standard to whatever pollutant EPA decided to regulate first from a listed source category, and then one more relaxed standard for whatever subsequent pollutants EPA decided to regulate from that same source category. That conclusion is confirmed by other endangerment provisions in the CAA, which EPA concedes require findings for each specific pollutant. 80 Fed. Reg. at 64,530 (citing the CAA §§ 202(a)(1), 211(c)(1), 231(a)(2)(A)), JA____.

Third, a “rational basis” test does not address the key question that the endangerment findings were designed to answer, namely, the scientific inquiry into whether a particular pollutant causes significant harm to health or welfare. *See Coal for Responsible Regulation*, 684 F.3d 102, 118 (D.C. Cir. 2012). Instead, the “rational basis” test is a standard of review that asks whether the government’s selected policy has “some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993). The

Supreme Court, however, has “rebuffed an[y] attempt by EPA itself to inject considerations of policy into its [emission] decision[s],” because “[t]he statute speaks in terms of endangerment, not in terms of policy.” *Coal. for Responsible Regulation*, 684 F.3d at 118 (citing *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007)). Thus, EPA’s invented “rational basis” test addresses itself to the wrong question, and this Court should reject it.

CONCLUSION

For the foregoing reasons, the petitions should be granted and the Rule vacated.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing State Petitioners' Opening Brief contains 8,897 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: October 13, 2016

/s/ Elbert Lin

Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October 2016, a copy of the foregoing State Petitioners' Opening Brief was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin

Elbert Lin

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1381 (and consolidated cases)

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

STATE OF NORTH DAKOTA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Petition for Review of Final Agency Actions of the
United States Environmental Protection Agency
80 Fed. Reg. 64,510 (Oct. 23, 2015) and
81 Fed. Reg. 27,442 (May 6, 2016)**

**ADDENDUM PURSUANT TO CIRCUIT RULE 28(a)(5) TO STATE
PETITIONERS' OPENING BRIEF**

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not made, shall be determined as though this section (other than this paragraph) has not been enacted.

“(D) RULES RELATING TO ELECTIONS.—An election under this paragraph shall be made not later than the day which is 90 days after the date of the enactment of this Act [Oct. 4, 1976], by filing a notification of such election with the national office of the Internal Revenue Service. Such an election, once made, shall be irrevocable.”

ENTITLEMENT TO CREDIT

Pub. L. 94-455, title VIII, §804(d), Oct. 4, 1976, 90 Stat. 1596, as amended by Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: “Paragraph (1) of section 48(k) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] (relating to entitlement to credit) shall apply to any motion picture film or video tape placed in service in any taxable year beginning before January 1, 1975.”

INCREASE IN BASIS OF PROPERTY PLACED IN SERVICE BEFORE JANUARY 1, 1964

Pub. L. 88-272, title II, §203(a)(2), Feb. 26, 1964, 78 Stat. 33, as amended by Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that:

“(A) The basis of any section 38 property (as defined in section 48(a) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]) placed in service before January 1, 1964, shall be increased, under regulations prescribed by the Secretary of the Treasury or his delegate, by an amount equal to 7 percent of the qualified investment with respect to such property under section 46(c) of the Internal Revenue Code of 1986. If there has been any increase with respect to such property under section 48(g)(2) of such Code, the increase under the preceding sentence shall be appropriately reduced therefor.

“(B) If a lessor made the election provided by section 48(d) of the Internal Revenue Code of 1986 with respect to property placed in service before January 1, 1964—

“(i) subparagraph (A) shall not apply with respect to such property, but

“(ii) under regulations prescribed by the Secretary of the Treasury or his delegate, the deductions otherwise allowable under section 162 of such Code to the lessee for amounts paid to the lessor under the lease (or, if such lessee has purchased such property, the basis of such property) shall be adjusted in a manner consistent with subparagraph (A).

“(C) The adjustments under this paragraph shall be made as of the first day of the taxpayer’s first taxable year which begins after December 31, 1963.”

§ 48A. Qualifying advanced coal project credit

(a) In general

For purposes of section 46, the qualifying advanced coal project credit for any taxable year is an amount equal to—

(1) 20 percent of the qualified investment for such taxable year in the case of projects described in subsection (d)(3)(B)(i),

(2) 15 percent of the qualified investment for such taxable year in the case of projects described in subsection (d)(3)(B)(ii), and

(3) 30 percent of the qualified investment for such taxable year in the case of projects described in clause (iii) of subsection (d)(3)(B).

(b) Qualified investment

(1) In general

For purposes of subsection (a), the qualified investment for any taxable year is the basis of eligible property placed in service by the taxpayer during such taxable year which is part of a qualifying advanced coal project—

(A)(i) the construction, reconstruction, or erection of which is completed by the taxpayer, or

(ii) which is acquired by the taxpayer if the original use of such property commences with the taxpayer, and

(B) with respect to which depreciation (or amortization in lieu of depreciation) is allowable.

(2) Special rule for certain subsidized property

Rules similar to section 48(a)(4) (without regard to subparagraph (D) thereof) shall apply for purposes of this section.

(3) Certain qualified progress expenditures rules made applicable

Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this section.

(c) Definitions

For purposes of this section—

(1) Qualifying advanced coal project

The term “qualifying advanced coal project” means a project which meets the requirements of subsection (e).

(2) Advanced coal-based generation technology

The term “advanced coal-based generation technology” means a technology which meets the requirements of subsection (f).

(3) Eligible property

The term “eligible property” means—

(A) in the case of any qualifying advanced coal project using an integrated gasification combined cycle, any property which is a part of such project and is necessary for the gasification of coal, including any coal handling and gas separation equipment, and

(B) in the case of any other qualifying advanced coal project, any property which is a part of such project.

(4) Coal

The term “coal” means anthracite, bituminous coal, subbituminous coal, lignite, and peat.

(5) Greenhouse gas capture capability

The term “greenhouse gas capture capability” means an integrated gasification combined cycle technology facility capable of adding components which can capture, separate on a long-term basis, isolate, remove, and sequester greenhouse gases which result from the generation of electricity.

(6) Electric generation unit

The term “electric generation unit” means any facility at least 50 percent of the total annual net output of which is electrical power, including an otherwise eligible facility which is used in an industrial application.

(7) Integrated gasification combined cycle

The term “integrated gasification combined cycle” means an electric generation unit which produces electricity by converting coal to synthesis gas which is used to fuel a combined-cycle plant which produces electricity from both a combustion turbine (including a combustion turbine/fuel cell hybrid) and a steam turbine.

(d) Qualifying advanced coal project program**(1) Establishment**

Not later than 180 days after the date of enactment of this section, the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying advanced coal project program for the deployment of advanced coal-based generation technologies.

(2) Certification**(A) Application period**

Each applicant for certification under this paragraph shall submit an application meeting the requirements of subparagraph (B). An applicant may only submit an application—

(i) for an allocation from the dollar amount specified in clause (i) or (ii) of paragraph (3)(B) during the 3-year period beginning on the date the Secretary establishes the program under paragraph (1), and

(ii) for an allocation from the dollar amount specified in paragraph (3)(B)(iii) during the 3-year period beginning at the earlier of the termination of the period described in clause (i) or the date prescribed by the Secretary.

(B) Requirements for applications for certification

An application under subparagraph (A) shall contain such information as the Secretary may require in order to make a determination to accept or reject an application for certification as meeting the requirements under subsection (e)(1). Any information contained in the application shall be protected as provided in section 552(b)(4) of title 5, United States Code.

(C) Time to act upon applications for certification

The Secretary shall issue a determination as to whether an applicant has met the requirements under subsection (e)(1) within 60 days following the date of submittal of the application for certification.

(D) Time to meet criteria for certification

Each applicant for certification shall have 2 years from the date of acceptance by the Secretary of the application during which to provide to the Secretary evidence that the criteria set forth in subsection (e)(2) have been met.

(E) Period of issuance

An applicant which receives a certification shall have 5 years from the date of issuance of the certification in order to place the project in service and if such project is not placed in service by that time period then the certification shall no longer be valid.

(3) Aggregate credits**(A) In general**

The aggregate credits allowed under subsection (a) for projects certified by the Secretary under paragraph (2) may not exceed \$2,550,000,000.

(B) Particular projects

Of the dollar amount in subparagraph (A), the Secretary is authorized to certify—

(i) \$800,000,000 for integrated gasification combined cycle projects the application for which is submitted during the period described in paragraph (2)(A)(i),

(ii) \$500,000,000 for projects which use other advanced coal-based generation technologies the application for which is submitted during the period described in paragraph (2)(A)(i), and

(iii) \$1,250,000,000 for advanced coal-based generation technology projects the application for which is submitted during the period described in paragraph (2)(A)(ii).

(4) Review and redistribution**(A) Review**

Not later than 6 years after the date of enactment of this section, the Secretary shall review the credits allocated under this section as of the date which is 6 years after the date of enactment of this section.

(B) Redistribution

The Secretary may reallocate credits available under clauses (i) and (ii) of paragraph (3)(B) if the Secretary determines that—

(i) there is an insufficient quantity of qualifying applications for certification pending at the time of the review, or

(ii) any certification made pursuant to paragraph (2) has been revoked pursuant to paragraph (2)(D) because the project subject to the certification has been delayed as a result of third party opposition or litigation to the proposed project.

(C) Reallocation

If the Secretary determines that credits under clause (i) or (ii) of paragraph (3)(B) are available for reallocation pursuant to the requirements set forth in paragraph (2), the Secretary is authorized to conduct an additional program for applications for certification.

(5) Disclosure of allocations

The Secretary shall, upon making a certification under this subsection or section 48B(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant.

(e) Qualifying advanced coal projects**(1) Requirements**

For purposes of subsection (c)(1), a project shall be considered a qualifying advanced coal project that the Secretary may certify under subsection (d)(2) if the Secretary determines that, at a minimum—

(A) the project uses an advanced coal-based generation technology—

(i) to power a new electric generation unit; or

(ii) to retrofit or repower an existing electric generation unit (including an existing natural gas-fired combined cycle unit);

(B) the fuel input for the project, when completed, is at least 75 percent coal;

(C) the project, consisting of one or more electric generation units at one site, will

have a total nameplate generating capacity of at least 400 megawatts;

(D) the applicant provides evidence that a majority of the output of the project is reasonably expected to be acquired or utilized;

(E) the applicant provides evidence of ownership or control of a site of sufficient size to allow the proposed project to be constructed and to operate on a long-term basis;

(F) the project will be located in the United States; and

(G) in the case of any project the application for which is submitted during the period described in subsection (d)(2)(A)(ii), the project includes equipment which separates and sequesters at least 65 percent (70 percent in the case of an application for reallocated credits under subsection (d)(4)) of such project's total carbon dioxide emissions.

(2) Requirements for certification

For the purpose of subsection (d)(2)(D), a project shall be eligible for certification only if the Secretary determines that—

(A) the applicant for certification has received all Federal and State environmental authorizations or reviews necessary to commence construction of the project; and

(B) the applicant for certification, except in the case of a retrofit or repower of an existing electric generation unit, has purchased or entered into a binding contract for the purchase of the main steam turbine or turbines for the project, except that such contract may be contingent upon receipt of a certification under subsection (d)(2).

(3) Priority for certain projects

In determining which qualifying advanced coal projects to certify under subsection (d)(2), the Secretary shall—

(A) certify capacity, in accordance with the procedures set forth in subsection (d), in relatively equal amounts to—

- (i) projects using bituminous coal as a primary feedstock,
- (ii) projects using subbituminous coal as a primary feedstock, and
- (iii) projects using lignite as a primary feedstock,

(B) give high priority to projects which include, as determined by the Secretary—

- (i) greenhouse gas capture capability,
- (ii) increased by-product utilization,
- (iii) applicant participants who have a research partnership with an eligible educational institution (as defined in section 529(e)(5)), and
- (iv) other benefits, and

(C) give highest priority to projects with the greatest separation and sequestration percentage of total carbon dioxide emissions.

(f) Advanced coal-based generation technology

(1) In general

For the purpose of this section, an electric generation unit uses advanced coal-based generation technology if—

- (A) the unit—
 - (i) uses integrated gasification combined cycle technology, or

(ii) except as provided in paragraph (3), has a design net heat rate of 8530 Btu/kWh (40 percent efficiency), and

(B) the unit is designed to meet the performance requirements in the following table:

Performance characteristic:	Design level for project:
SO ₂ (percent removal)	99 percent
NO _x (emissions)	0.07 lbs/MMBTU
PM* (emissions)	0.015 lbs/MMBTU
Hg (percent removal)	90 percent

For purposes of the performance requirement specified for the removal of SO₂ in the table contained in subparagraph (B), the SO₂ removal design level in the case of a unit designed for the use of feedstock substantially all of which is subbituminous coal shall be 99 percent SO₂ removal or the achievement of an emission level of 0.04 pounds or less of SO₂ per million Btu, determined on a 30-day average.

(2) Design net heat rate

For purposes of this subsection, design net heat rate with respect to an electric generation unit shall—

(A) be measured in Btu per kilowatt hour (higher heating value),

(B) be based on the design annual heat input to the unit and the rated net electrical power, fuels, and chemicals output of the unit (determined without regard to the co-generation of steam by the unit),

(C) be adjusted for the heat content of the design coal to be used by the unit—

(i) if the heat content is less than 13,500 Btu per pound, but greater than 7,000 Btu per pound, according to the following formula: design net heat rate = unit net heat rate x [1-(((13,500-design coal heat content, Btu per pound)/1,000)* 0.013]], and

(ii) if the heat content is less than or equal to 7,000 Btu per pound, according to the following formula: design net heat rate = unit net heat rate x [1-(((13,500-design coal heat content, Btu per pound)/1,000)* 0.018]], and

(D) be corrected for the site reference conditions of—

- (i) elevation above sea level of 500 feet,
- (ii) air pressure of 14.4 pounds per square inch absolute,
- (iii) temperature, dry bulb of 63°F,
- (iv) temperature, wet bulb of 54°F, and
- (v) relative humidity of 55 percent.

(3) Existing units

In the case of any electric generation unit in existence on the date of the enactment of this section, such unit uses advanced coal-based generation technology if, in lieu of the requirements under paragraph (1)(A)(ii), such unit achieves a minimum efficiency of 35 percent and an overall thermal design efficiency improvement, compared to the efficiency of the unit as operated, of not less than—

(A) 7 percentage points for coal of more than 9,000 Btu,

(B) 6 percentage points for coal of 7,000 to 9,000 Btu, or

(C) 4 percentage points for coal of less than 7,000 Btu.

(g) Applicability

No use of technology (or level of emission reduction solely by reason of the use of the technology), and no achievement of any emission reduction by the demonstration of any technology or performance level, by or at one or more facilities with respect to which a credit is allowed under this section, shall be considered to indicate that the technology or performance level is—

(1) adequately demonstrated for purposes of section 111 of the Clean Air Act (42 U.S.C. 7411);

(2) achievable for purposes of section 169 of that Act (42 U.S.C. 7479); or

(3) achievable in practice for purposes of section 171 of such Act (42 U.S.C. 7501).

(h) Competitive certification awards modification authority

In implementing this section or section 48B, the Secretary is directed to modify the terms of any competitive certification award and any associated closing agreement where such modification—

(1) is consistent with the objectives of such section,

(2) is requested by the recipient of the competitive certification award, and

(3) involves moving the project site to improve the potential to capture and sequester carbon dioxide emissions, reduce costs of transporting feedstock, and serve a broader customer base,

unless the Secretary determines that the dollar amount of tax credits available to the taxpayer under such section would increase as a result of the modification or such modification would result in such project not being originally certified. In considering any such modification, the Secretary shall consult with other relevant Federal agencies, including the Department of Energy.

(i) Recapture of credit for failure to sequester

The Secretary shall provide for recapturing the benefit of any credit allowable under subsection (a) with respect to any project which fails to attain or maintain the separation and sequestration requirements of subsection (e)(1)(G).

(Added Pub. L. 109–58, title XIII, §1307(b), Aug. 8, 2005, 119 Stat. 999; amended Pub. L. 109–432, div. A, title II, §203(a), Dec. 20, 2006, 120 Stat. 2945; Pub. L. 110–172, §11(a)(10), Dec. 29, 2007, 121 Stat. 2485; Pub. L. 110–234, title XV, §15346(a), May 22, 2008, 122 Stat. 1523; Pub. L. 110–246, §4(a), title XV, §15346(a), June 18, 2008, 122 Stat. 1664, 2285; Pub. L. 110–343, div. B, title I, §111(a)–(d), Oct. 3, 2008, 122 Stat. 3822, 3823; Pub. L. 111–5, div. B, title I, §1103(b)(2)(C), Feb. 17, 2009, 123 Stat. 321.)

REFERENCES IN TEXT

The enactment of the Revenue Reconciliation Act of 1990, referred to in subsec. (b)(3), is the date of enactment of title XI of Pub. L. 101–508, which was approved Nov. 5, 1990.

The date of enactment of this section, referred to in subsecs. (d)(1), (4)(A) and (f)(3), is the date of enactment of Pub. L. 109–58, which was approved Aug. 8, 2005.

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

AMENDMENTS

2009—Subsec. (b)(2). Pub. L. 111–5 inserted “(without regard to subparagraph (D) thereof)” after “section 48(a)(4)”.

2008—Subsec. (a)(3). Pub. L. 110–343, §111(a), added par. (3).

Subsec. (d)(2)(A). Pub. L. 110–343, §111(c)(2), reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “Each applicant for certification under this paragraph shall submit an application meeting the requirements of subparagraph (B). An applicant may only submit an application during the 3-year period beginning on the date the Secretary establishes the program under paragraph (1).”

Subsec. (d)(3)(A). Pub. L. 110–343, §111(b), substituted “\$2,550,000,000” for “\$1,300,000,000”.

Subsec. (d)(3)(B). Pub. L. 110–343, §111(c)(1), reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “Of the dollar amount in subparagraph (A), the Secretary is authorized to certify—

“(i) \$800,000,000 for integrated gasification combined cycle projects, and

“(ii) \$500,000,000 for projects which use other advanced coal-based generation technologies.”

Subsec. (d)(5). Pub. L. 110–343, §111(d), added par. (5).

Subsec. (e)(1)(G). Pub. L. 110–343, §111(c)(3)(A), added subpar. (G).

Subsec. (e)(3). Pub. L. 110–343, §111(c)(5), substituted “certain” for “integrated gasification combined cycle” in heading.

Subsec. (e)(3)(B)(iii), (iv). Pub. L. 110–343, §111(c)(4), added cl. (iii) and redesignated former cl. (iii) as (iv).

Subsec. (e)(3)(C). Pub. L. 110–343, §111(c)(3)(B), added subpar. (C).

Subsec. (h). Pub. L. 110–246, §15346(a), added subsec. (h).

Subsec. (i). Pub. L. 110–343, §111(c)(3)(C), added subsec. (i).

2007—Subsec. (d)(4)(B)(ii). Pub. L. 110–172 struck out “subsection” before “paragraph” in two places.

2006—Subsec. (f)(1). Pub. L. 109–432 inserted concluding provisions.

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111–5 applicable to periods after Dec. 31, 2008, under rules similar to the rules of section 48(m) of this title as in effect on the day before Nov. 5, 1990, see section 1103(c)(1) of Pub. L. 111–5, set out as a note under section 25C of this title.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–343, div. B, title I, §111(e), Oct. 3, 2008, 122 Stat. 3823, provided that:

“(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section [amending this section] shall apply to credits the application for which is submitted during the period described in section 48A(d)(2)(A)(ii) of the Internal Revenue Code of 1986 and which are allocated or reallocated after the date of the enactment of this Act [Oct. 3, 2008].

“(2) DISCLOSURE OF ALLOCATIONS.—The amendment made by subsection (d) [amending this section] shall apply to certifications made after the date of the enactment of this Act.

“(3) CLERICAL AMENDMENT.—The amendment made by subsection (c)(5) [amending this section] shall take effect as if included in the amendment made by section 1307(b) of the Energy Tax Incentives Act of 2005 [Pub. L. 109–58].”

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the

date of enactment of Pub. L. 110-234, except as otherwise provided, see section 4 of Pub. L. 110-246, set out as an Effective Date note under section 8701 of Title 7, Agriculture.

Pub. L. 110-234, title XV, §15346(b), May 22, 2008, 122 Stat. 1523, and Pub. L. 110-246, §4(a), title XV, §15346(b), June 18, 2008, 122 Stat. 1664, 2285, provided that: "The amendment made by this section [amending this section] shall take effect on the date of the enactment of this Act [June 18, 2008] and is applicable to all competitive certification awards entered into under section 48A or 48B of the Internal Revenue Code of 1986, whether such awards were issued before, on, or after such date of enactment."

[Pub. L. 110-234 and Pub. L. 110-246 enacted identical provisions. Pub. L. 110-234 was repealed by section 4(a) of Pub. L. 110-246, set out as a note under section 8701 of Title 7, Agriculture.]

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-432, div. A, title II, §203(b), Dec. 20, 2006, 120 Stat. 2945, provided that: "The amendment made by this section [amending this section] shall take apply [sic] with respect to applications for certification under section 48A(d)(2) of the Internal Revenue Code of 1986 submitted after October 2, 2006."

EFFECTIVE DATE

Section applicable to periods after Aug. 8, 2005, under rules similar to the rules of section 48(m) of this title, as in effect on the day before Nov. 5, 1990, see section 1307(d) of Pub. L. 109-58, set out as an Effective Date of 2005 Amendment note under section 46 of this title.

§ 48B. Qualifying gasification project credit

(a) In general

For purposes of section 46, the qualifying gasification project credit for any taxable year is an amount equal to 20 percent (30 percent in the case of credits allocated under subsection (d)(1)(B)) of the qualified investment for such taxable year.

(b) Qualified investment

(1) In general

For purposes of subsection (a), the qualified investment for any taxable year is the basis of eligible property placed in service by the taxpayer during such taxable year which is part of a qualifying gasification project—

(A)(i) the construction, reconstruction, or erection of which is completed by the taxpayer, or

(ii) which is acquired by the taxpayer if the original use of such property commences with the taxpayer, and

(B) with respect to which depreciation (or amortization in lieu of depreciation) is allowable.

(2) Special rule for certain subsidized property

Rules similar to section 48(a)(4) (without regard to subparagraph (D) thereof) shall apply for purposes of this section.

(3) Certain qualified progress expenditures rules made applicable

Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this section.

(c) Definitions

For purposes of this section—

(1) Qualifying gasification project

The term "qualifying gasification project" means any project which—

(A) employs gasification technology,

(B) will be carried out by an eligible entity, and

(C) any portion of the qualified investment of which is certified under the qualifying gasification program as eligible for credit under this section in an amount (not to exceed \$650,000,000) determined by the Secretary.

(2) Gasification technology

The term "gasification technology" means any process which converts a solid or liquid product from coal, petroleum residue, biomass, or other materials which are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion.

(3) Eligible property

The term "eligible property" means any property which is a part of a qualifying gasification project and is necessary for the gasification technology of such project.

(4) Biomass

(A) In general

The term "biomass" means any—

(i) agricultural or plant waste,

(ii) byproduct of wood or paper mill operations, including lignin in spent pulping liquors, and

(iii) other products of forestry maintenance.

(B) Exclusion

The term "biomass" does not include paper which is commonly recycled.

(5) Carbon capture capability

The term "carbon capture capability" means a gasification plant design which is determined by the Secretary to reflect reasonable consideration for, and be capable of, accommodating the equipment likely to be necessary to capture carbon dioxide from the gaseous stream, for later use or sequestration, which would otherwise be emitted in the flue gas from a project which uses a nonrenewable fuel.

(6) Coal

The term "coal" means anthracite, bituminous coal, subbituminous coal, lignite, and peat.

(7) Eligible entity

The term "eligible entity" means any person whose application for certification is principally intended for use in a domestic project which employs domestic gasification applications related to—

(A) chemicals,

(B) fertilizers,

(C) glass,

(D) steel,

(E) petroleum residues,

(F) forest products,

(G) agriculture, including feedlots and dairy operations, and

(b) Administrative enforcement; complaints; investigations; departmental action

If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c) Waiver by President; national interest special circumstances for waiver of particular agreements; waiver by Secretary of Labor of affirmative action requirements

(1) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.

(2)(A) The Secretary of Labor may waive the requirements of the affirmative action clause required by regulations promulgated under subsection (a) of this section with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this chapter.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,¹ of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

(e) Avoidance of duplicative efforts and inconsistencies

The Secretary shall develop procedures to ensure that administrative complaints filed under this section and under the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

(Pub. L. 93–112, title V, § 503, Sept. 26, 1973, 87 Stat. 393; Pub. L. 95–602, title I, § 122(d)(1), Nov.

6, 1978, 92 Stat. 2987; Pub. L. 99–506, title I, § 103(d)(2)(B), (C), title X, §§ 1001(f)(2), (3), 1002(e)(3), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100–630, title II, § 206(c), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102–569, title I, § 102(p)(31), title V, § 505, Oct. 29, 1992, 106 Stat. 4360, 4427.)

REFERENCES IN TEXT

The Americans with Disabilities Act of 1990, referred to in subsecs. (d) and (e), is Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to chapter 126 (§1201 et seq.) of Title 42, The Public Health and Welfare. Title I of the Act is classified generally to subchapter I (§1211 et seq.) of chapter 126 of Title 42. Section 510 of the Act was renumbered section 511 by Pub. L. 110–325, § 6(a)(2), Sept. 25, 2008, 122 Stat. 3558. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102–569, § 102(p)(31)(A), 505(a), substituted “\$10,000” for “\$2,500” in two places, struck out “, in employing persons to carry out such contract,” after “contain a provision requiring that”, and substituted “individuals with disabilities” for “individuals with handicaps as defined in section 706(8) of this title”.

Subsec. (b). Pub. L. 102–569, § 102(p)(31)(B), substituted “individual with a disability” for “individual with handicaps” and “individuals with disabilities” for “individuals with handicaps”.

Subsec. (c). Pub. L. 102–569, § 505(b), designated existing provisions as par. (1) and added par. (2).

Subsecs. (d), (e). Pub. L. 102–569, § 505(c), added subsecs. (d) and (e).

1988—Subsec. (a). Pub. L. 100–630, § 206(c)(1), inserted a comma after “to carry out such contract”.

Subsec. (b). Pub. L. 100–630, § 206(c)(2), substituted “refused” for “refuses”.

Subsec. (c). Pub. L. 100–630, § 206(c)(3), substituted “which the President” for “which The President” and “when the President” for “when The President”.

1986—Subsec. (a). Pub. L. 99–506, §§ 103(d)(2)(C), 1002(e)(3), substituted “individuals with handicaps” for “handicapped individuals” and “section 706(8) of this title” for “section 706(7) of this title”.

Subsec. (b). Pub. L. 99–506, §§ 103(d)(2)(B), (C), 1001(f)(2), substituted “individual with handicaps” for “handicapped individual”, “individuals with handicaps” for “handicapped individuals”, and “a contract” for “his contract”.

Subsec. (c). Pub. L. 99–506, § 1001(f)(3), substituted “The President” for “he” in two places and substituted “the reasons” for “his reasons”.

1978—Subsec. (a). Pub. L. 95–602 substituted “section 706(7) of this title” for “section 706(6) of this title”.

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any

¹See References in Text note below.

proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) “Program or activity” defined

For the purposes of this section, the term “program or activity” means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,¹ of the Americans with Disabilities Act of 1990 (42 U.S.C.

12201–12204 and 12210), as such sections relate to employment.

(Pub. L. 93–112, title V, §504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95–602, title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99–506, title I, §103(d)(2)(B), title X, §1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100–259, §4, Mar. 22, 1988, 102 Stat. 29; Pub. L. 100–630, title II, §206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102–569, title I, §102(p)(32), title V, §506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub. L. 103–382, title III, §394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub. L. 105–220, title IV, §408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub. L. 107–110, title X, §1076(u)(2), Jan. 8, 2002, 115 Stat. 2093; Pub. L. 113–128, title IV, §456(c), July 22, 2014, 128 Stat. 1675; Pub. L. 114–95, title IX, §9215(mmm)(3), Dec. 10, 2015, 129 Stat. 2188.)

REFERENCES IN TEXT

The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in subsec. (a), mean the amendments made by Pub. L. 95–602. See 1978 Amendments note below.

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub. L. 101–336, July 26, 1990, 104 Stat. 327. Title I of the Act is classified generally to subchapter I (§12111 et seq.) of chapter 126 of Title 42, The Public Health and Welfare. Section 510 of the Act was renumbered section 511 by Pub. L. 110–325, §6(a)(2), Sept. 25, 2008, 122 Stat. 3558. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

2015—Subsec. (b)(2)(B). Pub. L. 114–95 made technical amendment to reference in original act which appears in text as reference to section 7801 of title 20.

2014—Subsec. (b)(2)(B). Pub. L. 113–128 substituted “career and technical education” for “vocational education”.

2002—Subsec. (b)(2)(B). Pub. L. 107–110 substituted “section 7801 of title 20” for “section 8801 of title 20”.

1998—Subsec. (a). Pub. L. 105–220 substituted “section 705(20)” for “section 706(8)”.

1994—Subsec. (b)(2)(B). Pub. L. 103–382 substituted “section 8801 of title 20” for “section 2891(12) of title 20”.

1992—Subsec. (a). Pub. L. 102–569, §102(p)(32), substituted “a disability” for “handicaps” and “disability” for “handicap” in first sentence.

Subsec. (d). Pub. L. 102–569, §506, added subsec. (d).

1988—Subsec. (a). Pub. L. 100–630, §206(d)(1), substituted “her or his handicap” for “his handicap”.

Pub. L. 100–259, §4(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub. L. 100–259, §4(2), added subsec. (b).

Subsec. (b)(2)(B). Pub. L. 100–630, §206(d)(2), substituted “section 2891(12) of title 20” for “section 2854(a)(10) of title 20”.

Subsec. (c). Pub. L. 100–259, §4(2), added subsec. (c).

1986—Pub. L. 99–506 substituted “individual with handicaps” for “handicapped individual” and “section 706(8) of this title” for “section 706(7) of this title”.

1978—Pub. L. 95–602 substituted “section 706(7) of this title” for “section 706(6) of this title” and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–95 effective Dec. 10, 2015, except with respect to certain noncompetitive pro-

¹See References in Text note below.

grams and competitive programs, see section 5 of Pub. L. 114-95, set out as a note under section 6301 of Title 20, Education.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107-110, set out as an Effective Date note under section 6301 of Title 20, Education.

EXCLUSION FROM COVERAGE

Amendment by Pub. L. 100-259 not to be construed to extend application of this chapter to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100-259, set out as a Construction note under section 1687 of Title 20, Education.

ABORTION NEUTRALITY

Amendment by Pub. L. 100-259 not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100-259, set out as a note under section 1688 of Title 20, Education.

CONSTRUCTION OF PROHIBITION AGAINST DISCRIMINATION UNDER FEDERAL GRANTS

Rights or protections of this section not affected by any provision of Pub. L. 98-457, see section 127 of Pub. L. 98-457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS

For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1-201 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

EXECUTIVE ORDER No. 11914

Ex. Ord. No. 11914, Apr. 28, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensa-

tion) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93-112, title V, §505, as added Pub. L. 95-602, title I, §120(a), Nov. 6, 1978, 92 Stat. 2982; amended Pub. L. 111-2, §5(c)(1), Jan. 29, 2009, 123 Stat. 6.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (a)(2), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§2000d et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

AMENDMENTS

2009—Subsec. (a)(1). Pub. L. 111-2, §5(c)(1)(A), inserted “(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)” after “(42 U.S.C. 2000e-5(f) through (k))”.

Subsec. (a)(2). Pub. L. 111-2, §5(c)(1)(B), inserted “(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)” after “1964”.

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-2 effective as if enacted May 28, 2007, and applicable to certain claims of discrimination in compensation pending on or after that date, see section 6 of Pub. L. 111-2, set out as a note under section 2000e-5 of Title 42, The Public Health and Welfare.

§ 794b. Removal of architectural, transportation, or communication barriers; technical and financial assistance; compensation of experts or consultants; authorization of appropriations

(a) The Secretary may provide directly or by contract with State vocational rehabilitation agencies or experts or consultants or groups thereof, technical assistance—

(1) to persons operating community rehabilitation programs; and

(2) with the concurrence of the Access Board established by section 792 of this title, to any public or nonprofit agency, institution, or organization;

for the purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers. Any concurrence of the Access Board under paragraph (2) shall reflect its consideration of cost studies carried out by States.

(b) Any such experts or consultants, while serving pursuant to such contracts, shall be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily equivalent of the rate of pay for level 4 of the Senior Executive Service Schedule under section 5382 of title 5, including travel time, and while so serving away from their homes or regular places of business, they may be allowed trav-

(b) Authority under agreement

The Administrator shall be authorized to—

(1) accept from a refiner a consolidated application for all permits required from the Environmental Protection Agency, to the extent consistent with other applicable law;

(2) enter into memoranda of agreement with other Federal agencies to coordinate consideration of refinery applications and permits among Federal agencies; and

(3) enter into memoranda of agreement with a State, under which Federal and State review of refinery permit applications will be coordinated and concurrently considered, to the extent practicable.

(c) State assistance

The Administrator is authorized to provide financial assistance to State governments to facilitate the hiring of additional personnel with expertise in fields relevant to consideration of refinery permits.

(d) Other assistance

The Administrator is authorized to provide technical, legal, or other assistance to State governments to facilitate their review of applications to build new refineries.

(Pub. L. 109–58, title III, §392, Aug. 8, 2005, 119 Stat. 749.)

SUBCHAPTER IV—COAL

PART A—CLEAN COAL POWER INITIATIVE

§ 15961. Authorization of appropriations

(a) Clean coal power initiative

There are authorized to be appropriated to the Secretary to carry out the activities authorized by this part \$200,000,000 for each of fiscal years 2006 through 2014, to remain available until expended.

(b) Report

The Secretary shall submit to Congress the report required by this subsection not later than March 31, 2007. The report shall include, with respect to subsection (a), a plan containing—

(1) a detailed assessment of whether the aggregate funding levels provided under subsection (a) are the appropriate funding levels for that program;

(2) a detailed description of how proposals will be solicited and evaluated, including a list of all activities expected to be undertaken;

(3) a detailed list of technical milestones for each coal and related technology that will be pursued; and

(4) a detailed description of how the program will avoid problems enumerated in Government Accountability Office reports on the Clean Coal Technology Program, including problems that have resulted in unspent funds and projects that failed either financially or scientifically.

(Pub. L. 109–58, title IV, §401, Aug. 8, 2005, 119 Stat. 749.)

§ 15962. Project criteria

(a) In general

To be eligible to receive assistance under this part, a project shall advance efficiency, environ-

mental performance, and cost competitiveness well beyond the level of technologies that are in commercial service or have been demonstrated on a scale that the Secretary determines is sufficient to demonstrate that commercial service is viable as of August 8, 2005.

(b) Technical criteria for clean coal power initiative

(1) Gasification projects

(A) In general

In allocating the funds made available under section 15961(a) of this title, the Secretary shall ensure that at least 70 percent of the funds are used only to fund projects on coal-based gasification technologies, including—

- (i) gasification combined cycle;
- (ii) gasification fuel cells and turbine combined cycle;
- (iii) gasification coproduction;
- (iv) hybrid gasification and combustion; and
- (v) other advanced coal based technologies capable of producing a concentrated stream of carbon dioxide.

(B) Technical milestones

(i) Periodic determination

(I) In general

The Secretary shall periodically set technical milestones specifying the emission and thermal efficiency levels that coal gasification projects under this part shall be designed, and reasonably expected, to achieve.

(II) Prescriptive milestones

The technical milestones shall become more prescriptive during the period of the clean coal power initiative.

(ii) 2020 goals

The Secretary shall establish the periodic milestones so as to achieve by the year 2020 coal gasification projects able—

(I)(aa) to remove at least 99 percent of sulfur dioxide; or

(bb) to emit not more than 0.04 pound SO₂ per million Btu, based on a 30-day average;

(II) to emit not more than .05 lbs of NO_x per million Btu;

(III) to achieve at least 95 percent reductions in mercury emissions; and

(IV) to achieve a thermal efficiency of at least—

(aa) 50 percent for coal of more than 9,000 Btu;

(bb) 48 percent for coal of 7,000 to 9,000 Btu; and

(cc) 46 percent for coal of less than 7,000 Btu.

(2) Other projects

(A) Allocation of funds

The Secretary shall ensure that up to 30 percent of the funds made available under section 15961(a) of this title are used to fund projects other than those described in paragraph (1).

(B) Technical milestones**(i) Periodic determination****(I) In general**

The Secretary shall periodically establish technical milestones specifying the emission and thermal efficiency levels that projects funded under this paragraph shall be designed, and reasonably expected, to achieve.

(II) Prescriptive milestones

The technical milestones shall become more prescriptive during the period of the clean coal power initiative.

(ii) 2020 goals

The Secretary shall set the periodic milestones so as to achieve by the year 2020 projects able—

(I) to remove at least 97 percent of sulfur dioxide;

(II) to emit no more than .08 lbs of NO_x per million Btu;

(III) to achieve at least 90 percent reductions in mercury emissions; and

(IV) to achieve a thermal efficiency of at least—

(aa) 43 percent for coal of more than 9,000 Btu;

(bb) 41 percent for coal of 7,000 to 9,000 Btu; and

(cc) 39 percent for coal of less than 7,000 Btu.

(3) Consultation

Before setting the technical milestones under paragraphs (1)(B) and (2)(B), the Secretary shall consult with—

(A) the Administrator of the Environmental Protection Agency; and

(B) interested entities, including—

(i) coal producers;

(ii) industries using coal;

(iii) organizations that promote coal or advanced coal technologies;

(iv) environmental organizations;

(v) organizations representing workers; and

(vi) organizations representing consumers.

(4) Existing units

In the case of projects at units in existence on August 8, 2005, in lieu of the thermal efficiency requirements described in paragraphs (1)(B)(ii)(IV) and (2)(B)(ii)(IV), the milestones shall be designed to achieve an overall thermal design efficiency improvement, compared to the efficiency of the unit as operated, of not less than—

(A) 7 percent for coal of more than 9,000 Btu;

(B) 6 percent for coal of 7,000 to 9,000 Btu; or

(C) 4 percent for coal of less than 7,000 Btu.

(5) Administration**(A) Elevation of site**

In evaluating project proposals to achieve thermal efficiency levels established under paragraphs (1)(B)(i) and (2)(B)(i) and in de-

termining progress towards thermal efficiency milestones under paragraphs (1)(B)(ii)(IV), (2)(B)(ii)(IV), and (4), the Secretary shall take into account and make adjustments for the elevation of the site at which a project is proposed to be constructed.

(B) Applicability of milestones

In applying the thermal efficiency milestones under paragraphs (1)(B)(ii)(IV), (2)(B)(ii)(IV), and (4) to projects that separate and capture at least 50 percent of the potential emissions of carbon dioxide by a facility, the energy used for separation and capture of carbon dioxide shall not be counted in calculating the thermal efficiency.

(C) Permitted uses

In carrying out this section, the Secretary may give priority to projects that include, as part of the project—

(i) the separation or capture of carbon dioxide; or

(ii) the reduction of the demand for natural gas if deployed.

(c) Financial criteria

The Secretary shall not provide financial assistance under this part for a project unless the recipient documents to the satisfaction of the Secretary that—

(1) the recipient is financially responsible;

(2) the recipient will provide sufficient information to the Secretary to enable the Secretary to ensure that the funds are spent efficiently and effectively; and

(3) a market exists for the technology being demonstrated or applied, as evidenced by statements of interest in writing from potential purchasers of the technology.

(d) Financial assistance

The Secretary shall provide financial assistance to projects that, as determined by the Secretary—

(1) meet the requirements of subsections (a), (b), and (c); and

(2) are likely—

(A) to achieve overall cost reductions in the use of coal to generate useful forms of energy or chemical feedstocks;

(B) to improve the competitiveness of coal among various forms of energy in order to maintain a diversity of fuel choices in the United States to meet electricity generation requirements; and

(C) to demonstrate methods and equipment that are applicable to 25 percent of the electricity generating facilities, using various types of coal, that use coal as the primary feedstock as of August 8, 2005.

(e) Cost-sharing

In carrying out this part, the Secretary shall require cost sharing in accordance with section 16352 of this title.

(f) Scheduled completion of selected projects**(1) In general**

In selecting a project for financial assistance under this section, the Secretary shall establish a reasonable period of time during which

the owner or operator of the project shall complete the construction or demonstration phase of the project, as the Secretary determines to be appropriate.

(2) Condition of financial assistance

The Secretary shall require as a condition of receipt of any financial assistance under this part that the recipient of the assistance enter into an agreement with the Secretary not to request an extension of the time period established for the project by the Secretary under paragraph (1).

(3) Extension of time period

(A) In general

Subject to subparagraph (B), the Secretary may extend the time period established under paragraph (1) if the Secretary determines, in the sole discretion of the Secretary, that the owner or operator of the project cannot complete the construction or demonstration phase of the project within the time period due to circumstances beyond the control of the owner or operator.

(B) Limitation

The Secretary shall not extend a time period under subparagraph (A) by more than 4 years.

(g) Fee title

The Secretary may vest fee title or other property interests acquired under cost-share clean coal power initiative agreements under this part in any entity, including the United States.

(h) Data protection

For a period not exceeding 5 years after completion of the operations phase of a cooperative agreement, the Secretary may provide appropriate protections (including exemptions from subchapter II of chapter 5 of title 5) against the dissemination of information that—

(1) results from demonstration activities carried out under the clean coal power initiative program; and

(2) would be a trade secret or commercial or financial information that is privileged or confidential if the information had been obtained from and first produced by a non-Federal party participating in a clean coal power initiative project.

(i) Applicability

No technology, or level of emission reduction, solely by reason of the use of the technology, or the achievement of the emission reduction, by 1 or more facilities receiving assistance under this Act, shall be considered to be—

(1) adequately demonstrated for purposes of section 7411 of this title;

(2) achievable for purposes of section 7479 of this title; or

(3) achievable in practice for purposes of section 7501 of this title.

(Pub. L. 109–58, title IV, §402, Aug. 8, 2005, 119 Stat. 750; Pub. L. 110–140, title VI, §653, Dec. 19, 2007, 121 Stat. 1695.)

REFERENCES IN TEXT

This Act, referred to in subsec. (i), is Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 594, as amended, known as the En-

ergy Policy Act of 2005, which enacted this chapter and enacted, amended, and repealed numerous other sections and notes in the Code. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of this title and Tables.

AMENDMENTS

2007—Subsec. (b)(1)(B)(ii)(I). Pub. L. 110–140 added subcl. (I) and struck out former subcl. (I) which read as follows: “to remove at least 99 percent of sulfur dioxide;”.

EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110–140 effective on the date that is 1 day after Dec. 19, 2007, see section 1601 of Pub. L. 110–140, set out as an Effective Date note under section 1824 of Title 2, The Congress.

§ 15963. Report

Not later than 1 year after August 8, 2005, and once every 2 years thereafter through 2014, the Secretary, in consultation with other appropriate Federal agencies, shall submit to Congress a report describing—

(1) the technical milestones set forth in section 15962 of this title and how those milestones ensure progress toward meeting the requirements of subsections (b)(1)(B) and (b)(2) of section 15962 of this title; and

(2) the status of projects funded under this part.

(Pub. L. 109–58, title IV, §403, Aug. 8, 2005, 119 Stat. 753.)

§ 15964. Clean coal centers of excellence

(a) In general

As part of the clean coal power initiative, the Secretary shall award competitive, merit-based grants to institutions of higher education for the establishment of centers of excellence for energy systems of the future.

(b) Basis for grants

The Secretary shall award grants under this section to institutions of higher education that show the greatest potential for advancing new clean coal technologies.

(Pub. L. 109–58, title IV, §404, Aug. 8, 2005, 119 Stat. 753.)

§ 15965. Time limit for award; extension

If a Clean Coal Power Initiative project selected after March 11, 2009, for negotiation under this or any other Act in any fiscal year, is not awarded within 2 years from the date the application was selected, negotiations shall cease and the Federal funds committed to the application shall be retained by the Department for future coal-related research, development and demonstration projects, except that the time limit may be extended at the Secretary's discretion for matters outside the control of the applicant, or if the Secretary determines that extension of the time limit is in the public interest.

(Pub. L. 111–8, div. C, title III, Mar. 11, 2009, 123 Stat. 616.)

CODIFICATION

Section was enacted as part of the Energy and Water Development and Related Agencies Appropriations Act,

Subsec. (h). Pub. L. 95-190, §14(a)(5), redesignated subsec. (g), added by Pub. L. 95-95, §108(g), as (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 95-190, §14(a)(5), redesignated subsec. (h), added by Pub. L. 95-95, §108(g), as (i). Former subsec. (i) redesignated (j) and amended.

Subsec. (j). Pub. L. 95-190 §14(a)(5), (6), redesignated subsec. (i), added by Pub. L. 95-95, §108(g), as (j) and in subsec. (j) as so redesignated, substituted “will enable such source” for “at such source will enable it”.

1974—Subsec. (a)(3). Pub. L. 93-319, §4(a), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (c). Pub. L. 93-319, §4(b), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C), respectively, of such redesignated par. (1), and added par. (2).

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

MODIFICATION OR RESCISSION OF IMPLEMENTATION PLANS APPROVED AND IN EFFECT PRIOR TO AUG. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub. L. 95-95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SAVINGS PROVISION

Pub. L. 91-604, §16, Dec. 31, 1970, 84 Stat. 1713, provided that:

“(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub. L. 91-604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambi-

ent air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

“(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

“(b) Regulations or standards issued under this title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter].”

FEDERAL ENERGY ADMINISTRATOR

“Federal Energy Administrator”, for purposes of this chapter, to mean Administrator of Federal Energy Administration established by Pub. L. 93-275, May 7, 1974, 88 Stat. 97, which is classified to section 761 et seq. of Title 15, Commerce and Trade, but with the term to mean any officer of the United States designated as such by the President until Federal Energy Administrator takes office and after Federal Energy Administration ceases to exist, see section 798 of Title 15, Commerce and Trade.

Federal Energy Administration terminated and functions vested by law in Administrator thereof transferred to Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term “new source” means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term “stationary source” means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emit-

ted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term “existing source” means any stationary source other than a new source.

(7) The term “technological system of continuous emission reduction” means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supercedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)¹ of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(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)¹ 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.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(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 use-

¹See References in Text note below.

ful 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.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed

to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-

air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial

likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consider-

ation the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

(July 14, 1955, ch. 360, title I, § 111, as added Pub. L. 91-604, § 4(a), Dec. 31, 1970, 84 Stat. 1683; amended Pub. L. 92-157, title III, § 302(f), Nov. 18, 1971, 85 Stat. 464; Pub. L. 95-95, title I, § 109(a)-(d)(1), (e), (f), title IV, § 401(b), Aug. 7, 1977, 91 Stat. 697-703, 791; Pub. L. 95-190, § 14(a)(7)-(9), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 95-623, § 13(a), Nov. 9, 1978, 92 Stat. 3457; Pub. L. 101-549, title I, § 108(e)-(g), title III, § 302(a), (b), title IV, § 403(a), Nov. 15, 1990, 104 Stat. 2467, 2574, 2631.)

REFERENCES IN TEXT

Such Act, referred to in subsec. (a)(8), means Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, known as the Energy Supply and Environmental Coordination Act of 1974, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsec. (a)(8), was amended generally by Pub. L. 101-549, title VII,

§ 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

Subsection (a)(1) of this section, referred to in subsec. (b)(6), was amended generally by Pub. L. 101-549, title VII, § 403(a), Nov. 15, 1990, 104 Stat. 2631, and, as so amended, no longer contains subpars.

CODIFICATION

Section was formerly classified to section 1857c-6 of this title.

PRIOR PROVISIONS

A prior section 111 of act July 14, 1955, was renumbered section 118 by Pub. L. 91-604 and is classified to section 7418 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, § 403(a), amended par. (1) generally, substituting provisions defining “standard of performance” with respect to any air pollutant for provisions defining such term with respect to subsec. (b) fossil fuel fired and other stationary sources and subsec. (d) particular sources.

Subsec. (a)(3). Pub. L. 101-549, § 108(f), inserted at end “Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.”

Subsec. (b)(1)(B). Pub. L. 101-549, § 108(e)(1), substituted “Within one year” for “Within 120 days”, “within one year” for “within 90 days”, and “every 8 years” for “every four years”, inserted before last sentence “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.”, and inserted at end “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.”

Subsec. (d)(1)(A)(i). Pub. L. 101-549, § 302(a), which directed the substitution of “7412(b)” for “7412(b)(1)(A)”, could not be executed, because of the prior amendment by Pub. L. 101-549, § 108(g), see below.

Pub. L. 101-549, § 108(g), substituted “or emitted from a source category which is regulated under section 7412 of this title” for “or 7412(b)(1)(A)”.

Subsec. (f)(1). Pub. L. 101-549, § 108(e)(2), amended par. (1) generally, substituting present provisions for provisions requiring the Administrator to promulgate regulations listing the categories of major stationary sources not on the required list by Aug. 7, 1977, and regulations establishing standards of performance for such categories.

Subsec. (g)(5) to (8). Pub. L. 101-549, § 302(b), redesignated par. (7) as (5) and struck out “or section 7412 of this title” after “this section”, redesignated par. (8) as (6), and struck out former pars. (5) and (6) which read as follows:

“(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 7412 of this title the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

“(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 7412 of this title is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.”

1978—Subsecs. (d)(1)(A)(ii), (g)(4)(B). Pub. L. 95-623, §13(a)(2), substituted “under this section” for “under subsection (b) of this section”.

Subsec. (h)(5). Pub. L. 95-623, §13(a)(1), added par. (5). Subsec. (j). Pub. L. 95-623, §13(a)(3), substituted in pars. (1)(A) and (2)(A) “standards under this section” and “under this section” for “standards under subsection (b) of this section” and “under subsection (b) of this section”, respectively.

1977—Subsec. (a)(1). Pub. L. 95-95, §109(c)(1)(A), added subpars. (A), (B), and (C), substituted “For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect” for “a standard for emissions of air pollutants which reflects”, “and the percentage reduction achievable” for “achievable”, and “technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environment impact and energy requirements)” for “system of emission reduction which (taking into account the cost of achieving such reduction)” in existing provisions, and inserted provision that, for the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

Subsec. (a)(7). Pub. L. 95-95, §109(c)(1)(B), added par. (7) defining “technological system of continuous emission reduction”.

Pub. L. 95-95, §109(f), added par. (7) directing that under certain circumstances a conversion to coal not be deemed a modification for purposes of pars. (2) and (4).

Subsec. (a)(7), (8). Pub. L. 95-190, §14(a)(7), redesignated second par. (7) as (8).

Subsec. (b)(1)(A). Pub. L. 95-95, §401(b), substituted “such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger” for “such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of”.

Subsec. (b)(1)(B). Pub. L. 95-95, §109(c)(2), substituted “shall, at least every four years, review and, if appropriate,” for “may, from time to time,”.

Subsec. (b)(5), (6). Pub. L. 95-95, §109(c)(3), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-95, §109(d)(1), struck out “(except with respect to new sources owned or operated by the United States)” after “implement and enforce such standards”.

Subsec. (d)(1). Pub. L. 95-95, §109(b)(1), substituted “standards of performance” for “emission standards” and inserted provisions directing that regulations of the Administrator permit the State, in applying a standard of performance to any particular source under a submitted plan, to take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies.

Subsec. (d)(2). Pub. L. 95-95, §109(b)(2), provided that, in promulgating a standard of performance under a plan, the Administrator take into consideration, among other factors, the remaining useful lives of the sources in the category of sources to which the standard applies.

Subsecs. (f) to (i). Pub. L. 95-95, §109(a), added subsecs. (f) to (i).

Subsecs. (j), (k). Pub. L. 95-190, §14(a)(8), (9), redesignated subsec. (k) as (j) and, as so redesignated, substituted “(B)” for “(8)” as designation for second subpar. in par. (2). Former subsec. (j), added by Pub. L. 95-95, §109(e), which related to compliance with applicable standards of performance, was struck out.

Pub. L. 95-95, §109(e), added subsec. (k).

1971—Subsec. (b)(1)(B). Pub. L. 92-157 substituted in first sentence “publish proposed” for “propose”.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d)

of Pub. L. 95-95, set out as a note under section 7401 of this title.

REGULATIONS

Pub. L. 101-549, title IV, §403(b), (c), Nov. 15, 1990, 104 Stat. 2631, provided that:

“(b) REVISED REGULATIONS.—Not later than three years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], the Administrator shall promulgate revised regulations for standards of performance for new fossil fuel fired electric utility units commencing construction after the date on which such regulations are proposed that, at a minimum, require any source subject to such revised standards to emit sulfur dioxide at a rate not greater than would have resulted from compliance by such source with the applicable standards of performance under this section [amending sections 7411 and 7479 of this title] prior to such revision.

“(c) APPLICABILITY.—The provisions of subsections (a) [amending this section] and (b) apply only so long as the provisions of section 403(e) of the Clean Air Act [42 U.S.C. 7651b(e)] remain in effect.”

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official in Environmental Protection Agency related to compliance with new source performance standards under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

POWER SECTOR CARBON POLLUTION STANDARDS

Memorandum of President of the United States, June 25, 2013, 78 F.R. 39535, provided:

Memorandum for the Administrator of the Environmental Protection Agency

With every passing day, the urgency of addressing climate change intensifies. I made clear in my State of the Union address that my Administration is committed to reducing carbon pollution that causes climate change, preparing our communities for the consequences of climate change, and speeding the transition to more sustainable sources of energy.

The Environmental Protection Agency (EPA) has already undertaken such action with regard to carbon pollution from the transportation sector, issuing Clean Air Act standards limiting the greenhouse gas emissions of new cars and light trucks through 2025 and heavy duty trucks through 2018. The EPA standards were promulgated in conjunction with the Department of Transportation, which, at the same time, established fuel efficiency standards for cars and trucks as part of a harmonized national program. Both agencies engaged constructively with auto manufacturers, labor unions, States, and other stakeholders, and the resulting standards have received broad support. These standards will reduce the Nation's carbon pollution and dependence on oil, and also lead to greater innovation, economic growth, and cost savings for American families.

The United States now has the opportunity to address carbon pollution from the power sector, which produces nearly 40 percent of such pollution. As a country, we can continue our progress in reducing power plant pollution, thereby improving public health and protecting the environment, while supplying the reliable, affordable power needed for economic growth and advancing cleaner energy technologies, such as efficient natural gas, nuclear power, renewables such as wind and solar energy, and clean coal technology.

Investments in these technologies will also strengthen our economy, as the clean and efficient production and use of electricity will ensure that it remains reliable and affordable for American businesses and families.

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce power plant carbon pollution, building on actions already underway in States and the power sector, I hereby direct the following:

SECTION 1. Flexible Carbon Pollution Standards for Power Plants. (a) Carbon Pollution Standards for Future Power Plants. On April 13, 2012, the EPA published a Notice of Proposed Rulemaking entitled "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units," 77 Fed. Reg. 22392. In light of the information conveyed in more than two million comments on that proposal and ongoing developments in the industry, you have indicated EPA's intention to issue a new proposal. I therefore direct you to issue a new proposal by no later than September 20, 2013. I further direct you to issue a final rule in a timely fashion after considering all public comments, as appropriate.

(b) *Carbon Pollution Regulation for Modified, Reconstructed, and Existing Power Plants.* To ensure continued progress in reducing harmful carbon pollution, I direct you to use your authority under sections 111(b) and 111(d) of the Clean Air Act to issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector. In addition, I request that you:

(i) issue proposed carbon pollution standards, regulations, or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2014;

(ii) issue final standards, regulations, or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2015; and

(iii) include in the guidelines addressing existing power plants a requirement that States submit to EPA the implementation plans required under section 111(d) of the Clean Air Act and its implementing regulations by no later than June 30, 2016.

(c) *Development of Standards, Regulations, or Guidelines for Power Plants.* In developing standards, regulations, or guidelines pursuant to subsection (b) of this section, and consistent with Executive Orders 12866 of September 30, 1993, as amended, and 13563 of January 18, 2011, you shall ensure, to the greatest extent possible, that you:

(i) launch this effort through direct engagement with States, as they will play a central role in establishing and implementing standards for existing power plants, and, at the same time, with leaders in the power sector, labor leaders, non-governmental organizations, other experts, tribal officials, other stakeholders, and members of the public, on issues informing the design of the program;

(ii) consistent with achieving regulatory objectives and taking into account other relevant environmental regulations and policies that affect the power sector, tailor regulations and guidelines to reduce costs;

(iii) develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities;

(iv) ensure that the standards enable continued reliance on a range of energy sources and technologies;

(v) ensure that the standards are developed and implemented in a manner consistent with the continued provision of reliable and affordable electric power for consumers and businesses; and

(vi) work with the Department of Energy and other Federal and State agencies to promote the reliable and affordable provision of electric power through the continued development and deployment of cleaner technologies and by increasing energy efficiency, including through stronger appliance efficiency standards and other measures.

SEC. 2. General Provisions. (a) This memorandum shall be implemented consistent with applicable law, including international trade obligations, and subject to the availability of appropriations.

(b) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to a department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) You are hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 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.

California pilot test program or to specify as applicable the models, lines, or types of, or marketing or price practices, policies, or strategies for, vehicles subject to this part. Nothing in this part shall be construed to give the Administrator authority to mandate marketing or pricing practices, policies, or strategies for fuels.

(c) Tank and fuel system safety

The Secretary of Transportation shall, in accordance with chapter 301 of title 49, promulgate applicable regulations regarding the safety and use of fuel storage cylinders and fuel systems, including appropriate testing and retesting, in conversions of motor vehicles.

(d) Consultation with Department of Energy and Department of Transportation

The Administrator shall coordinate with the Secretaries of the Department of Energy and the Department of Transportation in carrying out the Administrator's duties under this part.

(July 14, 1955, ch. 360, title II, § 250, as added Pub. L. 101-549, title II, § 229(a), Nov. 15, 1990, 104 Stat. 2528.)

CODIFICATION

In subsec. (c), "chapter 301 of title 49" substituted for "the National Motor Vehicle Traffic Safety Act of 1966 [15 U.S.C. 1381 et seq.]", meaning "the National Traffic and Motor Vehicle Safety Act of 1966 [15 U.S.C. 1381 et seq.]", on authority of Pub. L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

SUBCHAPTER III—GENERAL PROVISIONS

§ 7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed—

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

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

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

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator—

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the 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 chapter 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 7405 of this title.

(July 14, 1955, ch. 360, title III, § 301, formerly § 8, as added Pub. L. 88-206, § 1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89-272, title I, § 101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90-148, § 2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91-604, §§ 3(b)(2), 15(c)(2), Dec. 31, 1970, 84 Stat. 1677, 1713;

Pub. L. 95-95, title III, §305(e), Aug. 7, 1977, 91 Stat. 776; Pub. L. 101-549, title I, §§107(d), 108(i), Nov. 15, 1990, 104 Stat. 2464, 2467.)

CODIFICATION

Section was formerly classified to section 1857g of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101-549, §108(i), inserted “subject to section 7607(d) of this title” after “regulations”.

Subsec. (d). Pub. L. 101-549, §107(d), added subsec. (d). 1977—Subsec. (a). Pub. L. 95-95 designated existing provisions as par. (1) and added par. (2).

1970—Subsec. (a). Pub. L. 91-604, §15(c)(2), substituted “Administrator” for “Secretary” and “Environmental Protection Agency” for “Department of Health, Education, and Welfare”.

Subsec. (b). Pub. L. 91-604, §3(b)(2), substituted “Environmental Protection Agency” for “Public Health Service” and struck out provisions covering the payment of salaries and allowances.

Subsec. (c). Pub. L. 91-604, §15(c)(2), substituted “Administrator” for “Secretary”.

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

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

DISADVANTAGED BUSINESS CONCERNS; USE OF QUOTAS PROHIBITED

Pub. L. 101-549, title X, Nov. 15, 1990, 104 Stat. 2708, provided that:

“SEC. 1001. DISADVANTAGED BUSINESS CONCERNS.

“(a) IN GENERAL.—In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments of 1990 [Pub. L. 101-549, see Tables for classification] which uses funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns.

“(b) DEFINITION.—

“(1)(A) For purposes of subsection (a), the term ‘disadvantaged business concern’ means a concern—

“(i) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly traded company, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

“(ii) the management and daily business operations of which are controlled by such individuals.

“(B)(i) A for-profit business concern is presumed to be a disadvantaged business concern for purposes of subsection (a) if it is at least 51 percent owned by, or

in the case of a concern which is a publicly traded company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

“(I) Black Americans.

“(II) Hispanic Americans.

“(III) Native Americans.

“(IV) Asian Americans.

“(V) Women.

“(VI) Disabled Americans.

“(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual’s identification as a member of a group specified in that clause.

“(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

“(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

“(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

“(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

“(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

“(i) a party to the joint venture is a disadvantaged business concern; and

“(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

“(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

“SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.”

§ 7602. Definitions

When used in this chapter—

(a) The term “Administrator” means the Administrator of the Environmental Protection Agency.

(b) The term “air pollution control agency” means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions.* The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability.* This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity.* Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded.* Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be dis-

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph,⁴ the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(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,³ 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)¹ 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 pub-

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

⁴ So in original. Probably should be "subsection,".

lishes 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).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁵ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(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.

⁵So in original. The word “to” probably should not appear.

(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.

(f) Costs

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

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of

title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section⁶ 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, § 307, as added Pub. L. 91-604, § 12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92-157, title III, § 302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93-319, § 6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95-95, title III, §§ 303(d), 305(a), (c), (f)-(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95-190, § 14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§ 108(p), 110(5), title III, § 302(g), (h), title VII, §§ 702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681-2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101-549, title II, § 230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101-549, title II, § 230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original “section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)”, meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, § 3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101-549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original “subtitle C of title I”, and was translated as reading “part C of title I” to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), “subchapter II of chapter 5 of title 5” was substituted for “the Administrative Procedures Act” on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h-5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91-604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly § 14, as added Dec. 17, 1963, Pub. L. 88-206, § 1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89-272, renumbered section 310 by Pub. L. 90-148, and renumbered section 317 by Pub. L. 91-604, and is set out as a Short Title note under section 7401 of this title.

⁶So in original. Probably should be “sections”.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, § 703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out “or section 7521(b)(5)” after “section 7410(f)”.

Subsec. (b)(1). Pub. L. 101-549, § 706(2), which directed amendment of second sentence by striking “under section 7413(d) of this title” immediately before “under section 7419 of this title”, was executed by striking “under section 7413(d) of this title,” before “under section 7419 of this title”, to reflect the probable intent of Congress.

Pub. L. 101-549, § 706(1), inserted at end: “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.”

Pub. L. 101-549, § 702(c), inserted “or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title,” before “or any other final action of the Administrator”.

Pub. L. 101-549, § 302(g), substituted “section 7412” for “section 7412(c)”.

Subsec. (b)(2). Pub. L. 101-549, § 707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101-549, § 110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title.”

Subsec. (d)(1)(D), (E). Pub. L. 101-549, § 302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101-549, § 302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101-549, § 110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: “promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders).”

Subsec. (d)(1)(G), (H). Pub. L. 101-549, § 302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101-549, § 710(b), which directed that subpar. (H) be amended by substituting “subchapter VI of this chapter” for “part B of subchapter I of this chapter”, was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, § 302(h), see below.

Pub. L. 101-549, § 302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101-549, § 302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101-549, § 302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101-549, § 110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101-549, § 302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101-549, § 110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101-549, § 302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101-549, § 110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101-549, § 302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101-549, § 108(p), added subsec. (h).

1977—Subsec. (b)(1). Pub. L. 95-190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c-10(c)(2)(A), (B), or (C) to the period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95-95, § 305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to noncompliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95-95, § 305(a), added subsec. (d).

Subsec. (e). Pub. L. 95-95, § 303(d), added subsec. (e).

Subsec. (f). Pub. L. 95-95, § 305(f), added subsec. (f).

Subsec. (g). Pub. L. 95-95, § 305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93-319 inserted reference to the Administrator's action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92-157 substituted reference to section “7545(c)(3)” for “7545(c)(4)” of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

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

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other

officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7608. Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, §308, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1708.)

CODIFICATION

Section was formerly classified to section 1857h-6 of this title.

PRIOR PROVISIONS

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91-604 and is classified to section 7615 of this title.

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

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect

immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7609. Policy review

(a) Environmental impact

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) Unsatisfactory legislation, action, or regulation

In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(July 14, 1955, ch. 360, title III, §309, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1709.)

CODIFICATION

Section was formerly classified to section 1857h-7 of this title.

PRIOR PROVISIONS

A prior section 309 of act July 14, 1955, ch. 360, title III, formerly §13, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401; renumbered §306, Oct. 20, 1965, Pub. L. 89-272, title I, §101(4), 79 Stat. 992; renumbered §309, Nov. 21, 1967, Pub. L. 90-148, §2, 81 Stat. 506; renumbered §316, Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1705, related to appropriations and was classified to section 1857i of this title, prior to repeal by section 306 of Pub. L. 95-95. See section 7626 of this title.

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

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

§ 7610. Other authority

(a) Authority and responsibilities under other laws not affected

Except as provided in subsection (b) of this section, this chapter shall not be construed as

(§7401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

This Act, referred to in subsec. (b)(2), is Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2776, known as the Energy Policy Act of 1992. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of this title and Tables.

§ 13573. Generation projects

(a) Eligible projects

Projects supported under section 13572(a)(1) of this title may include—

- (1) equipment or processes previously supported by a Department of Energy program;
- (2) advanced combustion equipment and processes that the Secretary determines will be cost-effective and could substantially contribute to meeting environmental or energy needs, including gasification, gasification fuel cells, gasification coproduction, oxidation combustion techniques, ultra-supercritical boilers, and chemical looping; and
- (3) hybrid gasification/combustion systems, including systems integrating fuel cells with gasification or combustion units.

(b) Criteria

The Secretary shall establish criteria for the selection of generation projects under section 13572(a)(1) of this title. The Secretary may modify the criteria as appropriate to reflect improvements in equipment, except that the criteria shall not be modified to be less stringent. The selection criteria shall include—

- (1) prioritization of projects whose installation is likely to result in significant air quality improvements in nonattainment air quality areas;
- (2) prioritization of projects whose installation is likely to result in lower emission rates of pollution;
- (3) prioritization of projects that result in the repowering or replacement of older, less efficient units;
- (4) documented broad interest in the procurement of the equipment and utilization of the processes used in the projects by owners or operators of facilities for electricity generation;
- (5) equipment and processes beginning in 2006 through 2011 that are projected to achieve a thermal efficiency of—

(A) 40 percent for coal of more than 9,000 Btu per pound based on higher heating values;

(B) 38 percent for coal of 7,000 to 9,000 Btu per pound passed on higher heating values; and

(C) 36 percent for coal of less than 7,000 Btu per pound based on higher heating values;

except that energy used for coproduction or cogeneration shall not be counted in calculating the thermal efficiency under this paragraph; and

(6) equipment and processes beginning in 2012 and 2013 that are projected to achieve a thermal efficiency of—

(A) 45 percent for coal of more than 9,000 Btu per pound based on higher heating values;

(B) 44 percent for coal of 7,000 to 9,000 Btu per pound passed on higher heating values; and

(C) 40 percent for coal of less than 7,000 Btu per pound based on higher heating values;

except that energy used for coproduction or cogeneration shall not be counted in calculating the thermal efficiency under this paragraph.

(c) Program balance and priority

In carrying out the program under section 13572(a)(1) of this title, the Secretary shall ensure, to the extent practicable, that—

- (1) between 25 percent and 75 percent of the projects supported are for the sole purpose of electrical generation; and
- (2) priority is given to projects that use electrical generation equipment and processes that have been developed and demonstrated and applied in actual production of electricity, but are not yet cost-competitive, and that achieve greater efficiency and environmental performance.

(d) Authorization of appropriations

There are authorized to be appropriated to the Secretary to carry out section 13572(a)(1) of this title—

- (1) \$250,000,000 for fiscal year 2007;
- (2) \$350,000,000 for fiscal year 2008;
- (3) \$400,000,000 for each of fiscal years 2009 through 2012; and
- (4) \$300,000,000 for fiscal year 2013.

(e) Applicability

No technology, or level of emission reduction, shall be treated as adequately demonstrated for purpose¹ of section 7411 of this title, achievable for purposes of section 7479 of this title, or achievable in practice for purposes of section 7501 of this title solely by reason of the use of such technology, or the achievement of such emission reduction, by one or more facilities receiving assistance under section 13572(a)(1) of this title.

(Pub. L. 102-486, title XXXI, §3103, as added Pub. L. 109-58, title IV, §421(a), Aug. 8, 2005, 119 Stat. 758.)

§ 13574. Air quality enhancement program

(a) Eligible projects

Projects supported under section 13572(a)(2) of this title shall—

- (1) utilize technologies that meet relevant Federal and State clean air requirements applicable to the unit or facility, including being adequately demonstrated for purposes of section 7411 of this title, achievable for purposes of section 7479 of this title, or achievable in practice for purposes of section 7501 of this title; or
- (2) utilize equipment or processes that exceed relevant Federal or State clean air requirements applicable to the unit or facilities included in the projects by achieving greater efficiency or environmental performance.

¹So in original. Probably should be “purposes”.

(§7401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

This Act, referred to in subsec. (b)(2), is Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2776, known as the Energy Policy Act of 1992. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of this title and Tables.

§ 13573. Generation projects

(a) Eligible projects

Projects supported under section 13572(a)(1) of this title may include—

- (1) equipment or processes previously supported by a Department of Energy program;
- (2) advanced combustion equipment and processes that the Secretary determines will be cost-effective and could substantially contribute to meeting environmental or energy needs, including gasification, gasification fuel cells, gasification coproduction, oxidation combustion techniques, ultra-supercritical boilers, and chemical looping; and
- (3) hybrid gasification/combustion systems, including systems integrating fuel cells with gasification or combustion units.

(b) Criteria

The Secretary shall establish criteria for the selection of generation projects under section 13572(a)(1) of this title. The Secretary may modify the criteria as appropriate to reflect improvements in equipment, except that the criteria shall not be modified to be less stringent. The selection criteria shall include—

- (1) prioritization of projects whose installation is likely to result in significant air quality improvements in nonattainment air quality areas;
- (2) prioritization of projects whose installation is likely to result in lower emission rates of pollution;
- (3) prioritization of projects that result in the repowering or replacement of older, less efficient units;
- (4) documented broad interest in the procurement of the equipment and utilization of the processes used in the projects by owners or operators of facilities for electricity generation;
- (5) equipment and processes beginning in 2006 through 2011 that are projected to achieve a thermal efficiency of—

(A) 40 percent for coal of more than 9,000 Btu per pound based on higher heating values;

(B) 38 percent for coal of 7,000 to 9,000 Btu per pound passed on higher heating values; and

(C) 36 percent for coal of less than 7,000 Btu per pound based on higher heating values;

except that energy used for coproduction or cogeneration shall not be counted in calculating the thermal efficiency under this paragraph; and

(6) equipment and processes beginning in 2012 and 2013 that are projected to achieve a thermal efficiency of—

(A) 45 percent for coal of more than 9,000 Btu per pound based on higher heating values;

(B) 44 percent for coal of 7,000 to 9,000 Btu per pound passed on higher heating values; and

(C) 40 percent for coal of less than 7,000 Btu per pound based on higher heating values;

except that energy used for coproduction or cogeneration shall not be counted in calculating the thermal efficiency under this paragraph.

(c) Program balance and priority

In carrying out the program under section 13572(a)(1) of this title, the Secretary shall ensure, to the extent practicable, that—

- (1) between 25 percent and 75 percent of the projects supported are for the sole purpose of electrical generation; and
- (2) priority is given to projects that use electrical generation equipment and processes that have been developed and demonstrated and applied in actual production of electricity, but are not yet cost-competitive, and that achieve greater efficiency and environmental performance.

(d) Authorization of appropriations

There are authorized to be appropriated to the Secretary to carry out section 13572(a)(1) of this title—

- (1) \$250,000,000 for fiscal year 2007;
- (2) \$350,000,000 for fiscal year 2008;
- (3) \$400,000,000 for each of fiscal years 2009 through 2012; and
- (4) \$300,000,000 for fiscal year 2013.

(e) Applicability

No technology, or level of emission reduction, shall be treated as adequately demonstrated for purpose¹ of section 7411 of this title, achievable for purposes of section 7479 of this title, or achievable in practice for purposes of section 7501 of this title solely by reason of the use of such technology, or the achievement of such emission reduction, by one or more facilities receiving assistance under section 13572(a)(1) of this title.

(Pub. L. 102-486, title XXXI, §3103, as added Pub. L. 109-58, title IV, §421(a), Aug. 8, 2005, 119 Stat. 758.)

§ 13574. Air quality enhancement program

(a) Eligible projects

Projects supported under section 13572(a)(2) of this title shall—

- (1) utilize technologies that meet relevant Federal and State clean air requirements applicable to the unit or facility, including being adequately demonstrated for purposes of section 7411 of this title, achievable for purposes of section 7479 of this title, or achievable in practice for purposes of section 7501 of this title; or
- (2) utilize equipment or processes that exceed relevant Federal or State clean air requirements applicable to the unit or facilities included in the projects by achieving greater efficiency or environmental performance.

¹So in original. Probably should be “purposes”.

(b) Priority in project selection

In making an award under section 13572(a)(2) of this title, the Secretary shall give priority to—

- (1) projects whose installation is likely to result in significant air quality improvements in nonattainment air quality areas or substantially reduce the emission level of criteria pollutants and mercury air emissions;
- (2) projects for pollution control that result in the mitigation or collection of more than 1 pollutant; and
- (3) projects designed to allow the use of the waste byproducts or other byproducts of the equipment.

(c) Authorization of appropriations

There are authorized to be appropriated to the Secretary to carry out section 13572(a)(2) of this title—

- (1) \$300,000,000 for fiscal year 2007;
- (2) \$100,000,000 for fiscal year 2008;
- (3) \$40,000,000 for fiscal year 2009;
- (4) \$30,000,000 for fiscal year 2010; and
- (5) \$30,000,000 for fiscal year 2011.

(d) Applicability

No technology, or level of emission reduction under subsection (a)(2) of this section shall be treated as adequately demonstrated for purpose of Section¹ 7411 of this title, achievable for purposes of section 7479 of this title, or achievable in practice for purposes of section 7501 of this title solely by reason of the use of such technology, or the achievement of such emission reduction, by one or more facilities receiving assistance under section 13572(a)(2) of this title.

(Pub. L. 102-486, title XXXI, §3104, as added Pub. L. 109-58, title IV, §421(a), Aug. 8, 2005, 119 Stat. 759.)

CHAPTER 135—RESIDENCY AND SERVICE REQUIREMENTS IN FEDERALLY ASSISTED HOUSING

SUBCHAPTER I—STANDARDS AND OBLIGATIONS OF RESIDENCY IN FEDERALLY ASSISTED HOUSING

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| 13601. | Compliance by owners as condition of Federal assistance. |
| 13602. | Compliance with criteria for occupancy as requirement for tenancy. |
| 13603. | Establishment of criteria for occupancy. |
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SUBCHAPTER II—AUTHORITY TO PROVIDE PREFERENCES FOR ELDERLY RESIDENTS AND UNITS FOR DISABLED RESIDENTS IN CERTAIN SECTION 8 ASSISTED HOUSING

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| 13611. | Authority. |
| 13612. | Reservation of units for disabled families. |
| 13613. | Secondary preferences. |
| 13614. | General availability of units. |
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| 13617. | Treatment of covered section 8 housing not subject to elderly preference. |
| 13618. | Treatment of other federally assisted housing. |
| 13619. | “Covered section 8 housing” defined. |

¹So in original. Probably should be “purposes of section”.

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| Sec. | |
| 13620. | Study. |

SUBCHAPTER III—SERVICE COORDINATORS FOR ELDERLY AND DISABLED RESIDENTS OF FEDERALLY ASSISTED HOUSING

- | | |
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| 13631. | Requirement to provide service coordinators. |
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SUBCHAPTER IV—GENERAL PROVISIONS

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| 13641. | Definitions. |
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SUBCHAPTER V—SAFETY AND SECURITY IN PUBLIC AND ASSISTED HOUSING

- | | |
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| 13661. | Screening of applicants for federally assisted housing. |
| 13662. | Termination of tenancy and assistance for illegal drug users and alcohol abusers in federally assisted housing. |
| 13663. | Ineligibility of dangerous sex offenders for admission to public housing. |
| 13664. | Definitions. |

SUBCHAPTER I—STANDARDS AND OBLIGATIONS OF RESIDENCY IN FEDERALLY ASSISTED HOUSING

§ 13601. Compliance by owners as condition of Federal assistance

The Secretary of Housing and Urban Development shall require owners of federally assisted housing (as such term is defined in section 13641(2) of this title), as a condition of receiving housing assistance for such housing, to comply with the procedures and requirements established under this subchapter.

(Pub. L. 102-550, title VI, §641, Oct. 28, 1992, 106 Stat. 3820.)

EFFECTIVE DATE

Chapter applicable upon expiration of 6-month period beginning Oct. 28, 1992, except as otherwise provided, see section 13642 of this title.

§ 13602. Compliance with criteria for occupancy as requirement for tenancy

In selecting tenants for occupancy of units in federally assisted housing, an owner of such housing shall utilize the criteria for occupancy in federally assisted housing established by the Secretary, by regulation, under section 13603 of this title. If an owner determines that an applicant for occupancy in the housing does not meet such criteria, the owner may deny such applicant occupancy.

(Pub. L. 102-550, title VI, §642, Oct. 28, 1992, 106 Stat. 3821.)

§ 13603. Establishment of criteria for occupancy

(a) Task force

(1) Establishment

To assist the Secretary in establishing reasonable criteria for occupancy in federally assisted housing, the Secretary shall establish a task force to review all rules, policy statements, handbooks, technical assistance memoranda, and other relevant documents issued by the Department of Housing and Urban Development on the standards and obligations gov-

XVI. Statutory Authority

The statutory authority for this action is provided by sections 111, 301, 302, and 307(d)(1)(C) of the CAA as amended (42 U.S.C. 7411, 7601, 7602, 7607(d)(1)(C)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

List of Subjects

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

40 CFR Part 98

Environmental protection, Greenhouse gases and monitoring, Reporting and recordkeeping requirements.

Dated: August 3, 2015.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, parts 60, 70, 71, and 98 of the Code of the Federal Regulations are amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

- 2. Section 60.17 is amended by:
 - a. Redesignating paragraphs (d) through (t) as paragraphs (e) through (u) and adding paragraph (d);
 - b. In newly redesignated paragraph (g), further redesignating paragraph (g)(15) as paragraph (g)(17) and adding paragraphs (g)(15) and (16);
 - c. In newly redesignated paragraph (h), revising paragraphs (h)(37), (42), (46), (138), (187), and (190); and
 - c. In newly redesignated paragraph (m), further redesignating paragraph (m)(1) as paragraph (m)(2) and adding paragraph (m)(1).

The revisions and additions read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(d) The following material is available for purchase from the American National Standards Institute (ANSI), 25 W. 43rd Street, 4th Floor, New York, NY 10036, Telephone (212) 642-4980, and is also available at the following Web site: <http://www.ansi.org>.

(1) ANSI No. C12.20-2010 American National Standard for Electricity Meters—0.2 and 0.5 Accuracy Classes (Approved August 31, 2010), IBR approved for § 60.5535(d).

(2) [Reserved]

* * * * *

(g) * * *

(15) ASME PTC 22-2014, Gas Turbines: Performance Test Codes, (Issued December 31, 2014), IBR approved for § 60.5580.

(16) ASME PTC 46-1996, Performance Test Code on Overall Plant Performance, (Issued October 15, 1997), IBR approved for § 60.5580.

* * * * *

(h) * * *

(37) ASTM D388-99 (Reapproved 2004)^{e1} Standard Classification of Coals by Rank, IBR approved for §§ 60.41, 60.45(f), 60.41Da, 60.41b, 60.41c, 60.251, and 60.5580.

* * * * *

(42) ASTM D396-98, Standard Specification for Fuel Oils, IBR approved for §§ 60.41b, 60.41c, 60.111(b), 60.111a(b), and 60.5580.

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(46) ASTM D975-08a, Standard Specification for Diesel Fuel Oils, IBR approved for §§ 60.41b 60.41c, and 60.5580.

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(138) ASTM D3699-08, Standard Specification for Kerosine, including Appendix X1, (Approved September 1, 2008), IBR approved for §§ 60.41b, 60.41c, and 60.5580.

* * * * *

(187) ASTM D6751-11b, Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels, including Appendices X1 through X3, (Approved July 15, 2011), IBR approved for §§ 60.41b, 60.41c, and 60.5580.

* * * * *

(190) ASTM D7467-10, Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20), including Appendices X1 through X3, (Approved August 1, 2010), IBR approved for §§ 60.41b, 60.41c, and 60.5580.

* * * * *

(m) * * *

(1) ISO 2314:2009(E), Gas turbines—Acceptance tests, Third edition

(December 15, 2009), IBR approved for § 60.5580.

* * * * *

■ 3. Part 60 is amended by adding subpart TTTT to read as follows:

Subpart TTTT—Standards of Performance for Greenhouse Gas Emissions for Electric Generating Units

Applicability

Sec.

60.5508 What is the purpose of this subpart?

60.5509 Am I subject to this subpart?

Emission Standards

60.5515 Which pollutants are regulated by this subpart?

60.5520 What CO₂ emissions standard must I meet?

General Compliance Requirements

60.5525 What are my general requirements for complying with this subpart?

Monitoring and Compliance Determination Procedures

60.5535 How do I monitor and collect data to demonstrate compliance?

60.5540 How do I demonstrate compliance with my CO₂ emissions standard and determine excess emissions?

Notifications, Reports, and Records

60.5550 What notifications must I submit and when?

60.5555 What reports must I submit and when?

60.5560 What records must I maintain?

60.5565 In what form and how long must I keep my records?

Other Requirements and Information

60.5570 What parts of the general provisions apply to my affected EGU?

60.5575 Who implements and enforces this subpart?

60.5580 What definitions apply to this subpart?

Table 1 of Subpart TTTT of Part 60—CO₂ Emission Standards for Affected Steam Generating Units and Integrated Gasification Combined Cycle Facilities that Commenced Construction after January 8, 2014 and Reconstruction or Modification after June 18, 2014

Table 2 of Subpart TTTT of Part 60—CO₂ Emission Standards for Affected Stationary Combustion Turbines that Commenced Construction after January 8, 2014 and Reconstruction after June 18, 2014 (Net Energy Output-based Standards Applicable as Approved by the Administrator)

Table 3 to Subpart TTTT of Part 60—Applicability of Subpart A of Part 60 (General Provisions) to Subpart TTTT

Applicability

§ 60.5508 What is the purpose of this subpart?

This subpart establishes emission standards and compliance schedules for the control of greenhouse gas (GHG) emissions from a steam generating unit,

IGCC, or a stationary combustion turbine that commences construction after January 8, 2014 or commences modification or reconstruction after June 18, 2014. An affected steam generating unit, IGCC, or stationary combustion turbine shall, for the purposes of this subpart, be referred to as an affected EGU.

§ 60.5509 Am I subject to this subpart?

(a) Except as provided for in paragraph (b) of this section, the GHG standards included in this subpart apply to any steam generating unit, IGCC, or stationary combustion turbine that commenced construction after January 8, 2014 or commenced reconstruction after June 18, 2014 that meets the relevant applicability conditions in paragraphs (a)(1) and (2) of this section. The GHG standards included in this subpart also apply to any steam generating unit or IGCC that commenced modification after June 18, 2014 that meets the relevant applicability conditions in paragraphs (a)(1) and (2) of this section.

(1) Has a base load rating greater than 260 GJ/h (250 MMBtu/h) of fossil fuel (either alone or in combination with any other fuel); and

(2) Serves a generator or generators capable of selling greater than 25 MW of electricity to a utility power distribution system.

(b) You are not subject to the requirements of this subpart if your affected EGU meets any of the conditions specified in paragraphs (b)(1) through (10) of this section.

(1) Your EGU is a steam generating unit or IGCC that is currently and always has been subject to a federally enforceable permit condition limiting annual net-electric sales to no more than one-third of its potential electric output or 219,000 MWh, whichever is greater.

(2) Your EGU is capable of combusting 50 percent or more non-fossil fuel and is also subject to a federally enforceable permit condition limiting the annual capacity factor for all fossil fuels combined of 10 percent (0.10) or less.

(3) Your EGU is a combined heat and power unit that is subject to a federally enforceable permit condition limiting annual net-electric sales to no more than either 219,000 MWh or the product of the design efficiency and the potential electric output, whichever is greater.

(4) Your EGU serves a generator along with other steam generating unit(s), IGCC, or stationary combustion turbine(s) where the effective generation capacity (determined based on a prorated output of the base load rating of each steam generating unit, IGCC, or

stationary combustion turbine) is 25 MW or less.

(5) Your EGU is a municipal waste combustor that is subject to subpart Eb of this part.

(6) Your EGU is a commercial or industrial solid waste incineration unit that is subject to subpart CCCC of this part.

(7) Your EGU is a steam generating unit or IGCC that undergoes a modification resulting in an hourly increase in CO₂ emissions (mass per hour) of 10 percent or less (2 significant figures). Modified units that are not subject to the requirements of this subpart pursuant to this subsection continue to be existing units under section 111 with respect to CO₂ emissions standards.

(8) Your EGU is a stationary combustion turbine that is not capable of combusting natural gas (*e.g.*, not connected to a natural gas pipeline).

(9) The proposed Washington County EGU project described in Air Quality Permit No. 4911-303-0051-P-01-0 issued by the Georgia Department of Natural Resources, Environmental Protection Division, Air Protection Branch, effective April 8, 2010, provided that construction had not commenced for NSPS purposes as of January 8, 2014.

(10) The proposed Holcomb EGU project described in Air Emission Source Construction Permit 0550023 issued by the Kansas Department of Health and Environment, Division of Environment, effective December 16, 2010, provided that construction had not commenced for NSPS purposes as of January 8, 2014.

Emission Standards

§ 60.5515 Which pollutants are regulated by this subpart?

(a) The pollutants regulated by this subpart are greenhouse gases. The greenhouse gas standard in this subpart is in the form of a limitation on emission of carbon dioxide.

(b) *PSD and title V thresholds for greenhouse gases.* (1) For the purposes of 40 CFR 51.166(b)(49)(ii), with respect to GHG emissions from affected facilities, the “pollutant that is subject to the standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in § 51.166(b)(48) of this chapter and in any SIP approved by the EPA that is interpreted to incorporate, or specifically incorporates, § 51.166(b)(48).

(2) For the purposes of 40 CFR 52.21(b)(50)(ii), with respect to GHG

emissions from affected facilities, the “pollutant that is subject to the standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is subject to regulation under the Act as defined in § 52.21(b)(49) of this chapter.

(3) For the purposes of 40 CFR 70.2, with respect to greenhouse gas emissions from affected facilities, the “pollutant that is subject to any standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is “subject to regulation” as defined in 40 CFR 70.2.

(4) For the purposes of 40 CFR 71.2, with respect to greenhouse gas emissions from affected facilities, the “pollutant that is subject to any standard promulgated under section 111 of the Act” shall be considered to be the pollutant that otherwise is “subject to regulation” as defined in 40 CFR 71.2.

§ 60.5520 What CO₂ emission standard must I meet?

(a) For each affected EGU subject to this subpart, you must not discharge from the affected EGU any gases that contain CO₂ in excess of the applicable CO₂ emission standard specified in Table 1 or 2 of this subpart, consistent with paragraphs (b), (c), and (d) of this section, as applicable.

(b) Except as specified in paragraphs (c) and (d) of this section, you must comply with the applicable gross energy output standard, and your operating permit must include monitoring, recordkeeping, and reporting methodologies based on the applicable gross energy output standard. For the remainder of this subpart (for sources that do not qualify under paragraphs (c) and (d) of this section), where the term “gross or net energy output” is used, the term that applies to you is “gross energy output.”

(c) As an alternate to meeting the requirements in paragraph (b) of this section, an owner or operator of a stationary combustion turbine may petition the Administrator in writing to comply with the alternate applicable net energy output standard. If the Administrator grants the petition, beginning on the date the Administrator grants the petition, the affected EGU must comply with the applicable net energy output-based standard included in this subpart. Your operating permit must include monitoring, recordkeeping, and reporting methodologies based on the applicable net energy output standard. For the remainder of this subpart, where the term “gross or net energy output” is used, the term that applies to you is “net energy output.” Owners or

operators complying with the net output-based standard must petition the Administrator to switch back to complying with the gross energy output-based standard.

(d) Stationary combustion turbines subject to a heat input-based standard in Table 2 of this subpart that are only permitted to burn one or more uniform fuels, as described in paragraph (d)(1) of this section, are only subject to the monitoring requirements in paragraph (d)(1). All other stationary combustion turbines subject to a heat input based standard in Table 2 are subject to the requirements in paragraph (d)(2) of this section.

(1) Stationary combustion turbines that are only permitted to burn fuels with a consistent chemical composition (*i.e.*, uniform fuels) that result in a consistent emission rate of 160 lb CO₂/MMBtu or less are not subject to any monitoring or reporting requirements under this subpart. These fuels include, but are not limited to, natural gas, methane, butane, butylene, ethane, ethylene, propane, naphtha, propylene, jet fuel kerosene, No. 1 fuel oil, No. 2 fuel oil, and biodiesel. Stationary

combustion turbines qualifying under this paragraph are only required to maintain purchase records for permitted fuels.

(2) Stationary combustion turbines permitted to burn fuels that do not have a consistent chemical composition or that do not have an emission rate of 160 lb CO₂/MMBtu or less (*e.g.*, non-uniform fuels such as residual oil and non-jet fuel kerosene) must follow the monitoring, recordkeeping, and reporting requirements necessary to complete the heat input-based calculations under this subpart.

General Compliance Requirements

§ 60.5525 What are my general requirements for complying with this subpart?

Combustion turbines qualifying under § 60.5520(d)(1) are not subject to any requirements in this section other than the requirement to maintain fuel purchase records for permitted fuel(s). For all other affected sources, compliance with the applicable CO₂ emission standard of this subpart shall be determined on a 12-operating-month rolling average basis. See Table 1 or 2

of this subpart for the applicable CO₂ emission standards.

(a) You must be in compliance with the emission standards in this subpart that apply to your affected EGU at all times. However, you must determine compliance with the emission standards only at the end of the applicable operating month, as provided in paragraph (a)(1) of this section.

(1) For each affected EGU subject to a CO₂ emissions standard based on a 12-operating-month rolling average, you must determine compliance monthly by calculating the average CO₂ emissions rate for the affected EGU at the end of the initial and each subsequent 12-operating-month period.

(2) Consistent with § 60.5520(d)(2), if your affected stationary combustion turbine is subject to an input-based CO₂ emissions standard, you must determine the total heat input in million Btus (MMBtu) from natural gas (HTIP_{ng}) and the total heat input from all other fuels combined (HTIP_o) using one of the methods under § 60.5535(d)(2). You must then use the following equation to determine the applicable emissions standard during the compliance period:

$$CO_2 \text{ emission standard} = \frac{(120 \times HTIP_{ng}) + (160 \times HTIP_o)}{HTIP_{ng} + HTIP_o} \quad (\text{Eq. 1})$$

Where:

CO₂ emission standard = the emission standard during the compliance period in units of lb/MMBtu.

HTIP_{ng} = the heat input in MMBtu from natural gas.

HTIP_o = the heat input in MMBtu from all fuels other than natural gas.

120 = allowable emission rate in lb of CO₂/MMBtu for heat input derived from natural gas.

160 = allowable emission rate in lb of CO₂/MMBtu for heat input derived from all fuels other than natural gas.

(b) At all times you must operate and maintain each affected EGU, including associated equipment and monitors, in a manner consistent with safety and good air pollution control practice. The Administrator will determine if you are using consistent operation and maintenance procedures based on information available to the Administrator that may include, but is not limited to, fuel use records, monitoring results, review of operation and maintenance procedures and records, review of reports required by this subpart, and inspection of the EGU.

(c) Within 30 days after the end of the initial compliance period (*i.e.*, no more than 30 days after the first 12-operating-month compliance period), you must

make an initial compliance determination for your affected EGU(s) with respect to the applicable emissions standard in Table 1 or 2 of this subpart, in accordance with the requirements in this subpart. The first operating month included in the initial 12-operating-month compliance period shall be determined as follows:

(1) For an affected EGU that commences commercial operation (as defined in § 72.2 of this chapter) on or after October 23, 2015, the first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which emissions reporting is required to begin under:

(i) Section 63.5555(c)(3)(i), for units subject to the Acid Rain Program; or

(ii) Section 63.5555(c)(3)(ii)(A), for units that are not in the Acid Rain Program.

(2) For an affected EGU that has commenced COMMERCIAL operation (as defined in § 72.2 of this chapter) prior to October 23, 2015:

(i) If the date on which emissions reporting is required to begin under § 75.64(a) of this chapter has passed prior to October 23, 2015, emissions reporting shall begin according to

§ 63.5555(c)(3)(i) (for Acid Rain program units), or according to

§ 63.5555(c)(3)(ii)(B) (for units that are not subject to the Acid Rain Program). The first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which the rule becomes effective; or

(ii) If the date on which emissions reporting is required to begin under § 75.64(a) of this chapter occurs on or after October 23, 2015, then the first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which emissions reporting is required to begin under § 63.5555(c)(3)(ii)(A).

(3) For a modified or reconstructed EGU that becomes subject to this subpart, the first month of the initial compliance period shall be the first operating month (as defined in § 60.5580) after the calendar month in which emissions reporting is required to begin under § 63.5555(c)(3)(iii).

Monitoring and Compliance Determination Procedures

§ 60.5535 How do I monitor and collect data to demonstrate compliance?

(a) Combustion turbines qualifying under § 60.5520(d)(1) are not subject to any requirements in this section other than the requirement to maintain fuel purchase records for permitted fuel(s). If your combustion turbine uses non-uniform fuels as specified under § 60.5520(d)(2), you must monitor heat input in accordance with paragraph (c)(1) of this section, and you must monitor CO₂ emissions in accordance with either paragraph (b), (c)(2), or (c)(5) of this section. For all other affected sources, you must prepare a monitoring plan to quantify the hourly CO₂ mass emission rate (tons/h), in accordance with the applicable provisions in § 75.53(g) and (h) of this chapter. The electronic portion of the monitoring plan must be submitted using the ECMPs Client Tool and must be in place prior to reporting emissions data and/or the results of monitoring system certification tests under this subpart. The monitoring plan must be updated as necessary. Monitoring plan submittals must be made by the Designated Representative (DR), the Alternate DR, or a delegated agent of the DR (see § 60.5555(c)).

(b) You must determine the hourly CO₂ mass emissions in kilograms (kg) from your affected EGU(s) according to paragraphs (b)(1) through (5) of this section, or, if applicable, as provided in paragraph (c) of this section.

(1) For an affected coal-fired EGU or for an IGCC unit you must, and for all other affected EGUs you may, install, certify, operate, maintain, and calibrate a CO₂ continuous emission monitoring system (CEMS) to directly measure and record hourly average CO₂ concentrations in the affected EGU exhaust gases emitted to the atmosphere, and a flow monitoring system to measure hourly average stack gas flow rates, according to § 75.10(a)(3)(i) of this chapter. As an alternative to direct measurement of CO₂ concentration, provided that your EGU does not use carbon separation (e.g., carbon capture and storage), you may use data from a certified oxygen (O₂) monitor to calculate hourly average CO₂ concentrations, in accordance with § 75.10(a)(3)(iii) of this chapter. If you measure CO₂ concentration on a dry basis, you must also install, certify, operate, maintain, and calibrate a continuous moisture monitoring system, according to § 75.11(b) of this chapter. Alternatively, you may either use an appropriate fuel-specific default

moisture value from § 75.11(b) or submit a petition to the Administrator under § 75.66 of this chapter for a site-specific default moisture value.

(2) For each continuous monitoring system that you use to determine the CO₂ mass emissions, you must meet the applicable certification and quality assurance procedures in § 75.20 of this chapter and appendices A and B to part 75 of this chapter.

(3) You must use only unadjusted exhaust gas volumetric flow rates to determine the hourly CO₂ mass emissions rate from the affected EGU; you must not apply the bias adjustment factors described in Section 7.6.5 of appendix A to part 75 of this chapter to the exhaust gas flow rate data.

(4) You must select an appropriate reference method to setup (characterize) the flow monitor and to perform the ongoing RATAs, in accordance with part 75 of this chapter. If you use a Type-S pitot tube or a pitot tube assembly for the flow RATAs, you must calibrate the pitot tube or pitot tube assembly; you may not use the 0.84 default Type-S pitot tube coefficient specified in Method 2.

(5) Calculate the hourly CO₂ mass emissions (kg) as described in paragraphs (b)(5)(i) through (iv) of this section. Perform this calculation only for “valid operating hours”, as defined in § 60.5540(a)(1).

(i) Begin with the hourly CO₂ mass emission rate (tons/h), obtained either from Equation F–11 in Appendix F to part 75 of this chapter (if CO₂ concentration is measured on a wet basis), or by following the procedure in section 4.2 of appendix F to part 75 of this chapter (if CO₂ concentration is measured on a dry basis).

(ii) Next, multiply each hourly CO₂ mass emission rate by the EGU or stack operating time in hours (as defined in § 72.2 of this chapter), to convert it to tons of CO₂.

(iii) Finally, multiply the result from paragraph (b)(5)(ii) of this section by 909.1 to convert it from tons of CO₂ to kg. Round off to the nearest kg.

(iv) The hourly CO₂ tons/h values and EGU (or stack) operating times used to calculate CO₂ mass emissions are required to be recorded under § 75.57(e) of this chapter and must be reported electronically under § 75.64(a)(6) of this chapter. You must use these data to calculate the hourly CO₂ mass emissions.

(c) If your affected EGU exclusively combusts liquid fuel and/or gaseous fuel, as an alternative to complying with paragraph (b) of this section, you may determine the hourly CO₂ mass emissions according to paragraphs (c)(1)

through (4) of this section. If you use non-uniform fuels as specified in § 60.5520(d)(2), you may determine CO₂ mass emissions during the compliance period according to paragraph (c)(5) of this section.

(1) If you are subject to an output-based standard and you do not install CEMS in accordance with paragraph (b) of this section, you must implement the applicable procedures in appendix D to part 75 of this chapter to determine hourly EGU heat input rates (MMBtu/h), based on hourly measurements of fuel flow rate and periodic determinations of the gross calorific value (GCV) of each fuel combusted.

(2) For each measured hourly heat input rate, use Equation G–4 in appendix G to part 75 of this chapter to calculate the hourly CO₂ mass emission rate (tons/h). You may determine site-specific carbon-based F-factors (F_c) using Equation F–7b in section 3.3.6 of appendix F to part 75 of this chapter, and you may use these F_c values in the emissions calculations instead of using the default F_c values in the Equation G–4 nomenclature.

(3) For each “valid operating hour” (as defined in § 60.5540(a)(1)), multiply the hourly tons/h CO₂ mass emission rate from paragraph (c)(2) of this section by the EGU or stack operating time in hours (as defined in § 72.2 of this chapter), to convert it to tons of CO₂. Then, multiply the result by 909.1 to convert from tons of CO₂ to kg. Round off to the nearest two significant figures.

(4) The hourly CO₂ tons/h values and EGU (or stack) operating times used to calculate CO₂ mass emissions are required to be recorded under § 75.57(e) of this chapter and must be reported electronically under § 75.64(a)(6) of this chapter. You must use these data to calculate the hourly CO₂ mass emissions.

(5) If you operate a combustion turbine firing non-uniform fuels, as an alternative to following paragraphs (c)(1) through (4) of this section, you may determine CO₂ emissions during the compliance period using one of the following methods:

(i) Units firing fuel gas may determine the heat input during the compliance period following the procedure under § 60.107a(d) and convert this heat input to CO₂ emissions using Equation G–4 in appendix G to part 75 of this chapter.

(ii) You may use the procedure for determining CO₂ emissions during the compliance period based on the use of the Tier 3 methodology under § 98.33(a)(3) of this chapter.

(d) Consistent with § 60.5520, you must determine the basis of the emissions standard that applies to your

affected source in accordance with either paragraph (d)(1) or (2) of this section, as applicable:

(1) If you operate a source subject to an emissions standard established on an output basis (e.g., lb of CO₂ per gross or net MWh of energy output), you must install, calibrate, maintain, and operate a sufficient number of watt meters to continuously measure and record the hourly gross electric output or net electric output, as applicable, from the affected EGU(s). These measurements must be performed using 0.2 class electricity metering instrumentation and calibration procedures as specified under ANSI Standards No. C12.20 (incorporated by reference, see § 60.17). For a combined heat and power (CHP) EGU, as defined in § 60.5580, you must also install, calibrate, maintain, and operate meters to continuously (i.e., hour-by-hour) determine and record the total useful thermal output. For process steam applications, you will need to install, calibrate, maintain, and operate meters to continuously determine and record the hourly steam flow rate, temperature, and pressure. Your plan shall ensure that you install, calibrate, maintain, and operate meters to record each component of the determination, hour-by-hour.

(2) If you operate a source subject to an emissions standard established on a heat-input basis (e.g., lb CO₂/MMBtu) and your affected source uses non-uniform heating value fuels as delineated under § 60.5520(d), you must determine the total heat input for each fuel fired during the compliance period in accordance with one of the following procedures:

(i) Appendix D to part 75 of this chapter;

(ii) The procedures for monitoring heat input under § 60.107a(d);

(iii) If you monitor CO₂ emissions in accordance with the Tier 3 methodology under § 98.33(a)(3) of this chapter, you may convert your CO₂ emissions to heat input using the appropriate emission factor in Table C-1 of part 98 of this chapter. If your fuel is not listed in Table C-1, you must determine a fuel-specific carbon-based F-factor (F_c) in accordance with section 12.3.2 of EPA Method 19 of appendix A-7 to this part, and you must convert your CO₂ emissions to heat input using Equation G-4 in appendix G to part 75 of this chapter.

(e) Consistent with § 60.5520, if two or more affected EGUs serve a common electric generator, you must apportion the combined hourly gross or net energy output to the individual affected EGUs according to the fraction of the total steam load contributed by each EGU.

Alternatively, if the EGUs are identical, you may apportion the combined hourly gross or net electrical load to the individual EGUs according to the fraction of the total heat input contributed by each EGU.

(f) In accordance with §§ 60.13(g) and 60.5520, if two or more affected EGUs that implement the continuous emission monitoring provisions in paragraph (b) of this section share a common exhaust gas stack and are subject to the same emissions standard in Table 1 or 2 of this subpart, you may monitor the hourly CO₂ mass emissions at the common stack in lieu of monitoring each EGU separately. If you choose this option, the hourly gross or net energy output (electric, thermal, and/or mechanical, as applicable) must be the sum of the hourly loads for the individual affected EGUs and you must express the operating time as “stack operating hours” (as defined in § 72.2 of this chapter). If you attain compliance with the applicable emissions standard in § 60.5520 at the common stack, each affected EGU sharing the stack is in compliance.

(g) In accordance with §§ 60.13(g) and 60.5520 if the exhaust gases from an affected EGU that implements the continuous emission monitoring provisions in paragraph (b) of this section are emitted to the atmosphere through multiple stacks (or if the exhaust gases are routed to a common stack through multiple ducts and you elect to monitor in the ducts), you must monitor the hourly CO₂ mass emissions and the “stack operating time” (as defined in § 72.2 of this chapter) at each stack or duct separately. In this case, you must determine compliance with the applicable emissions standard in Table 1 or 2 of this subpart by summing the CO₂ mass emissions measured at the individual stacks or ducts and dividing by the total gross or net energy output for the affected EGU.

§ 60.5540 How do I demonstrate compliance with my CO₂ emissions standard and determine excess emissions?

(a) In accordance with § 60.5520, if you are subject to an output-based emission standard or you burn non-uniform fuels as specified in § 60.5520(d)(2), you must demonstrate compliance with the applicable CO₂ emission standard in Table 1 or 2 of this subpart as required in this section. For the initial and each subsequent 12-operating-month rolling average compliance period, you must follow the procedures in paragraphs (a)(1) through (7) of this section to calculate the CO₂ mass emissions rate for your affected EGU(s) in units of the applicable

emissions standard (i.e., either kg/MWh or lb/MMBtu). You must use the hourly CO₂ mass emissions calculated under § 60.5535(b) or (c), as applicable, and either the generating load data from § 60.5535(d)(1) for output-based calculations or the heat input data from § 60.5535(d)(2) for heat-input-based calculations. Combustion turbines firing non-uniform fuels that contain CO₂ prior to combustion (e.g., blast furnace gas or landfill gas) may sample the fuel stream to determine the quantity of CO₂ present in the fuel prior to combustion and exclude this portion of the CO₂ mass emissions from compliance determinations.

(1) Each compliance period shall include only “valid operating hours” in the compliance period, i.e., operating hours for which:

(i) “Valid data” (as defined in § 60.5580) are obtained for all of the parameters used to determine the hourly CO₂ mass emissions (kg) and, if a heat input-based standard applies, all the parameters used to determine total heat input for the hour are also obtained; and

(ii) The corresponding hourly gross or net energy output value is also valid data (*Note:* For hours with no useful output, zero is considered to be a valid value).

(2) You must exclude operating hours in which:

(i) The substitute data provisions of part 75 of this chapter are applied for any of the parameters used to determine the hourly CO₂ mass emissions or, if a heat input-based standard applies, for any parameters used to determine the hourly heat input; or

(ii) An exceedance of the full-scale range of a continuous emission monitoring system occurs for any of the parameters used to determine the hourly CO₂ mass emissions or, if applicable, to determine the hourly heat input; or

(iii) The total gross or net energy output (P_{gross/net}) or, if applicable, the total heat input is unavailable.

(3) For each compliance period, at least 95 percent of the operating hours in the compliance period must be valid operating hours, as defined in paragraph (a)(1) of this section.

(4) You must calculate the total CO₂ mass emissions by summing the valid hourly CO₂ mass emissions values from § 60.5535 for all of the valid operating hours in the compliance period.

(5) *Sources subject to output based standards.* For each valid operating hour of the compliance period that was used in paragraph (a)(4) of this section to calculate the total CO₂ mass emissions, you must determine P_{gross/net} (the corresponding hourly gross or net energy output in MWh) according to the

procedures in paragraphs (a)(3)(i) and (ii) of this section, as appropriate for the type of affected EGU(s). For an operating hour in which a valid CO₂ mass emissions value is determined according to paragraph (a)(1)(i) of this section, if there is no gross or net electrical output, but there is mechanical or useful thermal output, you must still determine the gross or net energy output for that hour. In addition,

for an operating hour in which a valid CO₂ mass emissions value is determined according to paragraph (a)(1)(i) of this section, but there is no (*i.e.*, zero) gross electrical, mechanical, or useful thermal output, you must use that hour in the compliance determination. For hours or partial hours where the gross electric output is equal to or less than the auxiliary loads, net electric output shall be counted as zero for this calculation.

(i) Calculate $P_{gross/net}$ for your affected EGU using the following equation. All terms in the equation must be expressed in units of megawatt-hours (MWh). To convert each hourly gross or net energy output (consistent with § 60.5520) value reported under part 75 of this chapter to MWh, multiply by the corresponding EGU or stack operating time.

$$P_{gross/net} = \frac{(Pe)_{ST} + (Pe)_{CT} + (Pe)_{IE} - (Pe)_{FW} - (Pe)_A}{TDF} + [(Pt)_{PS} + (Pt)_{HR} + (Pt)_{IE}] \quad (\text{Eq. } 2)$$

Where:

$P_{gross/net}$ = In accordance with § 60.5520, gross or net energy output of your affected EGU for each valid operating hour (as defined in § 60.5540(a)(1)) in MWh.

(Pe)_{ST} = Electric energy output plus mechanical energy output (if any) of steam turbines in MWh.

(Pe)_{CT} = Electric energy output plus mechanical energy output (if any) of stationary combustion turbine(s) in MWh.

(Pe)_{IE} = Electric energy output plus mechanical energy output (if any) of your affected EGU's integrated equipment that provides electricity or mechanical energy to the affected EGU or auxiliary equipment in MWh.

(Pe)_{FW} = Electric energy used to power boiler feedwater pumps at steam generating units in MWh. Not applicable to stationary combustion turbines, IGCC EGUs, or EGUs complying with a net energy output based standard.

(Pe)_A = Electric energy used for any auxiliary loads in MWh. Not applicable for determining P_{gross} .

(Pt)_{PS} = Useful thermal output of steam (measured relative to SATP conditions, as applicable) that is used for applications that do not generate additional electricity, produce mechanical energy output, or enhance the performance of the affected EGU. This is calculated using the equation specified in paragraph (a)(5)(ii) of this section in MWh.

(Pt)_{HR} = Non steam useful thermal output (measured relative to SATP conditions, as applicable) from heat recovery that is used for applications other than steam generation or performance enhancement of the affected EGU in MWh.

(Pt)_{IE} = Useful thermal output (relative to SATP conditions, as applicable) from any integrated equipment is used for applications that do not generate additional steam, electricity, produce mechanical energy output, or enhance the performance of the affected EGU in MWh.

TDF = Electric Transmission and Distribution Factor of 0.95 for a combined heat and power affected EGU where at least on an annual basis 20.0 percent of the total gross or net energy output consists of electric or direct mechanical output and 20.0 percent of the total gross or net

energy output consists of useful thermal output on a 12-operating-month rolling average basis, or 1.0 for all other affected EGUs.

(ii) If applicable to your affected EGU (for example, for combined heat and power), you must calculate (Pt)_{PS} using the following equation:

$$(Pt)_{PS} = \frac{Q_m \times H}{CF} \quad (\text{Eq. } 3)$$

Where:

Q_m = Measured steam flow in kilograms (kg) (or pounds (lb)) for the operating hour.

H = Enthalpy of the steam at measured temperature and pressure (relative to SATP conditions or the energy in the condensate return line, as applicable) in Joules per kilogram (J/kg) (or Btu/lb).

CF = Conversion factor of 3.6×10^9 J/MWh or 3.413×10^6 Btu/MWh.

(6) *Calculation of annual basis for standard.* Sources complying with energy output-based standards must calculate the basis (*i.e.*, denominator) of their actual annual emission rate in accordance with paragraph (a)(6)(i) of this section. Sources complying with heat input based standards must calculate the basis of their actual annual emission rate in accordance with paragraph (a)(6)(ii) of this section.

(i) In accordance with § 60.5520 if you are subject to an output-based standard, you must calculate the total gross or net energy output for the affected EGU's compliance period by summing the hourly gross or net energy output values for the affected EGU that you determined under paragraph (a)(5) of this section for all of the valid operating hours in the applicable compliance period.

(ii) If you are subject to a heat input-based standard, you must calculate the total heat input for each fuel fired during the compliance period. The calculation of total heat input for each individual fuel must include all valid operating hours and must also be consistent with any fuel-specific procedures specified within your

selected monitoring option under § 60.5535(d)(2).

(7) If you are subject to an output-based standard, you must calculate the CO₂ mass emissions rate for the affected EGU(s) (kg/MWh) by dividing the total CO₂ mass emissions value calculated according to the procedures in paragraph (a)(4) of this section by the total gross or net energy output value calculated according to the procedures in paragraph (a)(6)(i) of this section. Round off the result to two significant figures if the calculated value is less than 1,000; round the result to three significant figures if the calculated value is greater than 1,000. If you are subject to a heat input-based standard, you must calculate the CO₂ mass emissions rate for the affected EGU(s) (lb/MMBtu) by dividing the total CO₂ mass emissions value calculated according to the procedures in paragraph (a)(4) of this section by the total heat input calculated according to the procedures in paragraph (a)(6)(ii) of this section. Round off the result to two significant figures.

(b) In accordance with § 60.5520, to demonstrate compliance with the applicable CO₂ emission standard, for the initial and each subsequent 12-operating-month compliance period, the CO₂ mass emissions rate for your affected EGU must be determined according to the procedures specified in paragraph (a)(1) through (7) of this section and must be less than or equal to the applicable CO₂ emissions standard in Table 1 or 2 of this part, or the emissions standard calculated in accordance with § 60.5525(a)(2).

Notification, Reports, and Records

§ 60.5550 What notifications must I submit and when?

(a) You must prepare and submit the notifications specified in §§ 60.7(a)(1) and (3) and 60.19, as applicable to your affected EGU(s) (see Table 3 of this subpart).

(b) You must prepare and submit notifications specified in § 75.61 of this chapter, as applicable, to your affected EGUs.

§ 60.5555 What reports must I submit and when?

(a) You must prepare and submit reports according to paragraphs (a) through (d) of this section, as applicable.

(1) For affected EGUs that are required by § 60.5525 to conduct initial and on-going compliance determinations on a 12-operating-month rolling average basis, you must submit electronic quarterly reports as follows. After you have accumulated the first 12-operating months for the affected EGU, you must submit a report for the calendar quarter that includes the twelfth operating month no later than 30 days after the end of that quarter. Thereafter, you must submit a report for each subsequent calendar quarter, no later than 30 days after the end of the quarter.

(2) In each quarterly report you must include the following information, as applicable:

(i) Each rolling average CO₂ mass emissions rate for which the last (twelfth) operating month in a 12-operating-month compliance period falls within the calendar quarter. You must calculate each average CO₂ mass emissions rate for the compliance period according to the procedures in § 60.5540. You must report the dates (month and year) of the first and twelfth operating months in each compliance period for which you performed a CO₂ mass emissions rate calculation. If there are no compliance periods that end in the quarter, you must include a statement to that effect;

(ii) If one or more compliance periods end in the quarter, you must identify each operating month in the calendar quarter where your EGU violated the applicable CO₂ emission standard;

(iii) If one or more compliance periods end in the quarter and there are no violations for the affected EGU, you must include a statement indicating this in the report;

(iv) The percentage of valid operating hours in each 12-operating-month compliance period described in paragraph (a)(1)(i) of this section (*i.e.*, the total number of valid operating hours (as defined in § 60.5540(a)(1)) in that period divided by the total number of operating hours in that period, multiplied by 100 percent);

(v) Consistent with § 60.5520, the CO₂ emissions standard (as identified in Table 1 or 2 of this part) with which your affected EGU must comply; and

(vi) Consistent with § 60.5520, an indication whether or not the hourly gross or net energy output ($P_{gross/net}$) values used in the compliance determinations are based solely upon gross electrical load.

(3) In the final quarterly report of each calendar year, you must include the following:

(i) Consistent with § 60.5520, gross energy output or net energy output sold to an electric grid, as applicable to the units of your emission standard, over the four quarters of the calendar year; and

(ii) The potential electric output of the EGU.

(b) You must submit all electronic reports required under paragraph (a) of this section using the Emissions Collection and Monitoring Plan System (ECMPS) Client Tool provided by the Clean Air Markets Division in the Office of Atmospheric Programs of EPA.

(c)(1) For affected EGUs under this subpart that are also subject to the Acid Rain Program, you must meet all applicable reporting requirements and submit reports as required under subpart G of part 75 of this chapter.

(2) For affected EGUs under this subpart that are not in the Acid Rain Program, you must also meet the reporting requirements and submit reports as required under subpart G of part 75 of this chapter, to the extent that those requirements and reports provide applicable data for the compliance demonstrations required under this subpart.

(3)(i) For all newly-constructed affected EGUs under this subpart that are also subject to the Acid Rain Program, you must begin submitting the quarterly electronic emissions reports described in paragraph (c)(1) of this section in accordance with § 75.64(a) of this chapter, *i.e.*, beginning with data recorded on and after the earlier of:

(A) The date of provisional certification, as defined in § 75.20(a)(3) of this chapter; or

(B) 180 days after the date on which the EGU commences commercial operation (as defined in § 72.2 of this chapter).

(ii) For newly-constructed affected EGUs under this subpart that are not subject to the Acid Rain Program, you must begin submitting the quarterly electronic reports described in paragraph (c)(2) of this section, beginning with data recorded on and after:

(A) The date on which reporting is required to begin under § 75.64(a) of this chapter, if that date occurs on or after October 23, 2015; or

(B) October 23, 2015, if the date on which reporting would ordinarily be required to begin under § 75.64(a) of this chapter has passed prior to October 23, 2015.

(iii) For reconstructed or modified units, reporting of emissions data shall begin at the date on which the EGU becomes an affected unit under this subpart, provided that the ECMPS Client Tool is able to receive and process net energy output data on that date. Otherwise, emissions data reporting shall be on a gross energy output basis until the date that the Client Tool is first able to receive and process net energy output data.

(4) If any required monitoring system has not been provisionally certified by the applicable date on which emissions data reporting is required to begin under paragraph (c)(3) of this section, the maximum (or in some cases, minimum) potential value for the parameter measured by the monitoring system shall be reported until the required certification testing is successfully completed, in accordance with § 75.4(j) of this chapter, § 75.37(b) of this chapter, or section 2.4 of appendix D to part 75 of this chapter (as applicable). Operating hours in which CO₂ mass emission rates are calculated using maximum potential values are not "valid operating hours" (as defined in § 60.5540(a)(1)), and shall not be used in the compliance determinations under § 60.5540.

(d) For affected EGUs subject to the Acid Rain Program, the reports required under paragraphs (a) and (c)(1) of this section shall be submitted by:

(1) The person appointed as the Designated Representative (DR) under § 72.20 of this chapter; or

(2) The person appointed as the Alternate Designated Representative (ADR) under § 72.22 of this chapter; or

(3) A person (or persons) authorized by the DR or ADR under § 72.26 of this chapter to make the required submissions.

(e) For affected EGUs that are not subject to the Acid Rain Program, the owner or operator shall appoint a DR and (optionally) an ADR to submit the reports required under paragraphs (a) and (c)(2) of this section. The DR and ADR must register with the Clean Air Markets Division (CAMD) Business System. The DR may delegate the authority to make the required submissions to one or more persons.

(f) If your affected EGU captures CO₂ to meet the applicable emission limit, you must report in accordance with the requirements of 40 CFR part 98, subpart PP and either:

(1) Report in accordance with the requirements of 40 CFR part 98, subpart RR, if injection occurs on-site, or

(2) Transfer the captured CO₂ to an EGU or facility that reports in accordance with the requirements of 40 CFR part 98, subpart RR, if injection occurs off-site.

(3) Transfer the captured CO₂ to a facility that has received an innovative technology waiver from EPA pursuant to paragraph (g) of this section.

(g) Any person may request the Administrator to issue a waiver of the requirement that captured CO₂ from an affected EGU be transferred to a facility reporting under 40 CFR part 98, subpart RR. To receive a waiver, the applicant must demonstrate to the Administrator that its technology will store captured CO₂ as effectively as geologic sequestration, and that the proposed technology will not cause or contribute to an unreasonable risk to public health, welfare, or safety. In making this determination, the Administrator shall consider (among other factors) operating history of the technology, whether the technology will increase emissions or other releases of any pollutant other than CO₂, and permanence of the CO₂ storage. The Administrator may test the system itself, or require the applicant to perform any tests considered by the Administrator to be necessary to show the technology's effectiveness, safety, and ability to store captured CO₂ without release. The Administrator may grant conditional approval of a technology, with the approval conditioned on monitoring and reporting of operations. The Administrator may also withdraw approval of the waiver on evidence of releases of CO₂ or other pollutants. The Administrator will provide notice to the public of any application under this provision and provide public notice of any proposed action on a petition before the Administrator takes final action.

§ 60.5560 What records must I maintain?

(a) You must maintain records of the information you used to demonstrate compliance with this subpart as specified in § 60.7(b) and (f).

(b)(1) For affected EGUs subject to the Acid Rain Program, you must follow the applicable recordkeeping requirements and maintain records as required under subpart F of part 75 of this chapter.

(2) For affected EGUs that are not subject to the Acid Rain Program, you must also follow the recordkeeping requirements and maintain records as required under subpart F of part 75 of this chapter, to the extent that those records provide applicable data for the compliance determinations required

under this subpart. Regardless of the prior sentence, at a minimum, the following records must be kept, as applicable to the types of continuous monitoring systems used to demonstrate compliance under this subpart:

(i) Monitoring plan records under § 75.53(g) and (h) of this chapter;

(ii) Operating parameter records under § 75.57(b)(1) through (4) of this chapter;

(iii) The records under § 75.57(c)(2) of this chapter, for stack gas volumetric flow rate;

(iv) The records under § 75.57(c)(3) of this chapter for continuous moisture monitoring systems;

(v) The records under § 75.57(e)(1) of this chapter, except for paragraph (e)(1)(x), for CO₂ concentration monitoring systems or O₂ monitors used to calculate CO₂ concentration;

(vi) The records under § 75.58(c)(1) of this chapter, specifically paragraphs (c)(1)(i), (ii), and (viii) through (xiv), for oil flow meters;

(vii) The records under § 75.58(c)(4) of this chapter, specifically paragraphs (c)(4)(i), (ii), (iv), (v), and (vii) through (xi), for gas flow meters;

(viii) The quality-assurance records under § 75.59(a) of this chapter, specifically paragraphs (a)(1) through (12) and (15), for CEMS;

(ix) The quality-assurance records under § 75.59(a) of this chapter, specifically paragraphs (b)(1) through (4), for fuel flow meters; and

(x) Records of data acquisition and handling system (DAHS) verification under § 75.59(e) of this chapter.

(c) You must keep records of the calculations you performed to determine the hourly and total CO₂ mass emissions (tons) for:

(1) Each operating month (for all affected EGUs); and

(2) Each compliance period, including, each 12-operating-month compliance period.

(d) Consistent with § 60.5520, you must keep records of the applicable data recorded and calculations performed that you used to determine your affected EGU's gross or net energy output for each operating month.

(e) You must keep records of the calculations you performed to determine the percentage of valid CO₂ mass emission rates in each compliance period.

(f) You must keep records of the calculations you performed to assess compliance with each applicable CO₂ mass emissions standard in Table 1 or 2 of this subpart.

(g) You must keep records of the calculations you performed to determine any site-specific carbon-

based F-factors you used in the emissions calculations (if applicable).

§ 60.5565 In what form and how long must I keep my records?

(a) Your records must be in a form suitable and readily available for expeditious review.

(b) You must maintain each record for 3 years after the date of conclusion of each compliance period.

(c) You must maintain each record on site for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 60.7. Records that are accessible from a central location by a computer or other means that instantly provide access at the site meet this requirement. You may maintain the records off site for the remaining year(s) as required by this subpart.

Other Requirements and Information

§ 60.5570 What parts of the general provisions apply to my affected EGU?

Notwithstanding any other provision of this chapter, certain parts of the general provisions in §§ 60.1 through 60.19, listed in Table 3 to this subpart, do not apply to your affected EGU.

§ 60.5575 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the EPA, or a delegated authority such as your state, local, or tribal agency. If the Administrator has delegated authority to your state, local, or tribal agency, then that agency (as well as the EPA) has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency, the Administrator retains the authorities listed in paragraphs (b)(1) through (5) of this section and does not transfer them to the state, local, or tribal agency. In addition, the EPA retains oversight of this subpart and can take enforcement actions, as appropriate.

(1) Approval of alternatives to the emission standards.

(2) Approval of major alternatives to test methods.

(3) Approval of major alternatives to monitoring.

(4) Approval of major alternatives to recordkeeping and reporting.

(5) Performance test and data reduction waivers under § 60.8(b).

§ 60.5580 What definitions apply to this subpart?

As used in this subpart, all terms not defined herein will have the meaning given them in the Clean Air Act and in subpart A (general provisions of this part).

Annual capacity factor means the ratio between the actual heat input to an EGU during a calendar year and the potential heat input to the EGU had it been operated for 8,760 hours during a calendar year at the base load rating.

Base load rating means the maximum amount of heat input (fuel) that an EGU can combust on a steady state basis, as determined by the physical design and characteristics of the EGU at ISO conditions. For a stationary combustion turbine, *base load rating* includes the heat input from duct burners.

Coal means all solid fuels classified as anthracite, bituminous, subbituminous, or lignite by ASTM International in ASTM D388–99 (Reapproved 2004) ^{ε1} (incorporated by reference, see § 60.17), coal refuse, and petroleum coke. Synthetic fuels derived from coal for the purpose of creating useful heat, including, but not limited to, solvent-refined coal, gasified coal (not meeting the definition of natural gas), coal-oil mixtures, and coal-water mixtures are included in this definition for the purposes of this subpart.

Combined cycle unit means an electric generating unit that uses a stationary combustion turbine from which the heat from the turbine exhaust gases is recovered by a heat recovery steam generating unit (HRSG) to generate additional electricity.

Combined heat and power unit or CHP unit, (also known as “cogeneration”) means an electric generating unit that that use a steam generating unit or stationary combustion turbine to simultaneously produce both electric (or mechanical) and useful thermal output from the same primary energy source.

Design efficiency means the rated overall net efficiency (e.g., electric plus useful thermal output) on a lower heating value basis at the base load rating, at ISO conditions, and at the maximum useful thermal output (e.g., CHP unit with condensing steam turbines would determine the design efficiency at the maximum level of extraction and/or bypass). Design efficiency shall be determined using one of the following methods: ASME PTC 22 Gas Turbines (incorporated by reference, see § 60.17), ASME PTC 46 Overall Plant Performance (incorporated by reference, see § 60.17) or ISO 2314 Gas turbines—acceptance tests (incorporated by reference, see § 60.17).

Distillate oil means fuel oils that comply with the specifications for fuel oil numbers 1 and 2, as defined by ASTM International in ASTM D396–98 (incorporated by reference, see § 60.17); diesel fuel oil numbers 1 and 2, as defined by ASTM International in ASTM D975–08a (incorporated by reference, see § 60.17); kerosene, as defined by ASTM International in ASTM D3699 (incorporated by reference, see § 60.17); biodiesel as defined by ASTM International in ASTM D6751 (incorporated by reference, see § 60.17); or biodiesel blends as defined by ASTM International in ASTM D7467 (incorporated by reference, see § 60.17).

Electric Generating units or EGU means any steam generating unit, IGCC unit, or stationary combustion turbine that is subject to this rule (i.e., meets the applicability criteria)

Fossil fuel means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such material for the purpose of creating useful heat.

Gaseous fuel means any fuel that is present as a gas at ISO conditions and includes, but is not limited to, natural gas, refinery fuel gas, process gas, coke-oven gas, synthetic gas, and gasified coal.

Gross energy output means:

(1) For stationary combustion turbines and IGCC, the gross electric or direct mechanical output from both the EGU (including, but not limited to, output from steam turbine(s), combustion turbine(s), and gas expander(s)) plus 100 percent of the useful thermal output.

(2) For steam generating units, the gross electric or mechanical output from the affected EGU(s) (including, but not limited to, output from steam turbine(s), combustion turbine(s), and gas expander(s)) minus any electricity used to power the feedwater pumps plus 100 percent of the useful thermal output;

(3) For combined heat and power facilities where at least 20.0 percent of the total gross energy output consists of electric or direct mechanical output and 20.0 percent of the total gross energy output consists of useful thermal output on a 12-operating-month rolling average basis, the gross electric or mechanical output from the affected EGU (including, but not limited to, output from steam turbine(s), combustion turbine(s), and gas expander(s)) minus any electricity used to power the feedwater pumps (the electric auxiliary load of boiler feedwater pumps is not applicable to IGCC facilities), that difference divided by 0.95, plus 100 percent of the useful thermal output.

Heat recovery steam generating unit (HRSG) means an EGU in which hot exhaust gases from the combustion turbine engine are routed in order to extract heat from the gases and generate useful output. Heat recovery steam generating units can be used with or without duct burners.

Integrated gasification combined cycle facility or IGCC means a combined cycle facility that is designed to burn fuels containing 50 percent (by heat input) or more solid-derived fuel not meeting the definition of natural gas, plus any integrated equipment that provides electricity or useful thermal output to the affected EGU or auxiliary equipment. The Administrator may waive the 50 percent solid-derived fuel requirement during periods of the gasification system construction, startup and commissioning, shutdown, or repair. No solid fuel is directly burned in the EGU during operation.

ISO conditions means 288 Kelvin (15°C), 60 percent relative humidity and 101.3 kilopascals pressure.

Liquid fuel means any fuel that is present as a liquid at ISO conditions and includes, but is not limited to, distillate oil and residual oil.

Mechanical output means the useful mechanical energy that is not used to operate the affected EGU(s), generate electricity and/or thermal energy, or to enhance the performance of the affected EGU. Mechanical energy measured in horsepower hour should be converted into MWh by multiplying it by 745.7 then dividing by 1,000,000.

Natural gas means a fluid mixture of hydrocarbons (e.g., methane, ethane, or propane), composed of at least 70 percent methane by volume or that has a gross calorific value between 35 and 41 megajoules (MJ) per dry standard cubic meter (950 and 1,100 Btu per dry standard cubic foot), that maintains a gaseous state under ISO conditions. Finally, natural gas does not include the following gaseous fuels: Landfill gas, digester gas, refinery gas, sour gas, blast furnace gas, coal-derived gas, producer gas, coke oven gas, or any gaseous fuel produced in a process which might result in highly variable CO₂ content or heating value.

Net-electric sales means:

(1) The gross electric sales to the utility power distribution system minus purchased power; or

(2) For combined heat and power facilities where at least 20.0 percent of the total gross energy output consists of electric or direct mechanical output and at least 20.0 percent of the total gross energy output consists of useful thermal output on an annual basis, the gross electric sales to the utility power

distribution system minus purchased power of the thermal host facility or facilities.

(3) Electricity supplied to other facilities that produce electricity to offset auxiliary loads are included when calculating net-electric sales.

(4) Electric sales that result from a system emergency are not included when calculating net-electric sales.

Net-electric output means the amount of gross generation the generator(s) produces (including, but not limited to, output from steam turbine(s), combustion turbine(s), and gas expander(s)), as measured at the generator terminals, less the electricity used to operate the plant (*i.e.*, auxiliary loads); such uses include fuel handling equipment, pumps, fans, pollution control equipment, other electricity needs, and transformer losses as measured at the transmission side of the step up transformer (*e.g.*, the point of sale).

Net energy output means:

(1) The net electric or mechanical output from the affected EGU plus 100 percent of the useful thermal output; or

(2) For combined heat and power facilities where at least 20.0 percent of the total gross or net energy output consists of electric or direct mechanical output and at least 20.0 percent of the total gross or net energy output consists of useful thermal output on a 12-month rolling average basis, the net electric or mechanical output from the affected EGU divided by 0.95, plus 100 percent of the useful thermal output.

Operating month means a calendar month during which any fuel is combusted in the affected EGU at any time.

Petroleum means crude oil or a fuel derived from crude oil, including, but not limited to, distillate and residual oil.

Potential electric output means 33 percent or the base load rating design efficiency at the maximum electric production rate (*e.g.*, CHP units with condensing steam turbines will operate at maximum electric production), whichever is greater, multiplied by the base load rating (expressed in MMBtu/h) of the EGU, multiplied by 10^6 Btu/MMBtu, divided by 3,413 Btu/KWh, divided by 1,000 kWh/MWh, and multiplied by 8,760 h/yr (*e.g.*, a 35 percent efficient affected EGU with a 100 MW (341 MMBtu/h) fossil fuel heat input capacity would have a 306,000 MWh 12-month potential electric output capacity).

Standard ambient temperature and pressure (SATP) conditions means 298.15 Kelvin (25 °C, 77 °F) and 100.0 kilopascals (14.504 psi, 0.987 atm) pressure. The enthalpy of water at SATP conditions is 50 Btu/lb.

Solid fuel means any fuel that has a definite shape and volume, has no tendency to flow or disperse under moderate stress, and is not liquid or gaseous at ISO conditions. This includes, but is not limited to, coal, biomass, and pulverized solid fuels.

Stationary combustion turbine means all equipment including, but not limited to, the turbine engine, the fuel, air, lubrication and exhaust gas systems, control systems (except emissions control equipment), heat recovery system, fuel compressor, heater, and/or pump, post-combustion emission control technology, and any ancillary components and sub-components comprising any simple cycle stationary combustion turbine, any combined cycle combustion turbine, and any combined heat and power combustion turbine based system plus any integrated equipment that provides electricity or useful thermal output to the combustion turbine engine, heat recovery system or auxiliary equipment. Stationary means that the combustion turbine is not self-propelled or intended to be propelled while performing its function. It may, however, be mounted on a vehicle for portability. A stationary combustion turbine that burns any solid fuel directly is considered a steam generating unit.

Steam generating unit means any furnace, boiler, or other device used for combusting fuel and producing steam (nuclear steam generators are not included) plus any integrated equipment that provides electricity or useful thermal output to the affected EGU(s) or auxiliary equipment.

System emergency means any abnormal system condition that the Regional Transmission Organizations (RTO), Independent System Operators (ISO) or control area Administrator determines requires immediate automatic or manual action to prevent or limit loss of transmission facilities or generators that could adversely affect the reliability of the power system and therefore call for maximum generation resources to operate in the affected area, or for the specific affected EGU to operate to avert loss of load.

Useful thermal output means the thermal energy made available for use in

any heating application (*e.g.*, steam delivered to an industrial process for a heating application, including thermal cooling applications) that is not used for electric generation, mechanical output at the affected EGU, to directly enhance the performance of the affected EGU (*e.g.*, economizer output is not useful thermal output, but thermal energy used to reduce fuel moisture is considered useful thermal output), or to supply energy to a pollution control device at the affected EGU. Useful thermal output for affected EGU(s) with no condensate return (or other thermal energy input to the affected EGU(s)) or where measuring the energy in the condensate (or other thermal energy input to the affected EGU(s)) would not meaningfully impact the emission rate calculation is measured against the energy in the thermal output at SATP conditions. Affected EGU(s) with meaningful energy in the condensate return (or other thermal energy input to the affected EGU) must measure the energy in the condensate and subtract that energy relative to SATP conditions from the measured thermal output.

Valid data means quality-assured data generated by continuous monitoring systems that are installed, operated, and maintained according to part 75 of this chapter. For CEMS, the initial certification requirements in § 75.20 of this chapter and appendix A to part 75 of this chapter must be met before quality-assured data are reported under this subpart; for on-going quality assurance, the daily, quarterly, and semiannual/annual test requirements in sections 2.1, 2.2, and 2.3 of appendix B to part 75 of this chapter must be met and the data validation criteria in sections 2.1.5, 2.2.3, and 2.3.2 of appendix B to part 75 of this chapter apply. For fuel flow meters, the initial certification requirements in section 2.1.5 of appendix D to part 75 of this chapter must be met before quality-assured data are reported under this subpart (except for qualifying commercial billing meters under section 2.1.4.2 of appendix D to part 75), and for on-going quality assurance, the provisions in section 2.1.6 of appendix D to part 75 apply (except for qualifying commercial billing meters).

Violation means a specified averaging period over which the CO₂ emissions rate is higher than the applicable emissions standard located in Table 1 or 2 of this subpart.

TABLE 1 OF SUBPART TTTT OF PART 60—CO₂ EMISSION STANDARDS FOR AFFECTED STEAM GENERATING UNITS AND INTEGRATED GASIFICATION COMBINED CYCLE FACILITIES THAT COMMENCED CONSTRUCTION AFTER JANUARY 8, 2014 AND RECONSTRUCTION OR MODIFICATION AFTER JUNE 18, 2014

[Note: Numerical values of 1,000 or greater have a minimum of 3 significant figures and numerical values of less than 1,000 have a minimum of 2 significant figures]

Affected EGU	CO ₂ Emission standard
Newly constructed steam generating unit or integrated gasification combined cycle (IGCC).	640 kg CO ₂ /MWh of gross energy output (1,400 lb CO ₂ /MWh).
Reconstructed steam generating unit or IGCC that has base load rating of 2,100 GJ/h (2,000 MMBtu/h) or less.	910 kg of CO ₂ per MWh of gross energy output (2,000 lb CO ₂ /MWh).
Reconstructed steam generating unit or IGCC that has a base load rating greater than 2,100 GJ/h (2,000 MMBtu/h).	820 kg of CO ₂ per MWh of gross energy output (1,800 lb CO ₂ /MWh).
Modified steam generating unit or IGCC	A unit-specific emission limit determined by the unit's best historical annual CO ₂ emission rate (from 2002 to the date of the modification); the emission limit will be no lower than: <ol style="list-style-type: none"> 1,800 lb CO₂/MWh-gross for units with a base load rating greater than 2,000 MMBtu/h; or 2,000 lb CO₂/MWh-gross for units with a base load rating of 2,000 MMBtu/h or less.

TABLE 2 OF SUBPART TTTT OF PART 60—CO₂ EMISSION STANDARDS FOR AFFECTED STATIONARY COMBUSTION TURBINES THAT COMMENCED CONSTRUCTION AFTER JANUARY 8, 2014 AND RECONSTRUCTION AFTER JUNE 18, 2014 (NET ENERGY OUTPUT-BASED STANDARDS APPLICABLE AS APPROVED BY THE ADMINISTRATOR)

[Note: Numerical values of 1,000 or greater have a minimum of 3 significant figures and numerical values of less than 1,000 have a minimum of 2 significant figures]

Affected EGU	CO ₂ Emission standard
Newly constructed or reconstructed stationary combustion turbine that supplies more than its design efficiency or 50 percent, whichever is less, times its potential electric output as net-electric sales on both a 12-operating month and a 3-year rolling average basis and combusts more than 90% natural gas on a heat input basis on a 12-operating-month rolling average basis.	450 kg of CO ₂ per MWh of gross energy output (1,000 lb CO ₂ /MWh); or 470 kilograms (kg) of CO ₂ per megawatt-hour (MWh) of net energy output (1,030 lb/MWh).
Newly constructed or reconstructed stationary combustion turbine that supplies its design efficiency or 50 percent, whichever is less, times its potential electric output or less as net-electric sales on either a 12-operating month or a 3-year rolling average basis and combusts more than 90% natural gas on a heat input basis on a 12-operating-month rolling average basis.	50 kg CO ₂ per gigajoule (GJ) of heat input (120 lb CO ₂ /MMBtu).
Newly constructed and reconstructed stationary combustion turbine that combusts 90% or less natural gas on a heat input basis on a 12-operating-month rolling average basis.	50 kg CO ₂ /GJ of heat input (120 lb/MMBtu) to 69 kg CO ₂ /GJ of heat input (160 lb/MMBtu) as determined by the procedures in § 60.5525.

TABLE 3 TO SUBPART TTTT OF PART 60—APPLICABILITY OF SUBPART A OF PART 60 (GENERAL PROVISIONS) TO SUBPART TTTT

General provisions citation	Subject of citation	Applies to subpart TTTT	Explanation
§ 60.1	Applicability	Yes.	Additional terms defined in § 60.5580.
§ 60.2	Definitions	Yes	
§ 60.3	Units and Abbreviations	Yes.	
§ 60.4	Address	Yes	Does not apply to information reported electronically through ECMPS. Duplicate submittals are not required.
§ 60.5	Determination of construction or modification	Yes.	
§ 60.6	Review of plans	Yes.	
§ 60.7	Notification and Recordkeeping	Yes	Only the requirements to submit the notifications in § 60.7(a)(1) and (3) and to keep records of malfunctions in § 60.7(b), if applicable.
§ 60.8	Performance tests	No.	
§ 60.9	Availability of Information	Yes.	
§ 60.10	State authority	Yes.	All monitoring is done according to part 75.
§ 60.11	Compliance with standards and maintenance requirements.	No.	
§ 60.12	Circumvention	Yes.	
§ 60.13	Monitoring requirements	No	

TABLE 3 TO SUBPART TTTT OF PART 60—APPLICABILITY OF SUBPART A OF PART 60 (GENERAL PROVISIONS) TO SUBPART TTTT—Continued

General provisions citation	Subject of citation	Applies to subpart TTTT	Explanation
§ 60.14	Modification	Yes (steam generating units and IGCC facilities). No (stationary combustion turbines).	
§ 60.15	Reconstruction	Yes.	
§ 60.16	Priority list	No.	
§ 60.17	Incorporations by reference	Yes.	
§ 60.18	General control device requirements	No.	
§ 60.19	General notification and reporting requirements	Yes	Does not apply to notifications under § 75.61 or to information reported through ECMPS.

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 4. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 5. In § 70.2, the definition of “Regulated pollutant (for presumptive fee calculation)” is amended by:

■ a. Revising the introductory text;

■ b. Removing “or” from the end of paragraph (2);

■ c. Removing the period at the end of paragraph (3) and adding “; or” in its place; and

■ d. Adding paragraph (4).

The revision and additions read as follows:

§ 70.2 Definitions.

* * * * *

Regulated pollutant (for presumptive fee calculation), which is used only for purposes of § 70.9(b)(2), means any regulated air pollutant except the following:

* * * * *

(4) Greenhouse gases.

* * * * *

■ 6. Section 70.9 is amended by revising paragraph (b)(2)(i), and adding paragraph (b)(2)(v) to read as follows:

§ 70.9 Fee determination and certification.

* * * * *

(b) * * *

(2)(i) The Administrator will presume that the fee schedule meets the requirements of paragraph (b)(1) of this section if it would result in the collection and retention of an amount not less than \$25 per year [as adjusted pursuant to the criteria set forth in paragraph (b)(2)(iv) of this section] times the total tons of the actual emissions of each regulated pollutant (for presumptive fee calculation) emitted from part 70 sources and any

GHG cost adjustment required under paragraph (b)(2)(v) of this section.

* * * * *

(v) *GHG cost adjustment*. The amount calculated in paragraph (b)(2)(i) of this section shall be increased by the GHG cost adjustment determined as follows: For each activity identified in the following table, multiply the number of activities performed by the permitting authority by the burden hours per activity, and then calculate a total number of burden hours for all activities. Next, multiply the burden hours by the average cost of staff time, including wages, employee benefits and overhead.

Activity	Burden hours per activity
GHG completeness determination (for initial permit or updated application)	43
GHG evaluation for a permit modification or related permit action	7
GHG evaluation at permit renewal	10

* * * * *

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 7. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 8. In § 71.2, the definition of “Regulated pollutant (for fee calculation)” is amended by:

■ a. Removing “or” from the end of paragraph (2);

■ b. Removing the period at the end of paragraph (3) and adding “; or” in its place; and

■ b. Adding paragraph (4).

The revisions and additions read as follows:

§ 71.2 Definitions.

* * * * *

Regulated pollutant (for fee calculation), which is used only for purposes of § 71.9(c), means any “regulated air pollutant” except the following:

* * * * *

(4) Greenhouse gases.

* * * * *

■ 9. Section 71.9 is amended by:

■ a. Revising paragraphs (c)(1), (c)(2)(i), (c)(3), and (c)(4); and

■ b. Adding paragraph (c)(8).

The revisions and addition read as follows:

§ 71.9 Permit fees.

* * * * *

(c) * * *

(1) For part 71 programs that are administered by EPA, each part 71 source shall pay an annual fee which is the sum of:

(i) \$32 per ton (as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section) times the total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions; and

(ii) Any GHG fee adjustment required under paragraph (c)(8) of this section.

(2) * * *

(i) Where the EPA has not suspended its part 71 fee collection pursuant to paragraph (c)(2)(ii) of this section, the annual fee for each part 71 source shall be the sum of:

(A) \$24 per ton (as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section) times the total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions; and

(B) Any GHG fee adjustment required under paragraph (c)(8) of this section.

* * * * *

(3) For part 71 programs that are administered by EPA with contractor assistance, the per ton fee shall vary depending on the extent of contractor involvement and the cost to EPA of contractor assistance. The EPA shall establish a per ton fee that is based on the contractor costs for the specific part 71 program that is being administered, using the following formula:

$$\text{Cost per ton} = (E \times 32) + [(1 - E) \times \$C]$$

Where *E* represents EPA's proportion of total effort (expressed as a percentage of total effort) needed to administer the part 71 program, *1 - E* represents the contractor's effort, and *C* represents the contractor assistance cost on a per ton basis. *C* shall be computed by using the following formula:

$$C = [B + T + N] \text{ divided by } 12,300,000$$

Where *B* represents the base cost (contractor costs), where *T* represents travel costs, and where *N* represents nonpersonnel data management and tracking costs. In addition, each part 71 source shall pay a GHG fee adjustment for each activity as required under paragraph (c)(8) of this section.

(4) For programs that are delegated in part, the fee shall be computed using the following formula:

$$\text{Cost per ton} = (E \times 32) + (D \times 24) + [(1 - E - D) \times \$C]$$

Where *E* and *D* represent, respectively, the EPA and delegate

agency proportions of total effort (expressed as a percentage of total effort) needed to administer the part 71 program, *1 - E - D* represents the contractor's effort, and *C* represents the contractor assistance cost on a per ton basis. *C* shall be computed using the formula for contractor assistance cost found in paragraph (c)(3) of this section and shall be zero if contractor assistance is not utilized. In addition, each part 71 source shall pay a GHG fee adjustment for each activity as required under paragraph (c)(8) of this section.

* * * * *

(8) *GHG fee adjustment.* The annual fee shall be increased by a GHG fee adjustment for any source that has initiated an activity listed in the following table since the fee was last paid. The GHG fee adjustment shall be equal to the set fee provided in the table for each activity that has been initiated since the fee was last paid:

Activity	Set fee
GHG completeness determination (for initial permit or updated application)	\$2,236
GHG evaluation for a permit modification or related permit action	364
GHG evaluation at permit renewal	520

* * * * *

PART 98—MANDATORY GREENHOUSE GAS REPORTING

■ 10. The authority citation for part 98 is revised to read as follows:

Authority: 42 U.S.C. 7401–7671q.

■ 11. Section 98.426 is amended by adding paragraph (h) to read as follows:

§ 98.426 Data reporting requirements.

* * * * *

(h) If you capture a CO₂ stream from an electricity generating unit that is subject to subpart D of this part and transfer CO₂ to any facilities that are subject to subpart RR of this part, you must:

(1) Report the facility identification number associated with the annual GHG report for the subpart D facility;

(2) Report each facility identification number associated with the annual GHG reports for each subpart RR facility to which CO₂ is transferred; and

(3) Report the annual quantity of CO₂ in metric tons that is transferred to each subpart RR facility.

■ 12. Section 98.427 is amended by adding paragraph (d) to read as follows:

§ 98.427 Records that must be retained.

* * * * *

(d) Facilities subject to § 98.426(h) must retain records of CO₂ in metric tons that is transferred to each subpart RR facility.

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Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MURRAY ENERGY CORPORATION, et al.,)	In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, published June 29, 2015 (MCP No. 135)
Petitioners,)	
v.)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
Respondents.)	On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The thirty-one State Petitioners request oral argument to address the significant legal defects identified herein.

JURISDICTIONAL STATEMENT

The U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, “Agencies”) promulgated the Clean Water Rule on June 29, 2015. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054-37,105 (June 29, 2015) (“Final Rule” or “Rule”). The States filed timely petitions for review within 120 days, as required under 33 U.S.C. § 1369(B)(1). This Court held that it has jurisdiction over the State petitions under 33 U.S.C. § 1369(B)(1)(F). *See In re U.S. Dep’t of Defense and U.S. EPA Final Rule*, 817 F.3d 261, 273 (6th Cir. 2016). The States have standing because the Rule’s expansion of the Agencies’ authority under the Clean Water Act (“CWA”) imposes significant and sovereign harm upon them. *See, e.g.,* State Petitioners’ Motion for Stay Pending Review & Declarations, No. 15-3799, Dkt. 24, at 15-19 (filed Sept. 9, 2015).

INTRODUCTION

This case is about who has authority to regulate isolated land and water features that are far removed from any navigable waterway: the federal government or the sovereign States. The CWA, like the United States Constitution, reserves that authority to the States. Yet, in the Rule at issue here, the Agencies have asserted federal authority over many of those local resources.

When Congress enacted the CWA over forty years ago, it “chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.’” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (“*SWANCC*”) (quoting 33 U.S.C. § 1251(b)). But it granted to the federal government primary jurisdiction over the nation’s “navigable waters,” defined as “waters of the United States.” 33 U.S.C. § 1362(7). The resulting statutory regime balances traditional state authority over land use and water resources within their borders with the need for uniform federal regulation to protect navigable-in-fact waters.

The Agencies have repeatedly sought to undermine this balance, asserting regulatory control over land and water resources far removed from the nation’s navigable-in-fact waters. Twice in the last fifteen years, the Supreme Court has rebuked the Agencies for their overreach. In *SWANCC*, the Court invalidated a federal rule that asserted jurisdiction over isolated, local ponds because the ponds were used by migratory birds. 531 U.S. at 174. Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court held that the Agencies could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Agencies deemed tributaries of navigable waters. *Id.* at 742 (Scalia, J., plurality). In both *SWANCC* and *Rapanos*, the Court made clear

that, in order to preserve the federal-state regulatory balance, the statutory term “waters of the United States” must be given a meaning that is consistent with the primary purpose of the CWA—to protect navigable-in-fact waters. As the Court explained, “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S. at 172; *see also Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment) (a “central requirement” of the Act is that “the word ‘navigable’ in ‘navigable waters’ be given some importance”).

The Final Rule demonstrates that the Agencies have ignored the lessons of *SWANCC* and *Rapanos*. The Agencies now assert jurisdiction over the *very same* waters that the Supreme Court specifically held in those cases were outside the Agencies’ authority. But that is just the tip of the iceberg, as the Rule’s scope far exceeds what the Agencies sought to do in *SWANCC* and *Rapanos*. The Rule categorically federalizes stream beds that usually carry no water, and features that are connected to navigable-in-fact waters, if at all, only once a century. It reaches dry arroyos in New Mexico, ephemeral drainages in Wyoming, swales in Ohio farmland, isolated prairie potholes on the North Dakota plains, and thousands of square miles of Alaskan land that is frozen most of the year. The Rule destroys the

careful balance between federal and state authority that Congress struck in the CWA and that the Constitution mandates.

The Rule is also a textbook example of procedural failure. The Agencies finalized a rule that looks nothing like the version submitted for public comment, all while declaring that the “rule does not have federalism implications,” 80 Fed. Reg. at 37,102. The Corps determined that the Rule would not have significant environmental or socioeconomic implications, ignoring its obligations under the National Environmental Policy Act (“NEPA”). These deficiencies, coupled with the sheer magnitude of the federal regulation at issue, make the Rule one of the most significant procedural failures in the history of the Administrative Procedure Act (“APA”).

Finally, it is worth noting that for decades, the regulatory definition of the foundational term “waters of the United States” in the CWA has been named after the term it defines. But in an attempt to sell the country on an expansive new federal regulation, the Agencies coined a new term for their regulatory program—the “Clean Water Rule.” This terminology implies that without this Rule, the nation’s waters will be “unclean.” The thirty-one States challenging the Rule take deep exception to that implication. All of the States have robust regulatory programs that protect and preserve the natural resources within their boundaries.

ISSUES PRESENTED

1. May the Agencies violate the CWA by asserting federal authority over isolated local land and water resources?

2. May the Agencies define the statutory term “waters of the United States” based on central criteria they did not make available for public comment and that are not supported by the administrative record?

3. May the Agencies violate the Constitution by adopting a rule that (i) deprives the States of their Tenth Amendment rights, (ii) allows the Agencies to exercise power beyond the limits of the Commerce Clause, and (iii) is so vague that it prohibits ordinary people from understanding the CWA’s jurisdictional reach?

4. May the Corps violate NEPA by promulgating a major federal rule without preparing an environmental impact statement?

STATEMENT OF THE CASE

A. Statutory Background

The CWA provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.” 33 U.S.C. §1251(b). Congress granted the Agencies authority only over certain “navigable waters,” *see*,

e.g., *id.* § 1362(12), defining such waters as “waters of the United States, including the territorial seas,” *id.* § 1362(7).

The definition of “waters of the United States” determines the scope of numerous provisions in the CWA, including obligations imposed upon the States. Subject to certain exclusions, any person who causes pollutant discharges into “waters of the United States” must obtain a permit under the section 402 National Pollutant Discharge Elimination System (“NPDES”) program, *id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. Forty-six States have assumed NPDES permitting responsibilities within their borders under 33 U.S.C. § 1342(b), NPDES Program Authorizations, <https://www.epa.gov/npdes/npdes-program-authorizations> (last visited October 31, 2016); another two have assumed section 404 permitting under 33 U.S.C. § 1344(g), 40 C.F.R. § 233.70-.71. All States are responsible for developing water quality standards for those “waters of the [United] State[s]” that lie within their borders. 33 U.S.C. § 1313. They must report on the condition of those waters to EPA every two years, *id.* § 1315, and if waters are not achieving their designated standards, the States must develop detailed pollution diets for the underperforming waters and submit those plans to EPA for approval, *id.* § 1313(d). Finally, States must issue water quality certifications for every federal permit that is issued by EPA or the Corps within their borders. *Id.* § 1341. In short, the regulatory

obligations of the thirty-one State Petitioners under the CWA are inextricably entwined with the scope of federal jurisdiction established by the term “waters of the United States.”

For waters that are not subject to section 402 or 404 permitting requirements, the States regulate the water quality and use of such waters under their independent sovereign authority. *See, e.g.*, N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

B. Supreme Court Precedent

The Rule is not the first time the Agencies have attempted to expand their jurisdiction through unlawful interpretation of the statutory phrase “waters of the United States.” The Supreme Court has twice in the last fifteen years rejected the Agencies’ overbroad reading of that phrase.

In *SWANCC*, the Court invalidated the Migratory Bird Rule, which asserted jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds. 531 U.S. at 164. The Corps exceeded its authority, the Court held, because it claimed authority over “nonnavigable, isolated, intrastate waters,” *id.* at 172, such as seasonal ponds, *id.* at 163. The Court supported its determination by finding that the Corps’ interpretation would “alter[] the federal-state framework by

permitting federal encroachment upon a traditional state power”—specifically, the States’ “traditional and primary power over land and water use.” *Id.* at 173-74. The Court held that Congress had not, in the CWA, “express[ed] a desire to readjust the federal-state balance in this manner” or to invoke the “outer limits” of its power. *Id.* at 172-74.

In *Rapanos*, the Court rejected the Corps’ assertion of authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. 547 U.S. 715. The Court’s majority consisted of a four-Justice plurality opinion and Justice Kennedy’s concurrence in the judgment. The plurality concluded that the CWA “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster’s New International Dictionary* 2882 (2d ed. 1954)), and “wetlands with a continuous surface connection to” those waters, *id.* at 742. The plurality said that “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall” are outside CWA jurisdiction. *Id.* at 739.

Justice Kennedy, in turn, explained that the Agencies only have authority over waters that are navigable-in-fact and waters with a “significant nexus” to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment)

(citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940)). A water has a “significant nexus” if it “significantly affect[s] the chemical, physical, and biological integrity of” a navigable water. *Id.* at 779-80. Under Justice Kennedy’s approach, the Agencies are not permitted to assert jurisdiction over all “wetlands (however remote)” or all “continuously flowing stream[s] (however small).” *Id.* at 776; *see also id.* at 769 (“merest trickle, [even] if continuous” is insufficient). Justice Kennedy also specifically rejected the Corps’ “theory of jurisdiction,” namely, any “adjacency to tributaries, however remote and insubstantial.” *Id.* at 780.

C. The Proposed Rule

On April 21, 2014, the Agencies published a proposed rule redefining “waters of the United States.” 79 Fed. Reg. 22,188 (Apr. 21, 2014) (“Proposed Rule”). The Agencies proposed to categorize primary waters as “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce,” as well as “[a]ll interstate waters, including interstate wetlands” and “the territorial seas.” *Id.* at 22,262. The Proposed Rule then provided three additional categories of waters that would fall within the definition of “waters of the United States”: (1) all “tributaries” of primary waters would be per se jurisdictional; (2) all waters “adjacent” to primary waters would be per se jurisdictional, with “adjacency” defined as including all waters lying in a “riparian

area” or “flood plain”; and (3) additional waters, on a case-by-case basis, that “alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a” primary water, meaning they “significantly affect[] the chemical, physical, or biological integrity” of a primary water. *Id.* at 22,269.

The Proposed Rule triggered more than one million comments, including comments from the States. A prevailing theme in many of the State comments was that the proposal reached too many local water and land features that are remote from navigable waters. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__);¹ WY DEQ Comments 3, ID-18020 (JA__); AK DEC Comments 27, ID-19465 (JA__); TX AG Comments 6, ID-5143 (JA__). The States also expressed concern that the Connectivity Study, used as the primary scientific support for the Proposed Rule, failed to address adequately the significance of the connection between waters. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); ND Comments 5-6, ID-15365 (JA__). The States were also concerned that only a draft of the Connectivity Study was available during the comment period. *See* AK DEC Comments 11, ID-19465 (JA__). The Agencies failed to release a final and

¹ Citations to record materials within this brief are as follows: short title, a pinpoint page reference if applicable, an abbreviated EPA docket number, and a reference to the joint appendix.

significantly revised version of that report until two months *after* the close of the comment period. *See* Connectivity Study, ID-20859 (JA__); 80 Fed. Reg. 2,100 (Jan. 15, 2015).

Commenters also called for the Corps to comply with NEPA by preparing an Environmental Impact Statement (“EIS”) assessing the environmental and socioeconomic effects of the Proposed Rule, as compelled by 42 U.S.C. § 4332(2)(C). *See* AK DEC Comments 15-16, ID-19465 (JA__). The Corps ignored those comments and instead prepared a more streamlined Environmental Assessment (“EA”)² and corresponding Finding of No Significant Impact (“FONSI”),³ determining that the Rule fell below the significance threshold triggering the need for full evaluation in an EIS. And it waited to release those reports until six months *after* the close of the public comment period, shielding the Agencies from public scrutiny. *Compare* 79 Fed. Reg. 61,590, 61,591 (Oct. 14, 2014) (comments on proposed rule due November 14, 2014), *with* Final EA, ID-20867 (JA__) (released May 26, 2015).

D. The Final Rule

The Agencies published the Final Rule in the Federal Register on June 29, 2015. The Rule incorporates the proposal’s definition of primary waters and

² Final EA, ID-20867 (JA__).

³ FONSI, ID-20867 (JA__).

largely retains the proposal's sweeping approach to "tributaries," but then adopts a significantly different approach to "adjacent" waters and case-by-case waters. Importantly, several of the central components that guide the Rule's approach for adjacent waters and case-by-case waters are not even discussed, let alone analyzed, in the administrative record.

In general, the Rule includes three aspects that are relevant for the States' challenge in the present case:

Tributaries. The Rule claims per se jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5),⁴ defined as any "water that contributes flow, either directly or through another water" to a primary water and that is "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark," *id.* § 328.3(c)(3). This includes even usually dry channels that provide "intermittent or ephemeral" flow through "any number" of links. 80 Fed. Reg. at 37,076.

Adjacent Waters. The Rule asserts automatic jurisdiction over all waters "adjacent" to primary waters and their "tributaries." 33 C.F.R. § 328.3(a)(6). The Rule defines "adjacent" as all waters "bordering, contiguous, or neighboring"

⁴ The Final Rule's definition of "waters of the United States" is located in multiple parts of the Code of Federal Regulations. For ease of reference, this brief refers to the first location identified in the Rule, 33 C.F.R. Part 328.

primary waters, impoundments, or tributaries. *Id.* §328.3(c)(1). This includes “waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.” *Id.* Departing significantly from the Proposed Rule, the Final Rule then defines “neighboring” to cover: (1) “all waters” any part of which are within 100 feet of the ordinary high water mark of a primary water or “tributary;” (2) “all waters” any part of which are within 1,500 feet of the ordinary high water mark of a primary water or “tributary” and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a primary water. *Id.* §328.3(c)(2).

The Final Rule also adds an exclusion from the adjacent waters categories—not even mentioned in the Proposed Rule—for “[adjacent w]aters being used for established normal farming, ranching, and silviculture activities.” *Id.* § 328.3(c)(1). The Agencies did not explain why the per se jurisdictional tributaries category contains no similar exclusion.

Case-by-case Waters. The Final Rule allows the Agencies to exercise authority on a case-by-case basis over waters and land features in a way that differs significantly from the proposal. The Rule grants the Agencies authority, on a case-by-case basis, over those “waters [at least partially] located within the 100-year floodplain of a” primary water and “waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a” primary water,

impoundment, or tributary so long as the Agencies find a significant nexus with a primary water. *Id.* § 328.3(a)(8).

Under the Final Rule, a water will be deemed to have a “significant nexus” to a primary water if that water, “either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water]” based on “any single function or combination of functions performed by the water.” *Id.* § 328.3(c)(5) (emphasis added). For example, if bird species like ducks use hydrologically isolated wetlands for foraging and feeding, that use would extend federal jurisdiction to the isolated wetland. *See* 80 Fed. Reg. at 37,093. The same would be true if insects breed in an isolated wetland or marsh and then terminate their life cycle as food for fish or fowl in a non-navigable stream that crosses a state border. *See id.* And isolated wetlands or depressions could be deemed jurisdictional precisely *because of* their isolation—if the Agencies determine that such features store water, trap sediment, or cycle nutrients, they can be deemed jurisdictional individually or in conjunction with other similar waters. *See id.*

E. This Litigation

After the Rule was published in the Federal Register, thirty-one States filed petitions for review in courts of appeals. Pursuant to 28 U.S.C. § 2112, those petitions were consolidated in this Court. On October 9, 2015, this Court stayed

the Rule nationwide, finding that “it is far from clear that the new Rule’s distance limitations are harmonious” with *Rapanos*, and that “the rulemaking process by which the distance limitations were adopted is facially suspect.” *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). After granting the stay, this Court held that it has jurisdiction under 33 U.S.C. § 1369(B)(1)(F). *In re U.S. Dep’t of Defense and U.S. EPA Final Rule*, 817 F.3d at 274; *id.* at 282-83 (Griffin, J., concurring in the judgment).

SUMMARY OF ARGUMENT

I. The Rule exceeds the Agencies’ authority under the CWA.

Agencies can only exercise power that has been delegated to them by Congress. In just the last fifteen years, the Supreme Court has twice rebuked the Agencies for regulating beyond the boundaries set by Congress in the CWA, but the Agencies continue to defy those boundaries. In fact, the Rule regulates the very same waters the Court held fall outside the scope of the CWA in *SWANCC* and *Rapanos*.

The Agencies claim to rely exclusively on Justice Kennedy’s *Rapanos* concurrence, but the Rule plainly violates this approach. For example, the Rule’s tributaries category sweeps in usually dry channels that at most occasionally carry the “[t]he merest trickle[s]” into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The adjacency category covers waters

simply because they are somewhat near a remote “tributary,” which are the *very same* waters that Justice Kennedy specifically explained fell outside of the CWA. *See id.* This category also asserts jurisdiction over land features that might link to navigable waters, if at all, only during once-in-a-century rainstorms, which exceeds any reasonable notion of a “significant nexus.” And the case-by-case waters category sweeps in—among many other features—the very same waters that the Supreme Court held were not jurisdictional in *SWANCC*, a decision that Justice Kennedy relied upon heavily.

The Rule also fails the test set out in the *Rapanos* plurality opinion because it includes isolated tributaries, non-adjacent waters misleadingly termed “adjacent,” and waters on a case-by-case basis that also are without a surface connection to relatively permanent navigable waters. The Agencies do not even argue that the Rule satisfies this test, and any such argument would be impossible.

Even if the Rule were not prohibited by the Supreme Court’s clear directives on the meaning of the phrase “waters of the United States,” the Rule’s assertion of broad authority at, and beyond, constitutional limits requires clear congressional authorization. The Supreme Court in *SWANCC* held that the assertion of federal authority in that case was unlawful, in part, to avoid serious constitutional concerns. These concerns apply with much greater urgency to the Rule, which covers not only the very same waters at issue in *SWANCC*, but innumerable other

local land and water features, the regulation of which is a core sovereign function of the States.

II. The Agencies adopted the Rule in plain violation of the APA.

The Agencies unlawfully built the Final Rule around five distance-based components and an unduly narrow exclusion that are not even arguably a “logical outgrowth” of the proposal. The Final Rule’s adjacency and case-by-case waters categories are oriented around several distance-based components that were nowhere mentioned in the Proposed Rule. The Agencies’ notice was so lacking as to these components that the Agencies have not been able to identify even a single comment, out of more than a million, that addresses any of the components. This sort of procedural failure would be unacceptable as to any agency rule, but it is particularly egregious given the context of this rulemaking, which defines how millions of acres of local land and water features will be regulated.

The Agencies’ failure to comply with the APA’s notice-and-comment requirements contributed to another APA violation: the failure to offer record support for the Final Rule. The five distance-based components and the unduly narrow exclusion lack *any* record support, forcing the Agencies to rely upon vague assertions of “reasonable and practical” distinctions and unspecified “experience” to justify their inclusion. 80 Fed. Reg. at 37,085-91. These conclusory statements are insufficient to justify the Rule.

The Agencies’ “significant nexus” analysis in support of the Final Rule is similarly problematic. The Agencies rely heavily on the scientific analysis in their Connectivity Study to support their expansive new assertion of jurisdiction. But the science simply supports the unremarkable conclusion that upstream waters are connected to downstream waters. The science does not establish the significance of that connection, as the law requires.

III. The Rule violates the Constitution in three principal ways.

First, it intrudes upon the States’ sovereign interests in regulating their land and water resources in violation of the Tenth Amendment, contrary to the core federalism principles also reflected in the CWA. *See* 33 U.S.C. § 1251(b). The Rule asserts jurisdiction over local land and water features that have only a remote connection, if any, to navigable-in-fact waters, turning the Agencies into a “*de facto*” federal “zoning board.” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). This imposes significant burdens on the States, and deprives the States of their sovereign land-use authority.

Second, the Rule exceeds Congress’s constitutional authority under the Commerce Clause because it assigns the federal government jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. *See SWANCC*, 531 U.S. at 173.

Third, the Rule violates the Due Process Clause because it is unconstitutionally vague. The Rule defines jurisdictional tributaries based on the presence of ordinary high water marks and other difficult-to-identify features, which are “so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application,” *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). Similarly, the Rule allows the Agencies to assert jurisdiction over waters on a case-by-case basis without providing sufficient guidance for making such a determination, making it impossible for ordinary citizens to know when their lands will be swept within the CWA on an enforcement agent’s whim.

IV. The Corps violated NEPA in at least three ways.

First, the Corps violated NEPA by failing to prepare an EIS analyzing the environmental and socioeconomic effects of the Final Rule. As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily triggered NEPA’s EIS requirement.

Second, the Corps relied on a wholly inadequate EA to determine that the Final Rule will not have significant effects on the human environment. The EA was devoid of analysis of key factors that, if considered, would have prompted any reasonable agency to prepare an EIS.

Third, the Corps' alternatives analysis was similarly defective. The Corps analyzed only two options: the Final Rule and the existing post-*Rapanos* regulatory regime. The Corps ignored reasonable and feasible alternatives, including several raised by the States during the public comment period on the Proposed Rule. By narrowing the range of alternatives considered, the Corps narrowed its scope of review, depriving the public and the States of meaningful participation.

ARGUMENT

I. THE RULE VIOLATES THE CLEAN WATER ACT.

The Rule's interpretation of the statutory term "waters of the United States" in the CWA cannot be squared with the Act or the Supreme Court's understanding of that term. As the CWA makes clear, "waters of the United States" is synonymous with "navigable waters." 33 U.S.C. §§ 1362(7), 1362(12). This means that any reasonable interpretation of "waters of the United States" must apply to navigable-in-fact waters and, at the very most, additional waters that directly impact the water quality of navigable-in-fact waters. The plain terms of the CWA do not permit the Agencies to sweep in local, isolated waters and land features, which have only a tangential relationship to navigable-in-fact waters. In fact, it is a "central requirement" of the Act that "the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778 (Kennedy, J., concurring in the judgment).

In two opinions, a majority of the Supreme Court in *Rapanos* rejected a previous attempt by the Corps to define the phrase “waters of the United States” in a manner that swept in waters remote from navigable-in-fact waters. A four justice plurality concluded that the phrase applies only to “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality). Justice Kennedy concurred in the judgment, explaining instead that “waters of the United States” includes waters “navigable in fact or that could reasonably be so made” and waters with a “significant nexus” to a navigable-in-fact water. *See id.* at 759, 779 (Kennedy, J., concurring in the judgment).

Under *Marks v. United States*, 430 U.S. 188 (1977), “[w]hen a fragmented Court decides a case[,] . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (citation omitted). This Court has not yet decided which opinion controls under *Marks*, *see United States v. Cundiff*, 555 F.3d 200, 208-09 (6th Cir. 2009), and it need not do so here. Given that the Agencies justified the Rule based solely on Justice Kennedy’s test, the Rule must be held unlawful if it fails that test. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Even if the Agencies are not bound by their reliance on Justice Kennedy’s test, the Rule also

fails the plurality’s test. And, at the very minimum, if any doubt remains as to the Rule’s legality under either test, that doubt is settled under avoidance principles—as invoked by the Supreme Court in *SWANCC*—because the Rule goes to (and beyond) the limits of Congress’s constitutional authority and settles questions of deep political significance.

A. The Rule Fails Justice Kennedy’s Significant Nexus Test.

In *Rapanos*, Justice Kennedy concluded that the CWA covers only “waters that are or were navigable in fact or that could reasonably be so made” and secondary waters with a “significant nexus” to a navigable-in-fact water. 547 U.S. at 759 (Kennedy, J., concurring in the judgment). A significant nexus exists where the water “either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of” a navigable-in-fact water. *Id.* at 780. This means that the CWA does not include waters with a “speculative or insubstantial” nexus to navigable waters. *Id.* at 780. Thus, Justice Kennedy explained that the CWA does not extend to all “wetlands (however remote),” all “continuously flowing stream[s] (however small),” *id.* at 776, and all waters containing “[t]he merest trickle, [even] if continuous,” *id.* at 769. Justice Kennedy specifically rejected the Corps’ approach of sweeping in all wetlands actually adjacent to tributaries of navigable waters, “however remote and insubstantial,” *id.* at 778-79, explaining that the standard’s breadth “preclude[d] its

adoption,” *id.* at 781. The Rule violates Justice Kennedy’s approach in multiple respects.

1. Per Se Coverage Of “Tributaries.” The Rule’s provision that all “tributaries” of primary waters are per se “waters of the United States” cannot be squared with Justice Kennedy’s approach. Under the Rule, a tributary is any land feature with “a bed and banks and an ordinary high water mark” and that “contributes flow”—no matter how ephemeral—“either directly or through another water” to a primary water. 33 C.F.R. § 328.3(c)(3). This covers land features with “one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground).” *Id.* If there is such a break, the feature is still a tributary if it has “a bed and banks and an ordinary high water mark [that] can be identified upstream of the break.” *Id.* A feature also qualifies as a tributary if it contributes flow (even through a chain of “any number” of other waters) to a primary water. *Id.*; 80 Fed. Reg. at 37,076. As a result, tributaries under the Rule include typically dry land features that indirectly and only occasionally contribute even a mere trickle into a navigable water. *See* 80 Fed. Reg. at 37,076. This wide-reaching definition fails Justice Kennedy’s test because it provides no “assurance” that jurisdictional waters have a *significant* nexus to a

navigable water. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

First, the Rule sweeps in features based upon the fact that they “contribute[] flow,” 33 C.F.R. § 328.3(c)(3), even if the flow is “intermittent” or “ephemeral” and “only in response to precipitation events,” 80 Fed. Reg. at 37,076-77; *see also id.* (adding that the presence of such “tributaries” may be “infer[red]” through “desktop tools” where not apparent through “direct field observation”). This disregards Justice Kennedy’s concern that the “volume and regularity” of flow are relevant to decide whether a feature plays a sufficient role in “the integrity of an aquatic system” to establish a significant nexus to a navigable-in-fact water, *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Justice Kennedy expressly rejected jurisdiction over features with “[t]he merest trickle [even] if continuous.” *Id.* at 769.

Second, the Rule’s ordinary high water mark (“OHWM”) criterion does not sufficiently identify “flow” to satisfy Justice Kennedy’s test. The Rule defines an OHWM as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(c)(6). In

Rapanos, Justice Kennedy rejected reliance on the OHWM as a “determinative measure” for establishing a significant nexus. 547 U.S. at 761, 781 (Kennedy, J., concurring in the judgment) (citing 33 C.F.R. § 328.3(e) (2005)). Justice Kennedy concluded that the use of an OHWM as a standard could “provide[] a rough measure of the volume and regularity of flow” if it were consistently applied. *Id.* at 781. “Yet the breadth of this standard . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Id.* Such a standard would sweep in waters “little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” *Id.* at 781-82.

In fact, the Agencies’ own studies demonstrate that the presence of an OHWM has no connection to water flow and fails to provide assurance of a significant nexus to navigable waters. For example, a 2006 Corps study found “no direct correlation between the location of OHWM indicators and the inundation areas” in the arid southwest.⁵ Rather, the indicators are “frequently the result of moderate to extreme flood events,” and “are not associated with any return interval

⁵ Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of “Waters of the United States” in Arid Southwestern Channels* 14 (2006), <http://acwc.sdp.sirsi.net/client/search/asset/1001678>; see also AMA Comments 10-11, ID-13951 (JA__).

event or with physical channel features found in the field.” *Id.* Similarly, a 2013 Corps study concluded that “OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics.”⁶ The Rawhide Wash in Scottsdale, Arizona provides a compelling example of why these studies are accurate. The Wash only conveyed flow 12 times over a 15-year period, *for a total of 18 hours during that time*. City of Scottsdale Comments 3, ID-18024 (JA__). Like most washes in the city, the flow is highly episodic and infiltrates the permeable soils long before it reaches a navigable-in-fact water. *Id.* But that does not matter under the Rule, as this and similar dry washes in Arizona and throughout the arid southwest would be subject to automatic federal jurisdiction under the new tributary definition. In short, the presence of OHWM provides no indication of the regularity of flow and no indication of other channel characteristics that could justify a significant nexus.

Third, the “bed and banks” requirement is an even less reliable measure of water flow than the OHWM rejected by Justice Kennedy. For example, “erosional channels or cuts often will appear to have a distinguishable bed and banks . . . , but [those] are not evidence that the channels actually contribute flow to [navigable

⁶ Lindsey Lefebvre, et al., U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540; *see also* AMA Comments 11, ID-13951 (JA__).

waters].” AMA Comments 9, ID-13951 (JA__); *see also* WAC Comments 34, ID-14568 (JA__) (“Bed, banks, and OHWM can be seen even in features without ordinary flow.”). Particularly in the arid west, channels with a bed and banks do not necessarily convey even a minimal amount of water. *See* Freeport Comments 2, ID-14135 (JA__); City of Scottsdale Comments 3-5, ID-18024 (JA__). The bed and banks requirement thus provides no assurance that a water “significantly affect[s] the chemical, physical, and biological integrity of” a navigable water, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

Fourth, any doubt about the propriety of the Rule’s tributaries category is dispelled by its inclusion of the remote “drains, ditches and streams” that Justice Kennedy explained fall outside the CWA. *Id.* at 781. The Rule covers “[d]itches with perennial flow, . . . [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, . . . [and] [d]itches, *regardless of flow*, that are excavated in or relocate a tributary.” 80 Fed. Reg. at 37,078 (emphasis added). These are the “drains, ditches and streams” carrying only minor water volumes that Justice Kennedy references. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). The Agencies’ explanation that they will identify some ditches based not on current conditions but on the “historical presence of tributaries,” 80 Fed. Reg. at 37,078-79, simply confirms their failure to comply with the limits of Justice Kennedy’s analysis.

2. Per Se Coverage Of All “Adjacent” Waters. The Rule’s per se coverage of all “adjacent” waters is also irreconcilable with Justice Kennedy’s approach. The Rule defines adjacent waters as, *inter alia*, (1) “all waters [at least partially] located within 100 feet of the ordinary high water mark of a” primary water, impoundment, or tributary; (2) all “waters located within the 100-year floodplain of a” primary water, impoundment, or tributary “and not more than 1,500 feet from the ordinary high water mark of such water;” and (3) “all waters [at least partially] located within 1,500 feet of the high tide line of a” primary water. 33 C.F.R. § 328.3(c)(2).

As a threshold matter, because the Rule’s per se coverage of “tributaries” is unlawful, any assertion of jurisdiction over “adjacent waters” is illegal to the extent it relies on a connection with a “tributary.” As explained above, the Rule’s coverage of tributaries violates Justice Kennedy’s test by sweeping in waters regardless of frequency, duration, or volume of flow or proximity to navigable waters. It follows that “adjacent waters” included solely on account of their connection to a tributary necessarily lack a “significant nexus” to interstate, navigable waters. Indeed, this aspect of the Rule flagrantly violates Justice Kennedy’s explicit holding in *Rapanos*. Justice Kennedy rejected the Corps’ prior approach of asserting jurisdiction over all wetlands actually adjacent to tributaries of navigable-in-fact waters. *Rapanos*, 547 U.S. at 778-83 (Kennedy, J., concurring

in the judgment). In the Rule, the Agencies double down on this unlawful assertion of authority by defining adjacency itself far more broadly than the adjacency notion that Justice Kennedy found insufficiently robust when dealing with tributaries of navigable-in-fact waters.

The adjacency definition itself fails to satisfy Justice Kennedy's test, even when not dealing with tributaries.

Most obviously, the first part of the Rule's adjacency definition—per se coverage of all waters within the 100-year floodplain and within 1,500 feet of a primary water or a “tributary,” 33 C.F.R. § 328.3(c)(2)(ii)—extends to small ponds, drainages, and wetlands simply because they might have a relationship with such water during a once-in-a-century storm. That plainly violates Justice Kennedy's approach in *Rapanos*, which requires “assurance” that a water “significantly affect[s]” the “chemical, physical, and biological integrity” of a “navigable waters in the traditional sense,” 547 U.S. at 779-81 (Kennedy, J., concurring in the judgment). As Justice Kennedy explained, “[a] mere hydrologic connection should not suffice in all cases,” because it “may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.” *Id.* at 784-85. A once-in-a-hundred-years hydrologic connection is surely too insubstantial given its infrequency.

Thus, the Rule’s categorical claim of federal jurisdiction over all “adjacent” waters as far as 1,500 feet from a “tributary” is far more expansive than the Corps’ jurisdictional theory Justice Kennedy rejected in *Rapanos* as “precluded” by the CWA. *See id.* at 781; *see also id.* at 778-79 (Corps cannot regulate simply “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). And the Rule’s labeling these waters as “adjacent” also fails under *SWANCC*, upon which Justice Kennedy relied in *Rapanos*. After noting that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), had upheld federal jurisdiction “over wetlands that actually abutted on a navigable waterway,” the Court in *SWANCC* rejected jurisdiction over “ponds that are *not* adjacent to open water.” 531 U.S. at 167-68; *see also Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (contrasting abutting waters in *Riverside* with non-adjacent waters in *SWANCC* and *Rapanos*); *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (using the *Rapanos* understanding that “adjacent” does not mean “merely ‘nearby’” in a Clean Air Act case).

The Rule’s other two distance-based adjacency categories—“all waters [at least partially] located within 100 feet of the ordinary high water mark of a” primary water, impoundment, or tributary, and “all waters [at least partially] located within 1,500 feet of the high tide line of a” primary water—are similarly

unlawful. 33 C.F.R. § 328.3(c)(2). EPA’s Science Advisory Board noted that “‘the available science supports defining adjacency or determination of adjacency on the basis of *functional relationships*,’ rather than ‘solely on the basis of *geographical proximity of distance* to jurisdictional waters.’” 80 Fed. Reg. at 37,064 (citation omitted) (emphasis added). Yet, the Agencies based definitions of adjacent waters “solely” on “geographical proximity.” These definitions do not provide the necessary assurance that the covered land features “play an important role in the integrity of . . . navigable waters,” *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring in the judgment).

3. Case-By-Case Waters. The Rule’s approach to case-by-case jurisdictional waters is also inconsistent with Justice Kennedy’s test. Under the Rule, the Agencies can assert jurisdiction over all waters determined to have a “significant nexus to a” primary water, provided that the waters are: (1) “located within the 100-year floodplain of a” primary water; or (2) “located within 4,000 feet of the high tide line or ordinary high water mark of a” primary water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8). Based on the “functions performed by the water,” a “significant nexus” exists if the water “either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water].” 33 C.F.R. § 328.3(c)(5) (emphasis added). The functions include, among others, “[c]ontribution of flow,”

“[e]xport of organic matter,” “[e]xport of food resources,” and “[p]rovision of life cycle dependent aquatic habitat” for “species located in” primary waters. *Id.* By EPA’s own admission, the definition covers “the vast majority of the nation’s water features.” Economic Analysis 11, ID-20866 (JA__).

The Rule’s definition of “significant nexus” covers far more waters than permitted under Justice Kennedy’s approach. The Rule permits jurisdiction if a water affects just one aspect of a primary water, not just a navigable water: the “chemical, physical, or biological integrity” of that water. Thus, it expressly permits the Agencies to find a “significant nexus” based solely on a single function, such as “contribution of flow” or “provision of life cycle dependent aquatic habitat” for “species located in” primary waters. 33 C.F.R. § 328.3(c)(5). This means, for example, that the Rule allows for jurisdiction simply if a water affects “dispersal,” 80 Fed. Reg. at 37,063, 37,072, 37,094, which is when “[p]lants and invertebrates” “hitchhik[e]” on waterfowl. Connectivity Study 5-5, ID-20859 (JA__).

In contrast, Justice Kennedy would permit regulation of an intrastate water only where it “significantly affects” the “chemical, physical, *and* biological integrity” of a navigable water in the traditional sense. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) (emphasis added). The difference is illustrated by the Supreme Court’s decision in *SWANCC*, on which Justice

Kennedy relied in developing his test. In *SWANCC*, the Supreme Court rejected the Corps' argument that it had jurisdiction over isolated sand and gravel pits based merely on the presence of "approximately 121 bird species" that "depend upon aquatic environments for a significant portion of their life requirements." 531 U.S. at 164. As Justice Kennedy explained in *Rapanos*, the Corps' argument in *SWANCC* did not establish a sufficient "connection" between the isolated pits and navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). But under the Rule's permissive approach to case-by-case waters, the asserted basis for jurisdiction in *SWANCC* would be sufficient. Several of the bases for jurisdiction discussed above—*e.g.*, provision of "life cycle dependent aquatic habitat[s]" and impact on "dispersal"—are in practical effect no different from the Corps' reliance in *SWANCC* on the mere presence of migratory birds (since, for example, such birds necessarily engage in "dispersal" as they fly from navigable-in-fact to remote waters).

4. Interstate, Non-Navigable Waters. The Rule also violates Justice Kennedy's test because its definition of primary waters—from which the Rule's definitions of tributaries, adjacency, and case-by-case waters then operate—includes a category of waters that are not "navigable in fact," *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment), and "could [not] reasonably be so made," *id.* at 759. Specifically, the Rule's primary waters definition covers

“interstate waters, including interstate wetlands,” 33 C.F.R. § 328.3(a)(2), even where such waters are not “navigable in fact” and “could [not] reasonably be so made,” *Rapanos*, 547 U.S. at 759, 778 (Kennedy, J., concurring in the judgment). Under Justice Kennedy’s test, the CWA protects waters that are navigable and those additional waters that have a significant nexus to such navigable waters. Both Justice Kennedy and the statutory text make clear that non-navigable waters—whether they are interstate or not—are not the focus of the CWA. Accordingly, the Rule should not premise jurisdiction over non-navigable waters on a purported significant nexus to non-navigable interstate waters. To the extent that any category of such interstate waters is covered by the CWA, they could only be included under Justice Kennedy’s approach after a showing that they have a significant nexus to navigable-in-fact waters.

B. The Rule Fails The *Rapanos* Plurality’s Test.

Although the Agencies are precluded from arguing that the *Rapanos* plurality opinion justifies the Final Rule, *see Chenery*, 318 U.S. at 95, such an argument would fail in any event. The *Rapanos* plurality concluded that the CWA “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster’s New International Dictionary* 2882 (2d ed. 1954)),

and “those wetlands with a continuous surface connection to” those waters, *id.* at 742. It does not include “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739. The Rule violates these principles for at least four reasons.

First, the Rule’s tributary definition includes features with intermittent or ephemeral flow in excess of the *Rapanos* plurality’s reading of the CWA. The Agencies admit that the Rule covers “perennial, intermittent, [and] ephemeral” streams with “flowing water only in response to precipitation events in a typical year.” 80 Fed. Reg. at 37,076. But the plurality specifically found it unreasonable to read “waters of the United States” to include “channels containing merely intermittent or ephemeral flow.” *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality).

Second, the Rule’s per se coverage of adjacent waters fails the plurality’s test because it does not require any continuous surface connection to relatively permanent bodies of water. The Rule includes all waters within the 100-year floodplain and within 1,500 feet of the OHWM of a primary water regardless of actual connectivity or the significance of that connectivity. 33 C.F.R. § 328.3(c)(2)(ii). Many waters in these areas are on average connected to a primary water only once every one-hundred years, which falls far short of a “continuous surface connection” with a relatively permanent water. In addition, the Rule includes waters based solely on a connection to a “tributary,” which as

explained earlier can be usually dry channels. Although there may be a connection, that connection is not to a “relatively permanent, standing or flowing bod[y] of water.” *See Rapanos*, 547 U.S. at 732. And because the Rule includes waters based solely on certain distances, including from any “tributary” in a long chain, *see* 33 C.F.R. § 328.3(c)(2), it sweeps in waters with no surface connection to any body of water, let alone a continuous surface connection to a primary water.

Third, the Rule’s assertion of case-by-case jurisdiction also covers waters with no continuous surface connection to a relatively permanent body of water, in violation of the *Rapanos* plurality. The Rule’s definition of “significant nexus” can be satisfied based on any one of a number of functions, which can be present even if a continuous surface connection is absent. For example, a usually dry channel could meet the requirement for “[c]ontribution of flow,” 33 C.F.R. § 328.3(c)(5), during a rare heavy rainstorm and yet lack “a continuous surface connection” with the water. Similarly, an isolated body of water that is used by some wildlife might affect the “[p]rovision of life cycle dependent aquatic habitat . . . for species located in a [primary] water,” 33 C.F.R. § 328.3(c)(5), and yet lack a “continuous surface connection” with the primary water.

Fourth, the Rule’s inclusion of non-navigable interstate waters as a primary water, 33 C.F.R. § 328.3(a), also violates the plurality’s approach. The plurality held that the CWA is concerned with protecting “a relatively permanent body of

water connected to traditional interstate navigable waters.” *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). Clearly, non-navigable interstate waters fall outside of that understanding.

C. The Rule Is Not Clearly Authorized By The CWA.

Even if the Rule were not plainly foreclosed by the CWA, the Rule would still exceed the Agencies’ statutory authority because its transformational exercise of authority is not clearly authorized by Congress. It is well-established that “‘Congress legislates against the backdrop’ of certain unexpressed presumptions,” *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), two of which apply here. The first is that Congress does not delegate to agencies authority at the outer reaches of Congress’s power except in clear terms. *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). “This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* The second is that Congress does not grant transformative authority to regulate matters of vast political and economic significance absent a clear statement. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“*UARG*”). Both of these presumptions require a clear

statement from Congress to justify the Rule’s assertion of the broad authority that it claims. Such a statement is clearly missing here.⁷

First, clear congressional authorization is required for a rule that raises serious federalism concerns. It is a “well-established principle that it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond*, 134 S. Ct. at 2089 (internal quotation and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, if Congress intends to legislate “in traditionally sensitive areas, such as legislation affecting the federal balance,” it must make its intention plain. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (“To displace traditional state regulation . . . the federal statutory purpose must be ‘clear and manifest.’”); *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016) (finding that “[a]ny attempt by the federal government to interpose itself into [the] state-subdivision relationship therefore must come about by a clear directive from Congress”).

⁷ For these and other reasons, the Agencies are not entitled to any deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* Opening Br. for the Business & Municipal Pet’rs Part III.C.

The Supreme Court applied this clear statement rule in *SWANCC* to invalidate an assertion of CWA jurisdiction by the Corps far less capacious than what is at issue in the Rule. Finding “nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit,” the Court rejected the agency’s claimed jurisdiction because it “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *SWANCC*, 531 U.S. at 174. The Court noted that “[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.’” *Id.* (quoting 33 U.S.C. §1251(b)).

Similarly, the plurality in *Rapanos* applied the clear statement rule to bolster its rejection of the Corps’ attempt to extend CWA jurisdiction to “intermittent” and “ephemeral flows of water.” 547 U.S. at 737-38 (Scalia, J., plurality). The plurality found that any attempt to federally regulate such water would not only be “an unprecedented intrusion into traditional state authority,” but would also “stretch[] the outer limits of Congress’ commerce power and raise[] difficult questions about the ultimate scope of that power.” *Id.* at 738. That sort of authority requires a “clear and manifest statement from Congress,” and “the phrase ‘the waters of the United States’ hardly qualifies” as such a statement. *Id.*; *see also*

id. (“[W]e would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.”).

The Rule likewise reaches and even exceeds the outer bounds of Congress’s constitutional authority. The Rule’s expansion of federal authority over intrastate waters will “impinge[] o[n] the States’ traditional and primary power over land and water use,” and “readjust the federal-state balance.” *SWANCC*, 531 U.S. at 174. The Rule’s coverage of intermittent waters, ephemeral waters, and isolated sometimes-wet lands “presses the envelope of constitutional validity,” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) (citation omitted), far more than the challenged agency actions in *Rapanos* and *SWANCC*.

The Agencies cannot point to a clear statement from Congress authorizing the expansion of authority they assert. The CWA provides only that the Agencies may require permits for pollutant discharges to “navigable waters” defined as “waters of the United States.” This text does not support the Agencies’ expansive interpretation, and certainly does not do so clearly. *See SWANCC*, 531 U.S. at 174. To the contrary, Congress expressed an intent to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources,” 33 U.S.C. § 1251(b).

Second, recent Supreme Court cases have made clear that agencies cannot exercise transformative power over matters of vast economic and political

significance without clear congressional authorization. In *UARG*, EPA attempted to expand two Clean Air Act programs to cover sources based only on their greenhouse gas emissions. The Supreme Court rejected that effort, explaining that when an agency seeks to “bring about an enormous and transformative expansion” in its authority to make “decisions of vast ‘economic and political significance,’” *UARG*, 134 S. Ct. at 2444, under a “long-extant statute,” it must point to a clear statement from Congress, *id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Supreme Court affirmed this principle last year in *King v. Burwell*, 135 S. Ct. 2480 (2015), holding that courts are not to presume that Congress would implicitly delegate to agencies “question[s] of deep ‘economic and political significance’” because, if “Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly.” *Id.* at 2489 (citation omitted).

In the Final Rule, the Agencies assert transformative authority. The Rule seeks to change fundamentally the allocation of federal and state authority in land and water use. As the plurality noted in *Rapanos*, “extensive federal jurisdiction . . . would authorize the [Agencies] to function as [] *de facto* regulator[s] of immense stretches of intrastate land . . . with the scope of discretion that would befit a local zoning board.” 547 U.S. at 738 (Scalia, J. plurality). By the Agencies’ own estimate, the Rule will result in an increase in determinations of federal jurisdiction

by 2.84 to 4.65 percent. 80 Fed. Reg. at 37,101. Even accepting as true this under-inclusive estimation of the Final Rule's expansion, *but see, infra*, section IV.A., this seemingly small percentage translates to the assertion of authority over a vast amount of additional water and sometimes-wet land. Such an expansion of authority conflicts with the findings of *Rapanos* and *SWANCC* and allows the Agencies to function as a zoning board with the authority to effectively regulate road construction, building construction, farming, and numerous other activities almost anywhere in the nation. *See, e.g.*, ND Comments 3-4, ID-15365 (JA__); Multi-State Comments 12, ID-7988 (JA__).

The economic implications of the Rule for the landowners, businesses, and public agencies that will be subject to additional federal permitting requirements further demonstrate the Rule's transformative expansion of federal authority. As the Supreme Court observed recently, “[t]he costs of obtaining . . . a permit [from the Corps] are significant,” *U.S. Army Corps of Eng’rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and “the permitting process can be arduous, expensive, and long,” *id.* at 1815 (citing *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality)). Indeed, “[o]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetland permits alone.” *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation and citation omitted). And those are just the costs associated with permitting. Among other economic implications, the Rule's expansion of the Agencies'

authority will result in lost opportunities when permits improperly required under the expanded federal regime are delayed or are too costly to justify a project in the first place. *See, e.g.*, AK DEC Comments 14, 16, ID-19465 (JA__, __); WAC Comments 78, ID-14568 (JA__).

The Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Agencies' authority over local land and water use. The phrase "waters of the United States" in the CWA cannot plausibly be construed to clearly authorize the wide reach of the Rule.

II. THE RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The APA includes two important safeguards relevant to this case. First, an agency must make its rules available for meaningful public comment. 5 U.S.C. § 553(b). Second, a reviewing "court shall . . . hold unlawful and set aside" any final rules that are "arbitrary [or] capricious." *Id.* § 706(2)(A).

There is a critical relationship between these two APA requirements, which this Rule starkly demonstrates. An agency's failure to abide by the strictures of notice-and-comment rulemaking deprives the agency of meaningful comment, increases the likelihood of arbitrary decision-making, and frustrates the courts' ability to conduct meaningful review. For example, when a party challenges a final rule in court, that party is generally "limited to the administrative record" in making its arguments. *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed.*

Highway Admin., 756 F.3d 447, 464-65 (6th Cir. 2014). In turn, the record the party will need to rely upon will often consist of the “responsive data or argument” submitted during the notice-and-comment period. S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945). That is why one of the principal purposes of the notice-and-comment requirement is “to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *See Int’l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also Ohio Dep’t of Human Servs. v. U.S. Dep’t of Health & Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988). Importantly, when an agency adopts a final rule that is not a “logical outgrowth” of the proposal, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the result will often be the imposition of significant regulatory requirements on which the record is underdeveloped, or in an extreme example like this case, silent.

The Final Rule here is a textbook example of such a breakdown in the APA’s processes. The Agencies constructed the Rule’s definition of “waters of the United States” around five central distance-based components and an unduly narrow exclusion that were not even arguably presaged in the proposal. This deprived parties of the opportunity to comment meaningfully on those components, thereby undermining informed agency decision-making and meaningful judicial review. These failures, in turn, contributed to the promulgation of a Rule that is

unsupported by *any* record evidence. These and other failures compel a finding that this rulemaking is arbitrary, capricious, and unlawful.

A. The Agencies Built The Final Rule Around Distance-Based Components And An Unduly Narrow Exclusion That Were Never Submitted For Public Notice-And-Comment.

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is “designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Int’l Union*, 407 F.3d at 1259. These procedures “ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject.” *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). To secure these critical objectives, the final rule must be a “logical outgrowth” of the proposal. *Long Island*, 551 U.S. at 174. A final rule satisfies that test if affected parties “should have anticipated that [the] requirement” embodied in the final rule might be adopted, including because the agency satisfied its duty of informing the public of “the range of alternatives being considered with reasonable specificity.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The D.C. Circuit has explained that adopting a final rule that is not a logical outgrowth of the proposal “almost always requires vacatur.” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). For example, in *Small Refiner*, EPA “gave general notice that it might make unspecified changes in the definition of small refinery.” 705 F.2d at 549. The D.C. Circuit held that the agency violated the APA in the final rule by adopting a date-of-ownership limitation on the definition of “small refinery.” *Id.* at 548-49. Similarly, in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the court vacated a final rule where the listing of hazardous waste went from a “largely supplementary function” in the proposal to a “heavy emphasis” in the final rule. *Id.* at 751-52. And in *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009), the agency violated the APA by proposing to allow parties to recommend comparing data from the most recent year, but then adopting a rule that allowed data comparison over the past four years. *Id.* at 1082; *accord Int’l Union*, 407 F.3d at 1259-60; *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

Here, the Final Rule’s definition of “waters of the United States” includes five distance-based components and an unduly narrow exclusion that are not a logical outgrowth of the proposal.

1. The first three of these distance-based components involve the definition of per se “adjacent waters.” The Proposed Rule defined “adjacent waters” as all

waters within a so-called “riparian area” or “flood plain” of a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies adopted three entirely new distance-based components to define adjacency: (1) waters within 100 feet of a primary water, impoundment, or “tributary;” (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or “tributary;” and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2).

None of these three central “adjacency” distance-based components is a logical outgrowth of the proposal, because no interested party “should have anticipated” them, *Small Refiner*, 705 F.2d at 549. Had proper notice been given, parties from all sides would have submitted comments, data, and detailed maps, addressing the practical import and reasonableness of adopting these particular components. This did not occur because the public had no idea these components were being considered.

Notably, the Agencies cannot identify a single public comment (out of over *one million* submitted) addressing these three distance-based components or the other new components discussed below. The best the Agencies can muster are comments discussing the merits and demerits of distance-based concepts in

general. *See, e.g.*, No. 15-3799, Dkt. 50-1, at 5.⁸ The one internal Corps memorandum, No. 15-3799, Dkt. 132-2, that this Court mandated be included in the administrative record confirms this point. Even the Corps was in the dark about these significant modifications to the proposed rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID-20882 (JA__).

The Agencies' approach thus resulted in a final rule that was never "tested via exposure to diverse public comment," and was adopted in a manner manifestly "[un]fair[] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. It also deprived the Agencies of information from those "most interested" and "best informed" regarding this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *Phillips Petroleum*, 22 F.3d at 620.

The Agencies have argued that they did not violate the APA because in the Proposed Rule they sought comment on "'establishing specific geographic limits'

⁸ Even if the Agencies now manage to locate a comment or two guessing at one of the five standards or the unduly narrow exclusion, this would be of "little significance" because "the agency must itself provide notice of [its] proposal." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012). Indeed, when comments are "sparse and ambiguous at best," this supports the argument that the notice was not adequate. *Shell Oil*, 950 F.2d at 751.

for adjacency such as ‘distance limitations.’” Dkt. 47-1, at 5 (quoting 79 Fed. Reg. at 22,208-09). The Agencies’ position appears to be that because they asked about the merits of “geographical limitations” in general, they could then adopt, as a final rule, any distance-based definition of adjacency whatsoever, including both as to the reference point—e.g., “primary water, impoundment, or tributary;” “floodplain;” “high tide line;” *or any other feature*—and to the distance from that reference point—“100 feet,” “1,500 feet,” *or any other distance*—without seeking public input. This approach could be used to justify virtually “any final [adjacency] rule” and must be rejected. *Envtl. Integrity*, 425 F.3d at 998.

While the Agencies’ approach would be unlawful regardless of the context, it is particularly unacceptable given the scope of this rulemaking. The decision as to what qualifies as a “water of the United States” affects how millions of acres of local land and water features are regulated for purposes of the entire CWA. If the Agencies wanted to build the definition of adjacency around distances from certain reference points, they were duty-bound to inform the public of “the range of alternatives being considered with reasonable specificity,” *Small Refiner*, 705 F.2d at 549, as to *both* the particular reference points themselves *and* the particular distances. The Agencies’ failure on this score led to an APA failure orders of magnitude more significant than the comparatively banal notice failures involving the definition of “small refinery,” *Small Refiner*, 705 F.2d at 549, whether the

listing of wastes would play a “supplementary” or “heavy” role, *Shell Oil*, 950 F.2d at 751-52, or whether data from one or four years could be considered, *CSX*, 584 F.3d at 1078.

2. The next two distance-based components that the Agencies unexpectedly adopted in the Final Rule relate to case-by-case waters. The proposal included a limitless, unlawful approach to these waters, providing that the CWA applied to any water that, in the Agencies’ judgment, had a “significant nexus” to a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies sought to address the illegality of their proposed approach, but did so in a manner that violated the notice-and-comment requirement (among other defects). Specifically, the Agencies provided that their case-by-case analysis would now relate to, as relevant here: (1) waters within the 100-year floodplain of a primary water; and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies’ decision to add these two distance-based components to the case-by-case waters inquiry violates the notice-and-comment requirement because no regulated parties “should have anticipated,” *Small Refiner*, 705 F.2d at 549, that the Agencies would adopt this approach.

The Agencies’ defense of their actions with regard to adding these two components is no more credible than with regard to the three adjacency concepts discussed above. The most the Agencies have been able to muster is a citation to

the Proposed Rule’s observation that “‘distance of hydrologic connection’ is one of the factors that could be considered when evaluating a connection with a downstream water.” No. 15-3799, Dkt. 50-1, at 6 (quoting 79 Fed. Reg. at 22,214). But this opaque sentence appeared to be addressing factors that the Agencies would take into account *in conducting* their all-things-considered, case-by-case approach. It did not suggest that the Agencies were considering hard-and-fast distance requirements for case-by-case waters, let alone inform the public of “the range of alternatives being considered with reasonable specificity,” *Small Refiner*, 705 F.2d at 549, as to either the particular reference points or the particular distances being considered. Notably, the subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based upon specific distances from specific reference points. *See* 79 Fed. Reg. at 22,214-17.

3. The sixth and final standard that the Agencies adopted in the Final Rule was that “waters being used for established normal farming, ranching, and silviculture activities” were excluded from per se jurisdiction under the Rule’s adjacency category, but not from the tributary category. 33 C.F.R. § 328.3(c)(1). The Agencies “nowhere even hinted,” *CSX*, 584 F.3d at 1082, that they were considering treating farmland differently as between the adjacency and “tributary”

categories. Had the Agencies informed the public that they were contemplating this exclusion, the States and farmers would have submitted comments explaining why farmland should be excluded from all per se categories.

B. The Distance-Based Components And Unduly Narrow Exclusion Are Unsupported By The Record.

The APA's judicial review provision provides that a final rule must be "set aside" if that rule is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). While this inquiry is deferential, "[t]he arbitrary-and-capricious standard . . . does not require [courts] merely to rubber stamp the [agency's] decision." *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008) (citation omitted). A rule is arbitrary and capricious if it is unsupported by the record, *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-42 (1983), does not explain why alternatives were rejected, *id.*, or fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). In addition, "conclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). And judicial review becomes "meaningless where the administrative record is insufficient." *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976). All five of the distance-based components and the

unduly narrow exclusion that the Agencies unexpectedly adopted in their Final Rule fail the APA’s “arbitrary [or] capricious” standard.

1. With regard to the three adjacency distance-based components, as well as the two case-by-case criteria, nothing in the record supports a per se jurisdictional finding for all waters and lands (1) within 100 feet of a primary water, impoundment, or tributary, (2) within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or tributary, or (3) within 1,500 feet of the high tide line of a primary water. 33 C.F.R. § 328.3(c)(2). The same is true for case-by-case coverage focused upon (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. *Id.* § 328.3(a)(8).

The Agencies argue that these distance-based components are “reasonable and practical,” consistent with unspecified “experience,” and supported by “the implementation value of drawing clear lines.” 80 Fed. Reg. at 37,085-91. Such “conclusory statements” are insufficient, *Amerijet*, 753 F.3d at 1350 (D.C. Cir. 2014), especially given the Agencies’ necessary concession that the Final Rule would be arbitrary and capricious if “the administrative record [failed to] support[] the bright-lines that the Agencies crafted,” No. 15-3799, Dkt. 50-1, at 8.

And while some bright-line distance approaches could—perhaps—survive review given a proper administrative record, the record here is entirely

“insufficient.” *See Nat’l Welfare*, 533 F.2d at 648. To the extent the record says anything about this subject, the Agencies’ Science Advisory Board rejected any distance-based approach, arguing that “the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water.” SAB 2-3, ID-7531 (JA__).

More generally, nothing in the record supports the Agencies’ decision to choose the specific distances—100 feet, 1,500 feet, 4,000 feet—over any alternative distances from any alternative reference points. Given that the Agencies adopted the distance-based components without record support and without explaining why alternative distances and reference points were rejected, *State Farm*, 463 U.S. at 41-42, and then justified these components by “conclusory” statements, *Amerijet*, 753 F.3d at 1350, the Rule is plainly unlawful.

2. The Rule’s exclusion of farmland from the per se adjacent waters category, but not the per se tributary category, is also arbitrary and capricious. The Agencies explained that this exclusion was justified in light of “the vital role of farmers in providing the nation with food, fiber, and fuel.” 80 Fed. Reg. at 37,080. While the States agree with this rationale, that justification applies just as strongly to excluding farmland from the per se tributary category. The Agencies’ failure to explain their decision to exclude farmland from one per se category, but not the

other, violates the mandate that an agency must “treat similar cases in a similar manner unless it can provide a legitimate reason,” *Babbitt*, 92 F.3d at 1258.

C. The Rule’s Expansive Interpretation Of “Significant Nexus” Is Arbitrary And Capricious.

The Agencies claim that their Rule is grounded in sound science—indeed, the term “science” is repeated ninety times in the preamble to the Rule, with an additional sixty-four references to the Agencies’ Connectivity Study. The Agencies also claim that “science,” as documented in the Connectivity Study, shows that Justice Kennedy’s significant nexus test is satisfied by the Rule’s expansive new definitions of “waters of the United States.” But the Connectivity Study only highlights a fundamental disconnect between the actual science and the Agencies’ claimed reliance on that science.

According to the Agencies, the scientific basis for the Rule is that water flows downhill to create hydrological connections, *see* 80 Fed. Reg. at 37,063, and that the “protection of upstream waters is critical to maintaining the integrity of the downstream waters,” *id.* at 37,056. This is nothing but a truism, and implies a limitless expansion of federal power. Of course, upstream waters contribute to downstream waters, but that only establishes—at most—a “nexus” between the two.

Whether any such nexus is “significant,” which is the key question in the Agencies’ conception of how to define “waters of the United States,” is a legal

question that, as the Agencies acknowledge, *science does not answer*. “While the agencies agree defining significant nexus by quantified metrics would improve clarity, for the reasons discussed in the Science Report . . . , such an approach is not supported by the science at this time.” RTC, Topic 9, 23, ID-20872 (JA___). At best, the science demonstrates that connectivity occurs along a continuum that “can be described in terms of frequency, duration, magnitude, timing, and rate of change.” *Id.* at 19. But the Agencies never explain anywhere in the record how or when these or other scientific factors demonstrate a significant nexus between downstream navigable waters that they have the unquestioned authority to protect, and the upstream waters that are within the States’ exclusive jurisdiction unless those waters have *significant* nexus to downstream navigable waters.

Instead, the Agencies admit that while “[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, . . . it is the agencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA.” *Id.* at 21. And the Agencies made that determination based largely on (erroneous) legal and policy considerations, not science. *Id.* at 17 (“The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies’ expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.”).

As explained above, those legal grounds are legally insufficient. The mere existence of a hydrological connection—even a *continuous one*—is insufficient under Justice Kennedy’s approach. *Rapanos*, 547 U.S. at 769. But that is all the Connectivity Study demonstrates; it can at most be used to establish a nexus, but not the significance of that nexus. The Agencies have therefore failed to “articulate a rational connection between the facts found” and the expansive definitions in the Final Rule, one of the hallmarks of arbitrary decision-making. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

III. THE RULE VIOLATES THE CONSTITUTION.

The Final Rule violates the U.S. Constitution in at least three ways. First, it intrudes upon the States’ sovereign interests in regulating their land and water resources in violation of the Tenth Amendment. Second, it exceeds Congress’s constitutional authority under the Commerce Clause because it provides for federal jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. And third, it violates the Due Process Clause because it is unconstitutionally vague. As a result, the Rule must be vacated.

A. The Rule Violates The States’ Tenth Amendment Rights.

Under the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the

people.” U.S. Const., amend. X. Tenth Amendment concerns are implicated when a federal rule regulates the “states as states,” when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair a State’s ability to structure integral operations in areas of traditional state functions. *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 286-87 (1981). The federal system “protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. 211, 222 (2011).

State authority to regulate and manage local lands and waters is a core sovereign interest. Indeed, state authority in this realm “is perhaps the quintessential state activity.” *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). That is why Congress so clearly recognized the States’ inherent powers over local lands and water resources in the CWA, *see* 33 U.S.C. § 1251(b), and purposefully integrated federalism principles throughout the Act. In *SWANCC*, the Supreme Court relied on this core “traditional state power” to explain its narrower interpretation of the CWA. 531 U.S. at 172-73. The provision of the rule at issue in *SWANCC* exceeded the Agencies’ authority, the Court held, because it covered

“nonnavigable, isolated, intrastate waters” such as seasonal ponds. *Id.* at 170-71. The Court supported its determination by finding that the Corps’ interpretation would “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power”—specifically, the States’ “traditional and primary power over land and water use.” *Id.* at 173-74.

The Rule’s overbroad assertion of authority over local land and water features that have only a remote connection to navigable-in-fact waters invades the States’ sovereign authority, in violation of their Tenth Amendment rights. As already discussed, the definitions in the Rule extend federal jurisdiction to remote, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. Once the Agencies assert federal jurisdiction, they displace state and local land regulation, and act as a “*de facto*” federal “zoning board.” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See SWANCC*, 531 U.S. at 173.⁹ Here, that regulatory power is the “[r]egulation of land use”—“a

⁹ Indeed, once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying approximately 25 “public interest” factors the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production).

quintessential state and local power.” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality).

The Rule’s expansion of federal jurisdiction over traditional state lands and water resources necessarily regulates “states as states,” *Hodel*, 452 U.S. at 286-87, because of the extensive cooperative federalism principles embodied in the CWA. For example, all States are required to develop water quality standards for federal jurisdictional waters within their borders. 33 U.S.C. § 1313. They must also review those standards at least every three years, *id.* § 1313(c), and report to EPA on the quality of all federal waters in the State every other year, *id.* § 1315(b). States must also develop complicated total maximum daily loads for any water not meeting established water quality standards. *Id.* § 1313(d). States are also required to issue water quality certifications for every permit the federal government issues within their borders, including section 404 permits issued by the Corps. *See id.* § 1341(a)(1). For the forty-six States with authority to implement the NPDES program under 33 U.S.C. § 1342, additional federal waters means additional permitting responsibilities. Michigan and New Jersey bear additional obligations, as the two States that have assumed authority to issue dredge and fill permits under 33 U.S.C. § 1344. Finally, expanded federal jurisdiction directly affects state highway, transmission line, and pipeline projects, triggering federal permitting requirements for potential impacts to newly-minted federal waters. *See*,

e.g., AK DEC Comments 14-15, ID-19465 (JA__); ADOT Comments 1, ID-15215 (JA__).

The practical impact upon the States from the Rule's expansion of federal authority is breathtaking. From prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas, the Final Rule extends jurisdiction to virtually every potentially wet area of the country. *See* 33 C.F.R. § 328.3(b). In fact, the Rule sweeps so broadly that the Agencies find it necessary explicitly to disclaim authority over “puddles” and swimming pools “created in dry land.” *Id.* § 328.3(b)(4). The Agencies acknowledge that “the vast majority of the nation’s water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea” and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866 (JA__). These areas are swept within the jurisdictional reach of the Final Rule.

Alaska presents a telling example. *See* AK DEC Comments 18-20, ID-19465 (JA__). Forty-three percent of Alaska is wetlands, covering more than 174 million acres. Many of those wetlands are frozen much of the year, and are underlain with permafrost. During the warmer seasons, the surface soils become inundated when thawing conditions generate near-surface water that cannot penetrate the underlying permafrost, causing the soils to exhibit wetland-like

characteristics. These areas can extend for hundreds of miles inland from the main navigable-in-fact waterways, as much of northern Alaska is covered in “continuous permafrost.” *Id.* at 19, Att. 5 (JA___, ___). Under the Rule, these lands are subject to federal jurisdiction by virtue of the straddling provision contained in the Rule’s definition of neighboring: “The entire water is neighboring *if a portion* is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain.” 33 C.F.R. § 328.3(c)(2)(ii) (emphasis added). As Alaska warned the Agencies, the Proposed Rule would “federalize land use decisions for State, local and private lands” in Alaska because “nearly all waters and wetlands in Alaska” would be subject “to regulation by the EPA and the Corps.” AK Gov. Comments 1, ID-19465 (JA___). This conclusion applies just as much to the Final Rule.

The City of Scottsdale, Arizona provides another compelling example in a completely different ecological region. *See* City of Scottsdale Comments, ID-18024 (JA___). The City is replete with ephemeral drainages that flow in response to “high intensity and short duration storms.” *Id.* at 3 (JA___). The flow is limited in duration, and typically infiltrates through the highly permeable soils long before it reaches a navigable-in-fact water, if at all. *See, e.g., id.* (describing Rawhide Wash as flowing 0.014% of the time over a 15-year period). And a single storm may produce flow in one wash, but others a mile away could be bone dry. *See id.* But all washes in the region are marked by a bed and banks and an OHWM,

sometimes created after a single rain event. *See id.* These dry washes will be per se jurisdictional under the Rule, despite historically being treated as non-jurisdictional under the Agencies' post-*Rapanos* guidance. *See id.* at 4 (JA__).

The Rule's additional regulation will come at a steep financial cost to the States. For example, the Agencies have estimated that the Rule will impose additional obligations on the States of between \$798,000 and \$1.3 million per year under the section 401 water quality certification program. Economic Analysis 19, ID-20866 (JA__). The NPDES storm water permit program will add \$360,000 each year to state budgets, *id.* at 25 (JA__), and another \$270,000 to regulate confined animal feeding operations, *id.* at 27-28 (JA__). The States believe that these and other estimates in the Agencies' Economic Analysis are grossly understated. *See, e.g.,* AK DEC Comments 17, ID-19465 (JA__); KS Comments 6, ID-14794 (JA__); WY DEQ Comments 5, ID-18020 (JA__). Alaska, for example, paid approximately \$8 million to offset wetland and other impacts associated with the development of public projects between 2009 and 2015. AK DEC Comments 16, ID-19465 (JA__). "The[se] costs will only multiply with the additional waters that would become jurisdictional." *Id.* These costs and increased regulatory obligations impair the States' ability "to structure integral operations in areas of traditional state functions." *Hodel*, 452 U.S. at 287-88 (internal quotation and citations omitted). The same is true for local governments. In Scottsdale,

Arizona, for example, the City fears that the per se assertion of jurisdiction over the region's many dry washes will have "detrimental impacts" on "proposed development projects" and on "City transportation, parks, and drainage and flood control projects. These impacts would increase the costs of capital projects and put a greater strain on an ever tightening City budget." City of Scottsdale Comments 7, ID-18024 (JA__).

In addition, through the Rule, the Agencies are asserting regulatory authority over traditionally state-regulated waters. This displacement of state authority impairs the States' abilities to establish and enforce their own policies for their waters and lands. For example, waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.* Instead of regulating land and water within their borders to advance their own sovereign interests, the States must now defer to the federal government's framework and policies established under the CWA.

B. The Rule Exceeds Congress's Commerce Clause Authority.

The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 3. That power extends only to three areas: (1) “channels of interstate commerce;” (2) the “instrumentalities of interstate commerce;” and (3) “activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Rule imposes federal authority outside of these areas, and thus improperly steps into the realm of the States’ regulatory authority.

1. The CWA’s protection of “navigable waters” rests entirely upon Congress’s authority to regulate the “channels of interstate commerce.” *Id.* As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress’s “traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.” 531 U.S. at 172; *id.* at 168 n.3 (finding no indication that “Congress intended to exert anything more than its commerce power over navigation”); accord *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (“It has long been settled that Congress has extensive authority over this Nation’s waters under the Commerce Clause” as channels of interstate commerce.); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824). This understanding of the CWA’s constitutional basis is mandated by the statutory text, which asserts jurisdiction only to protect “navigable waters,” *see, e.g.*, 33 U.S.C. § 1362(12), and does not invoke Congress’s authority to protect instrumentalities of commerce or those matters substantially affecting interstate commerce.

The Rule reaches far beyond Congress's authority to protect in-fact navigable waters; that is, those waters that can be used as channels of interstate commerce. While Congress has authority to regulate more than merely the channels themselves, regulation under this authority must be carefully limited to protecting those channels. For example, "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). But as explained above, the Rule sweeps in numerous local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters, including just once every one-hundred years. Given that the Agencies' assertion of authority in *SWANCC* raised grave constitutional issues because the waters there were somewhat remote from navigable-in-fact waters, 531 U.S. at 174, the far more expansive authority over local land and water features at issue in the Rule moves from mere concern to outright constitutional violation.

2. Since the CWA is based exclusively upon Congress's authority over channels of interstate commerce, the Agencies may not rely on the second or third—and broadest—category of activities that "substantially affect interstate commerce," *Lopez*, 514 U.S. at 558-59, or the aggregation doctrine that the Court has developed and applied exclusively in the context of that third category, *id.* at

560-61. Congress has not adopted a comprehensive scheme for water and land use management, as it had for the regulation of controlled substances at issue in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). Instead, Congress enacted a regime tied to one specific category of waters: those that are navigable-in-fact or could reasonably be made so.

Even if this Court were to analyze the Rule under *Lopez*'s third prong, however, the Rule would not be lawful because it allows for regulation of much more than activities that "substantially affect interstate commerce." And in so doing, the Rule "effectually obliterate[s] the distinction between what is national and what is local," *Lopez*, 514 U.S. at 557 (internal quotations omitted). Importantly, this is not a limited problem of the "de minimis character of individual instances arising under [the Rule]," *Raich*, 545 U.S. at 17, but rather the heart of the Rule's reach.

In both *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court rejected the federal government's attempt to defend the constitutionality of a law regulating non-economic activities based on an argument that those non-economic activities, taken in aggregate, would have a substantial effect on interstate commerce. In *Lopez*, the Court determined that the law reached activity—specifically, the possession of a firearm in a school zone—that was "in no sense an economic activity." 514 U.S. at 567. The Court rejected the argument

that Congress had the authority to reach this non-economic activity because, in aggregate, guns in school zones would have a substantial effect on interstate commerce. Such aggregation would involve “pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* Similarly, in *Morrison*, the law at issue—the right to bring a civil action in federal court for domestic violence victims—targeted “noneconomic activity,” whereas every case “in our Nation’s history” that upheld Commerce Clause regulation of intrastate activity involved “activity [that was] economic in nature.” 529 U.S. at 613. As in *Lopez*, the federal government’s argument relied on an impermissible “but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.” *Morrison*, 529 U.S. at 615.

The Rule, to the extent it would be analyzed under the third prong at all, would fail for similar reasons.

First, the Rule allows the Agencies to regulate non-economic activities, which *Lopez* and *Morrison* held cannot be aggregated to produce the required substantial effect on interstate commerce. As the *Rapanos* plurality observed, “[i]n deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as ‘economics,’ ‘aesthetics,’ ‘recreation,’ and ‘in general, the needs and welfare of the people.’” 547 U.S. at

721 (Scalia, J., plurality) (quoting 33 C.F.R. § 320.4(a) (2004)). Thus, for example, the Agencies could prohibit an individual from disposing of leaves or brush in a shallow swale on his or her property provided that the swale is within 1,500 feet of the ordinary high water mark of a “tributary” to a navigable water. That is “in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Second, the Rule fails to “express[ly] . . . limit its reach to [activities that] have an explicit connection with or effect on interstate commerce.” *Id.* at 562. The Rule’s definitions for tributaries, adjacent waters, and case-by-case waters sweep in numerous waters and usually-dry lands that lack any meaningful connection to interstate commerce. For example, the tributary definition extends to any land feature with “a bed and banks and an ordinary high water mark”—whether observable in the field or not—and that “contributes flow”—no matter how ephemeral—“either directly *or through another water*” to a primary water. 33 C.F.R. § 328.3(c)(3) (emphasis added). This includes usually-dry channels that carry a minimal amount of water after a rainstorm to a stream that connects with other streams that *then* eventually flow into a navigable water.

The Rule’s assertion of case-by-case jurisdiction is based on an analysis that has little to nothing to do with commerce. For example, the Agencies may assert authority over a water or land because it “[e]xport[s] . . . organic matter,” 33

C.F.R. § 328.3(c)(5)(vii), to a primary water. In other words, if a bird flies from a primary water to another water or piece of dry land and a plant or invertebrate “hitchhik[es],” Connectivity Study 5-5, ID-20859 (JA__), on the bird’s feathers and travels back to the primary water, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Or if the land feature “[e]xport[s] . . . food resources,” 33 C.F.R. § 328.3(c)(5)(viii), because a bird travels to eat, the Agencies could deem it jurisdictional under the Rule. This is precisely the kind of overreach the Supreme Court expressly rejected in *SWANCC*.

Third, as in *Lopez* and *Morrison*, the Rule ultimately relies on an attenuated causal chain that “obliterate[s] the distinction between what is national and what is local,” *Lopez*, 514 U.S. at 557 (quotations omitted). In *Lopez* and *Morrison*, the Supreme Court rejected the federal government’s theory “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,” *Morrison*, 529 U.S. at 617. The Court explained that such reasoning would improperly permit the federal government to take over whole “areas of traditional state regulation.” *Id.* at 615. The same is true here, where the Rule’s overbroad assertion of authority over local land and water features tramples the States’ authority to manage local lands and waters.

C. The Rule Is Unconstitutionally Vague.

A statute or regulation is constitutionally invalid under the Due Process Clause if it prohibits conduct “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Ass’n of Cleveland Fire Fighters*, 502 F.3d at 551 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). In *Chicago v. Morales*, 527 U.S. 41 (1999), for example, the Supreme Court found void for vagueness an ordinance that imposed a criminal sanction for loitering, defined as “remaining in any one [public] place with no apparent purpose,” with one or more people the police officer reasonably believes are gang members. *Id.* at 47 (quotations and citations omitted). The Court reasoned that it would be difficult for a person to “know if he or she had an ‘apparent purpose.’” *Id.* at 57.

A law may be unconstitutionally vague for two independent reasons. “First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Id.* at 56. Such vagueness concerns are particularly acute where, as with the CWA, the term at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2556-57 (2015); 33 U.S.C. § 1319(c). Under these standards, the Rule is unconstitutionally vague.

First, the Rule “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Morales*, 527 U.S. at 56. For example, the Rule’s tributaries category covers any “water that contributes flow, either directly or through another water” and that is “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(c)(3). But as a Corps’ 2004 report explains, “selection of reliable OHWM field indicators [is] challenging” and “especially difficult in arid regions” even with respect to present channels.¹⁰ Moreover, the Agencies explain that they will use remote sensing and desktop tools to determine the OHWM and bed and banks of tributaries where “physical characteristics of bed and banks and another indicator of [OHWM] are absent in the field.” 80 Fed. Reg. at 37,077. In other words, even where there is no evidence of a bed and bank to the naked eye, the Agencies can assert jurisdiction over an indentation on the landscape that appears through sophisticated digital photography and satellite imaging to which ordinary people do not have access. *See id.*

¹⁰ R.W. Lichvar & J.S. Wakeley, U.S. Army Corps of Eng’rs, *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (2004), <http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/>; *see also* AMA Comments 10, ID-13951 (JA__).

Relatedly, the Rule's inclusion of "[d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, [and] [d]itches, regardless of flow, that are excavated in or relocate a tributary," 80 Fed. Reg. at 37,078, is similarly unconstitutionally vague. The Agencies explain that these ditches will be identified by the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." *Id.* at 37,078-79. But it is exceedingly difficult under this standard for an ordinary individual to know if a ditch will be covered. Even if the individual has the capability to conduct this research, it is unclear how far back in history the individual must look for the presence of a previously existing tributary.

The Rule's case-by-case waters category presents similar problems for ordinary landowners. That category instructs the Agencies to look at any water that is "[at least partially] located within the 100-year floodplain of a" primary water or "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary, 33 C.F.R. § 328.3(a)(8), and then to apply a largely unguided case-by-case analysis, looking at whether the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or*

biological integrity of a [primary water]” based on “any single function or combination of functions performed by the water,” *id.* § 328.3(c)(5) (emphasis added). Given the number of factors that staff are instructed to consider in terms of “chemical,” “physical” or “biological” impact, *see, e.g.*, 80 Fed. Reg. at 37,093 (referencing sediment trapping, nutrient recycling, food export, flood control, and multiple other factors), it will not be possible for ordinary people to know how any particular jurisdictional inquiry will turn out under the Rule.

Second, for many of the same reasons, the Rule is unconstitutionally vague because it “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *Morales*, 527 U.S. at 56. “[W]here the legislature fails to provide . . . minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotations omitted). The Supreme Court has concluded that a statute requiring an individual to provide “‘credible and reliable’ identification” was vague because it failed “to establish standards by which the officers may determine whether the suspect has complied.” *Id.* at 360-61.

The Rule does not provide the Agencies’ field staffs with “minimal guidelines” for assessing whether waters are subject to the CWA. For example, with regard to the tributaries category, the Rule does not define bed and banks

precisely, including allowing the Agencies to arbitrarily determine that a bed and banks exist through remote imaging. Moreover, even the presence of a bed, banks, and OHWM provide insufficient restraint against arbitrary enforcement because “OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics.” AMA Comments 11, ID-13951 (JA__) (quoting Lindsey Lefebvre, et al., U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540). And the case-by-case waters category involves the application of numerous different considerations, without clear indication of how any inquiry should turn out.

In many situations, a person subject to the law has no way to know whether his or her land contains a water of the United States before an enforcement action is commenced, unless he or she requests a jurisdictional determination. And the jurisdictional determination process is not required by the CWA. *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring).

D. The Agencies’ Repeated Unlawful Interpretations Of “Waters Of The United States” Threaten The Constitutionality Of That Term.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court invalidated the residual clause of the Armed Career Criminal Act—“involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)—after several decades of attempting to give that term a

definite meaning. The Supreme Court explained: “the failure of persistent efforts . . . to establish a standard” under a broadly worded statutory phrase can lead the courts to declare that phrase unconstitutional. *Johnson*, 135 S. Ct. at 2558 (quotation omitted).

The Agencies’ repeated failures to provide a lawful definition for the statutory term “waters of the United States” threaten that term’s legality. As Justice Kennedy has noted in a recent opinion joined by Justices Thomas and Alito, “the [CWA’s] reach is ‘notoriously unclear’ and the consequences to landowners . . . can be crushing.” *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)). This lack of clarity “raise[s] troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Id.* at 1817.

For the third time now, the Agencies have adopted an interpretation of the term “waters of the United States” that cannot withstand constitutional scrutiny, including because it is vague and “essentially limitless,” *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). The States join Chief Justice Roberts in urging the Agencies, in the strongest possible terms, to stop their repeated unlawful practice and to issue a definitional rule that ordinary people can understand and that is consistent with “the clearly limiting terms Congress employed in the Clean Water

Act.” *Id.* at 758. If the Agencies persist in their pattern of unlawful conduct, the Supreme Court may well choose to invalidate the term “waters of the United States,” just as it did with the residual clause in *Johnson*.

IV. THE RULE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

“NEPA is a procedural statute, designed to ensure that federal agencies consider the environmental impact of their actions.” *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 968 (6th Cir. 2009) (quotations and citation omitted). Unless exempted by statute, all agencies must comply with NEPA. *See Pac. Legal Found. v. Andrus*, 657 F.2d 829, 833 (6th Cir. 1981); 42 U.S.C. § 4332; 40 C.F.R. § 1507.1. EPA enjoys such an exemption for certain activities under the CWA, *see* 33 U.S.C. § 1371(c), but the Corps does not.

NEPA requires the preparation of an environmental impact statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This includes the promulgation of federal regulations. 40 C.F.R. § 1502.4(b).

As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily qualifies as a major federal action significantly affecting the quality of the human environment. The Corps, however, elected not to prepare an EIS for the Rule, and instead issued a Finding of No Significant Impact (“FONSI”) after preparing a legally deficient Environmental

Assessment (“EA”).¹¹ That finding—that the Rule has no significant impact on the human environment—is arbitrary and capricious and must be set aside. *See Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir. 1986).

The Corps also violated NEPA by evaluating an unreasonably restricted range of alternatives, considering only two—the Rule and a “no action” alternative in which the Corps would continue regulating under the existing rule and post-*Rapanos* agency guidance. The failure to consider a reasonable range of alternatives to the proposed agency action violates NEPA. *Partners in Forestry Co-op., Northwood Alliance, Inc. v. U.S. Forest Serv.*, 638 F. App’x 456, 464-65 (6th Cir. 2015).

A. The Corps Failed To Prepare An Environmental Impact Statement.

The Corps’ implausible conclusion that the Rule does not significantly affect the quality of the human environment was reached without considering legally-prescribed, mandatory factors for such assessments. “NEPA’s regulations state that whether a project is ‘significant’ requires agencies to consider both the ‘context’ and the ‘intensity’ of the project.” *Partners in Forestry Co-op.*, 638 F. App’x at 462 (quoting 40 C.F.R. § 1508.27). “Context” focuses “on the affected geographical region and its interests,” while “intensity” looks “to the severity of

¹¹ Agencies may prepare EAs as an initial step in the NEPA process to determine whether an EIS is warranted. *See* 40 C.F.R. § 1508.9; *Charter Twp. of Huron, Mich. v. Richards*, 997 F.2d 1168, 1174 (6th Cir. 1993).

the proposal's environmental impact.” *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002).

The Corps did not consider either the “context” or the “intensity” factors in its NEPA analysis. That alone should invalidate the Corps’ determination. *See State Farm*, 463 U.S. at 43 (vacatur is required if the agency “entirely failed to consider an important aspect of the problem”). In addition, both factors overwhelmingly support a finding that the Rule will significantly affect the quality of the human environment.

Context. “The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). The Rule is nationwide in scope, affecting all fifty States. In fact, it was the sweeping national effect of this regulation that partially prompted this Court to assert jurisdiction. *See In re U.S. Dep’t of Def., U.S. E.P.A. Final Rule*, 817 F.3d at 274.

By the Agencies’ own estimates, the Rule will result in “an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional.” Final EA 21, ID-20867 (JA__). Even if these estimates were accurate, they would have profound implications on federal and state regulatory programs, private landowners, and the regulated community. For example, the Agencies have performed more than 400,000 jurisdictional determinations since 2008. 80 Fed.

Reg. at 37,065. Small increases in jurisdiction trigger thousands of additional federal regulatory interactions between the public and private sector each year.

But the Agencies' estimates are grossly understated, and significantly mislead the public regarding the true regulatory and economic implications of the Final Rule. For example, Kansas estimated a 460% increase in federal jurisdiction in that State alone under the Proposed Rule, with an additional 133,000 miles of ephemeral streams subject to per se jurisdiction under the new tributary definition. KS Comments App. A, ID-14794 (JA___). Alaska is concerned that the Rule will regulate "nearly all waters and wetlands" within that State. AK Gov. Comments 1, ID-19465 (JA___). So too is New Mexico. NM ED Comments 10, ID-16552 (JA___) (the Rule "would in effect engulf all streams, drainage systems, and watersheds within the State"). Ninety-six percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," AZ DEQ Comments 2, ID-16437 (JA___), and "approximately 80% of Wyoming's stream miles are intermittent or ephemeral." WY DEQ Comments 4, ID-18020 (JA___); *see also* KY Ag. Comm. Comments 1, ID-14055 (JA___) (expressing concern regarding 92,000 stream miles in Kentucky).

The Corps simply ignored this "context" when proclaiming the Rule lacks significant effect. If the Corps had attempted to accurately quantify the actual impacts of the Rule, there is no way it could have articulated a "rational

connection” between these impacts and its FONSI. *See Bowman Transp.*, 419 U.S. at 285. Indeed, as the Corps’ own staff recognizes, absent an EIS “it is not possible to estimate” or “verify” the percentage of water bodies that would be effected by the Rule, and particularly by the changes made between the Proposed Rule and Final Rule. Moyer Memorandum 2, ID-20882 (JA___). Rather, “[t]his is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS).” *Id.* at 3.

The Corps also ignored the very large regional variations in the nation’s waterways when analyzing the potential effects of its Rule. For example, the Corps believes that the largest expansion of its regulatory program will likely be in the “other waters” category. Final EA 21-22, ID-20967 (JA___) (estimating a 34.5% increase in positive federal jurisdictional determinations for other waters). Geographical and hydrological features—including those covered by the “other waters category”—are not evenly distributed across the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(7). Although the Agencies were well aware of that fact, and were reminded of it during the public comment period, *see, e.g.*, AK DEC Comments 12, ID-19465 (JA___), they unreasonably failed to address this “context” in the EA. Instead, they relied on broad national averages to estimate the total costs and benefits associated with the Rule, marginalizing the potentially disparate treatment for individual States. *See, e.g.*, Final EA 25, ID-20867 (JA___) (“To

estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402, . . . and 404 programs to account for an estimated increase in permitting and regulatory activities that would result.”).

Intensity. The “intensity” factors also support a finding that the Final Rule “significantly” affects the human environment. These factors measure the “severity of impact” associated with a federal action, and include:

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

. . .

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

. . .

(10) Whether the action threatens a violation of Federal, State, or local law

40 C.F.R. § 1508.27(b). The EA does not discuss or address these, or *any* of the ten available factors, a failure that alone supports a finding of arbitrary and capricious decision-making. *See State Farm*, 463 U.S. at 43 (the agency “entirely failed to consider an important aspect of the problem”).

Focusing on just a few of the ten factors, it is clear that the Rule rises to the level of significance that warrants full analysis in an EIS. For example, the Rule is without a doubt highly controversial. *See* 40 C.F.R. § 1508.27(b)(4). “Controversy in the NEPA context does not necessarily denote public opposition to

a proposed action, but a substantial dispute as to the size, nature, or effect of the action.” *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (wide disputes regarding the loss of farmland acreage sufficiently controversial to warrant EIS). This case is nothing if not a dispute over the “size, nature, or effect” of the Rule. This factor alone warrants the preparation of an EIS.

The Rule also establishes a precedent for future actions with significant effects and represents a decision in principle about future considerations, *see* 40 C.F.R. § 1508.27(b)(6), because it sets controlling guidelines for hundreds of thousands of future regulatory decisions, *see* 80 Fed. Reg. at 37,065. Each positive jurisdictional determination rendered pursuant to the Rule will have substantial legal, economic, and environmental impacts on the property where it is made and any projects planned for that property. *See Hawkes Co.*, 136 S. Ct. at 1814-15. Expanding federal jurisdiction necessarily increases this burden. In *Hawkes*, for example, the required environmental analysis for a CWA permit was estimated at \$100,000, and it can be much more. *Id* at 1815.

Finally, as already discussed, the Rule “threatens a violation of Federal, State, or local law,” 40 C.F.R. § 1508.28(b)(10), as dozens of organizations and States informed the Agencies during the public comment period on the Proposed Rule. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__); WAC Comments 3-4, ID-14568 (JA__). Many of those same legal concerns were recognized by this

Court and the District Court for the District of North Dakota in temporarily staying the Final Rule. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Taking all of these factors into consideration, there is no plausible explanation for failing to prepare an EIS in support of the Final Rule, a fatal flaw the Corps should have easily identified during the EA development process.

B. The Corps Rejected The Need For An Environmental Impact Statement Based On A Flawed Environmental Assessment.

The purpose of an EA is to assess the “environmental impacts of proposed actions and alternatives” to determine whether an EIS is required. *Richards*, 997 F.2d at 1174 (citing 40 C.F.R. § 1508.9). In making that assessment, NEPA requires “a ‘hard look’ at the environmental consequences” of agency action. *Crounse Corp.*, 781 F.2d at 1193. “A proper consideration of the . . . impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004) (finding an EA inadequate) (quotation omitted). The EA prepared by the Corps falls far short of the “hard look” that NEPA requires.

For example, the “Environmental Consequences” section of the EA provides a brief, two-page description of how much the Rule will cause federal jurisdiction

to expand, but then makes no serious attempt to assess the environmental and socioeconomic effects of that new federal jurisdiction. Final EA 21-23, ID-20867 (JA__). Instead, the EA's "analysis" of environmental consequences, comprising only four pages, has sections relating to wildlife, recreation, and flood risk reduction. *Id.* at 24-27 (JA__). Each of those sections contains only *one* or *two* short paragraphs, and only *one sentence* of analysis, each of which is conclusory and virtually identical. Those single sentences of "analysis" assert that the extension of federal jurisdiction is expected to benefit the environment, but the Corps fails to support this assertion with any evidence or effort to quantify the benefits.

This is but one example: "The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing, bird watching, and photography." *Id.* at 25 (JA__). Nowhere does the Corps describe why it believes the Rule will lead to an increase in wildlife or attempt to quantify that increase. And most importantly, the Corps fails to mention whether the States are already regulating the same waters under state law and whether the net effect of duplicative regulation would have any positive or negative effect on wildlife. This is precisely

the kind of drive-by analysis the courts have rejected under NEPA. *See, e.g., Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 996.

The fundamental purpose of NEPA is to force federal agencies to genuinely consider the environmental costs and benefits of major federal actions. That purpose is thwarted here by the Corps' refusal to make any effort to analyze or quantify the environmental, socioeconomic or other effects of its sweeping new Rule, including potential effects on the States, their regulatory programs, or their regulated communities. And the Corps' decision to avoid preparing an EIS, based on the flawed EA, prohibited the States from participating in the NEPA process for the Rule as "cooperating agencies," *see* 40 C.F.R. §§ 1501.6 and 1508.5, further eroding the cooperative federalism principles enshrined in our nation's laws. *See* George T. Frampton, *Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies To Be Cooperating Agencies* 2 (July 28, 1999), available at <https://ceq.doe.gov/nepa/regs/ceqcoop.pdf> ("Considering NEPA's mandate and the authority granted in federal regulation to allow for cooperating agency status for state, tribal and local agencies, cooperator status for appropriate non-federal agencies should be routinely solicited.").

C. The Corps Failed To Consider A Reasonable Range Of Alternatives.

The flawed EA and the resultant failure to prepare an EIS fundamentally undermined the Corps' NEPA analysis of the Rule, but it was not the only fatal

defect. Agencies are required to consider alternatives to their proposed actions to fulfill the mandates of NEPA. 42 U.S.C. § 4332(2)(C)(iii). The Corps' alternatives analysis in the EA fails any objective review of that important requirement.

“An agency is required to ‘consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.’” *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). The same holds true whether an agency is preparing an EA or an EIS. *Partners in Forestry Co-op.*, 638 F. App'x at 464. “[T]he purpose of an EA, which is defined in regulations of the Council on Environmental Quality (CEQ) as a concise document describing the environmental impacts of *proposed actions and alternatives*, 40 C.F.R. § 1508.9 (1992), is to provide the agency with the basic information needed to decide on the next step.” *Richards*, 997 F.2d at 1174 (emphasis added). Agencies do not fulfill their obligation to consider alternatives when—as here—they artificially limit themselves to the two options of the proposed action and a no-action alternative without considering obvious variations. *See Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

The Corps considered only one alternative to the Rule, a “no action” alternative, where “the current procedures, processes, and definitions used by the

USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule.” Final EA 23, ID-20867 (JA__). Oddly, the Corps did not consider the Proposed Rule as an option in its NEPA analysis. Apparently, the Corps “considered whether to analyze the draft rule in th[e] Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action.” *Id.* at 13 (JA__). The Corps did not explain why it was not a “viable option” except that the decision was made “upon a review of the substantive comments received during the public comment period.” *Id.*

What is most troubling about the Corps’ limited alternatives analysis is that several other perfectly feasible alternatives were available. Many State Petitioners, for example, submitted comments favoring an alternative that would adopt a narrower definition of “waters of the United States” that would enable them to implement their own state laws and policies to protect their own lands and waters using their on-the-ground expertise—such as permitting programs that are capable of issuing necessary permits in a reasonable timeframe and at a reasonable cost. *See, e.g.*, ND Comments 14-15, ID-15365 (JA__); TX CEQ Comments 4, ID-14279 (JA__). The EA was obligated to address the alternative of limiting CWA jurisdiction to traditional navigable waterways and waters that are closely tied to

those waters: “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.” *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality). Such an approach would enable state governments to tailor their own laws and regulations more closely to the topography of their land and to make local land use decisions more responsive to the local community directly affected, while still leaving genuine interstate waterways under federal regulation. *See* TX CEQ Comments 4, ID-14279 (JA__); WY DEQ Comments 7, ID-18020 (JA__). Although the purpose of the rulemaking was to respond to a series of Supreme Court decisions holding that the Agencies had been using too broad a definition of “waters of the United States,” the Corps did not even consider the possibility of a narrower definition in its EA.

Several commenters also suggested that instead of adopting a single, unitary definition for the entire country, separate definitions could be adopted on a regional or state-by-state basis. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); PA DOA Comments 2, ID-14465 (JA__) (“Administering a detailed and specific but ‘one-size-fits-all’ definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections.”). Separate definitions would take into account the fact that a bed and banks may be indicia of streams in the wetter parts

of the country, but that in other regions beds and banks are often found in bone-dry washes. Regions with extensive farmland that becomes flooded only in rare wet years, such as the northern plains, could have a definition that takes this into account. ND Comments 6, ID-15365 (JA___). And the definition of “waters of the United States” applicable to Alaska could specifically address the complications caused by widespread permafrost. AK DEC Comments 11-12, ID-19465 (JA___). Separate state or regional “waters of the United States” definitions are a perfectly reasonable and feasible alternative that should have been addressed in the EA.

The Corps failed “to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives,” *Am. Radio Relay League, Inc.*, 524 F.3d at 242. The Corps’ decision to ignore—without comment—the principle alternatives that had been advocated by the States is arbitrary, capricious and contrary to the fundamental objectives of NEPA.

CONCLUSION

For all the reasons articulated above, the Rule should be vacated.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 20,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). By order of this Court, State Petitioners' Opening Brief was not to exceed 21,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

Date: November 1, 2016

/s/ Eric E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, a true and correct copy of the State Petitioner's Opening Brief was served via the Court's CM/ECF system to the parties registered to receive notice of the filings in this case.

/s/ Eric E. Murphy

Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MURRAY ENERGY CORPORATION, et al.,)	In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, published June 29, 2015 (MCP No. 135)
Petitioners,)	
v.)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
Respondents.)	On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

**ADDENDUM PURSUANT TO FEDERAL RULE OF APPELLATE
PROCEDURE 28(f) TO STATE PETITIONERS' OPENING BRIEF**

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CODIFICATION

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by act June 30, 1948, ch. 758, 62 Stat. 1155, and amended by acts July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, §§1, 2, 70 Stat. 498-507; June 25, 1959, Pub. L. 86-70, 73 Stat. 141; July 12, 1960, Pub. L. 86-624, 74 Stat. 411; July 20, 1961, Pub. L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91-611, 84 Stat. 1818; July 9, 1971, Pub. L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92-137, 85 Stat. 379; Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The act is shown herein, however, as having been added by Pub. L. 92-500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the act's provisions by Pub. L. 92-500.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning proc-

esses be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) **Congressional recognition, preservation, and protection of primary responsibilities and rights of States**

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) **Congressional policy toward Presidential activities with foreign countries**

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) **Administrator of Environmental Protection Agency to administer chapter**

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) **Public participation in development, revision, and enforcement of any regulation, etc.**

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the

States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and inter-agency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, ch. 758, title I, § 101, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub. L. 95-217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub. L. 100-4, title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

AMENDMENTS

1987—Subsec. (a)(7). Pub. L. 100-4 added par. (7).

1977—Subsec. (b). Pub. L. 95-217, § 26(b), inserted provisions expressing Congressional policy that the States manage the construction grant program under this chapter and implement the permit program under sections 1342 and 1344 of this title.

Subsec. (g). Pub. L. 95-217, § 5(a), added subsec. (g).

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110-365, § 1, Oct. 8, 2008, 122 Stat. 4021, provided that: “This Act [amending sections 1268 and 1271a of this title] may be cited as the ‘Great Lakes Legacy Reauthorization Act of 2008’.”

Pub. L. 110-288, § 1, July 29, 2008, 122 Stat. 2650, provided that: “This Act [amending sections 1322, 1342, and 1362 of this title] may be cited as the ‘Clean Boating Act of 2008’.”

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107-303, § 1(a), Nov. 27, 2002, 116 Stat. 2355, provided that: “This Act [enacting section 1271a of this title, amending sections 1254, 1266, 1268, 1270, 1285, 1290, 1324, 1329, 1330, and 1375 of this title, enacting provisions set out as notes under this section, section 1254 of this title, and section 1113 of Title 31, Money and Finance, and repealing provisions set out as a note under section 50 of Title 20, Education] may be cited as the ‘Great Lakes and Lake Champlain Act of 2002’.”

Pub. L. 107-303, title I, § 101, Nov. 27, 2002, 116 Stat. 2355, provided that: “This title [enacting section 1271a of this title and amending section 1268 of this title] may be cited as the ‘Great Lakes Legacy Act of 2002’.”

Pub. L. 107-303, title II, § 201, Nov. 27, 2002, 116 Stat. 2358, provided that: “This title [amending section 1270 of this title] may be cited as the ‘Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002’.”

SHORT TITLE OF 2000 AMENDMENTS

Pub. L. 106-457, title II, § 201, Nov. 7, 2000, 114 Stat. 1967, provided that: “This title [amending section 1267

of this title and enacting provisions set out as a note under section 1267 of this title] may be cited as the ‘Chesapeake Bay Restoration Act of 2000’.”

Pub. L. 106-457, title IV, § 401, Nov. 7, 2000, 114 Stat. 1973, provided that: “This title [amending section 1269 of this title] may be cited as the ‘Long Island Sound Restoration Act’.”

Pub. L. 106-457, title V, § 501, Nov. 7, 2000, 114 Stat. 1973, provided that: “This title [enacting section 1273 of this title] may be cited as the ‘Lake Pontchartrain Basin Restoration Act of 2000’.”

Pub. L. 106-457, title VI, § 601, Nov. 7, 2000, 114 Stat. 1975, provided that: “This title [enacting section 1300 of this title] may be cited as the ‘Alternative Water Sources Act of 2000’.”

Pub. L. 106-284, § 1, Oct. 10, 2000, 114 Stat. 870, provided that: “This Act [enacting sections 1346 and 1375a of this title and amending sections 1254, 1313, 1314, 1362, and 1377 of this title] may be cited as the ‘Beaches Environmental Assessment and Coastal Health Act of 2000’.”

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103-431, § 1, Oct. 31, 1994, 108 Stat. 4396, provided that: “This Act [amending section 1311 of this title] may be cited as the ‘Ocean Pollution Reduction Act’.”

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-596, § 1, Nov. 16, 1990, 104 Stat. 3000, provided that: “This Act [enacting sections 1269 and 1270 of this title, amending sections 1268, 1324, and 1416 of this title, and enacting provisions set out as notes under this section and section 1270 of this title] may be cited as the ‘Great Lakes Critical Programs Act of 1990’.”

Pub. L. 101-596, title II, § 201, Nov. 16, 1990, 104 Stat. 3004, provided that: “This part [probably means title, enacting section 1269 of this title and amending section 1416 of this title] may be cited as the ‘Long Island Sound Improvement Act of 1990’.”

Pub. L. 101-596, title III, § 301, Nov. 16, 1990, 104 Stat. 3006, provided that: “This title [enacting section 1270 of this title, amending section 1324 of this title, and enacting provisions set out as a note under section 1270 of this title] may be cited as the ‘Lake Champlain Special Designation Act of 1990’.”

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100-653, title X, § 1001, Nov. 14, 1988, 102 Stat. 3835, provided that: “This title [amending section 1330 of this title and enacting provisions set out as notes under section 1330 of this title] may be cited as the ‘Massachusetts Bay Protection Act of 1988’.”

SHORT TITLE OF 1987 AMENDMENT

Section 1(a) of Pub. L. 100-4 provided that: “This Act [enacting sections 1254a, 1267, 1268, 1281b, 1329, 1330, 1377, 1381 to 1387, and 1414a of this title, amending this section and sections 1254, 1256, 1262, 1281, 1282 to 1285, 1287, 1288, 1291, 1311 to 1313, 1314, 1317 to 1322, 1324, 1342, 1344, 1345, 1361, 1362, 1365, 1369, 1375, and 1376 of this title, and enacting provisions set out as notes under this section, sections 1284, 1311, 1317, 1319, 1330, 1342, 1345, 1362, 1375, and 1414a of this title, and section 1962d-20 of Title 42, The Public Health and Welfare] may be cited as the ‘Water Quality Act of 1987’.”

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97-117, § 1, Dec. 29, 1981, 95 Stat. 1623, provided that: “This Act [enacting sections 1298, 1299, and 1313a of this title, amending sections 1281 to 1285, 1287, 1291, 1292, 1296, 1311, and 1314 of this title, and enacting provisions set out as notes under sections 1311 and 1375 of this title] may be cited as the ‘Municipal Wastewater Treatment Construction Grant Amendments of 1981’.”

SHORT TITLE OF 1977 AMENDMENT

Section 1 of Pub. L. 95-217 provided: “That this Act [enacting sections 1281a, 1294 to 1296, and 1297 of this

title, amending this section and sections 1252, 1254 to 1256, 1259, 1262, 1263, 1281, 1282 to 1288, 1291, 1292, 1311, 1314, 1315, 1317 to 1319, 1321 to 1324, 1328, 1341, 1342, 1344, 1345, 1362, 1364, 1375, and 1376 of this title, enacting provisions set out as notes under this section and sections 1284, 1286, 1314, 1321, 1342, 1344, and 1376 of this title, and amending provisions set out as a note under this section] may be cited as the ‘Clean Water Act of 1977.’”

SHORT TITLE

Section 1 of Pub. L. 92-500 provided that: “That this Act [enacting this chapter, amending section 24 of Title 12, Banks and Banking, sections 633 and 636 of Title 15, Commerce and Trade, and section 711 of former Title 31, Money and Finance, and enacting provisions set out as notes under this section and sections 1281 and 1361 of this title] may be cited as the ‘Federal Water Pollution Control Act Amendments of 1972.’”

Section 519, formerly section 518, of Act June 30, 1948, ch. 758, title V, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 896, and amended Dec. 27, 1977, Pub. L. 95-217, § 2, 91 Stat. 1566, and renumbered § 519, Feb. 4, 1987, Pub. L. 100-4, title V, § 506, 101 Stat. 76, provided that: “This Act [this chapter] may be cited as the ‘Federal Water Pollution Control Act’ (commonly referred to as the Clean Water Act).”

SAVINGS PROVISION

Pub. L. 92-500, § 4, Oct. 18, 1972, 86 Stat. 896, provided that:

“(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall abate by reason of the taking effect of the amendment made by section 2 of this Act [which enacted this chapter]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

“(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972], and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall continue in full force and effect after the date of enactment of this Act [Oct. 18, 1972] until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [this chapter].

“(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in section 202 of the Federal Water Pollution Control Act as amended by this Act [section 1282 of this title] and in subsection (c) of section 3 of this Act.”

SEPARABILITY

Act June 30, 1948, ch. 758, title V, § 512, as added by Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 894, provided that: “If any provision of this Act [this chapter], or the application of any provision of this Act [this chapter] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [this chapter], shall not be affected thereby.”

NATIONAL SHELLFISH INDICATOR PROGRAM

Pub. L. 102-567, title III, § 308, Oct. 29, 1992, 106 Stat. 4286; as amended by Pub. L. 105-362, title II, § 201(b), Nov. 10, 1998, 112 Stat. 3282, provided that:

“(a) ESTABLISHMENT OF A RESEARCH PROGRAM.—The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the ‘Program’) for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for—

“(1) an environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

“(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

“(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

“(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

“(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

“(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

“(b) ADVISORY COMMITTEE.—(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the ‘Committee’) shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

“(2) The Committee shall—

“(A) identify priorities for achieving the purpose of the Program;

“(B) review and recommend approval or disapproval of Program work plans and plans of operation;

“(C) review and comment on all subcontracts and grants to be awarded under the Program;

“(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

“(E) provide such other advice on the Program as is appropriate.

“(3) The Committee shall consist of at least ten members and shall include—

“(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

“(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference Executive Board), of whom one shall represent the shellfish industry in each region;

“(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

“(D) one member representing the Shellfish Institute of North America.

“(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

“(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the Program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

“(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee, but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

“(c) CONTRACT WITH CONSORTIUM.—Within 30 days after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will—

“(1) be the academic administrative organization and fiscal agent for the Program;

“(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

“(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

“(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

“(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

“(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

“(d) AUTHORIZATION OF APPROPRIATIONS.—(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98-210; 97 Stat. 1409), there are authorized to be appropriated to the Secretary of Commerce \$5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

“(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

“(e) DEFINITIONS.—As used in this section, the term—

“(1) ‘Consortium’ means the Louisiana Universities Marine Consortium; and

“(2) ‘shellfish’ means any species of oyster, clam, or mussel that is harvested for human consumption.”

LIMITATION ON PAYMENTS

Section 2 of Pub. L. 100-4 provided that: “No payments may be made under this Act [see Short Title of 1987 Amendment note above] except to the extent provided in advance in appropriation Acts.”

SEAFOOD PROCESSING STUDY; SUBMITTAL OF RESULTS TO CONGRESS NOT LATER THAN JANUARY 1, 1979

Pub. L. 95-217, §74, Dec. 27, 1977, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters and to include in this study an examination of technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and to submit the result of this study to Congress not later than Jan. 1, 1979.

STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare.

OVERSIGHT STUDY

Pub. L. 92-500, §5, Oct. 18, 1972, 86 Stat. 897, authorized the Comptroller General of the United States to conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution conducted, supported, or assisted by any Federal agency pursuant to any Federal law or regulation and assess conflicts between these programs and their coordination and efficacy, and to report to Congress thereon by Oct. 1, 1973.

INTERNATIONAL TRADE STUDY

Pub. L. 92-500, §6, Oct. 18, 1972, 86 Stat. 897, provided that:

“(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

“(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

“(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

“(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

“(A) does not require its manufacturers to implement pollution abatement and control programs.

“(B) requires a lesser degree of pollution abatement and control in its programs, or

“(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

“(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of

a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

“(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

“(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section [Oct. 18, 1972] of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months.”

INTERNATIONAL AGREEMENTS

Pub. L. 92-500, § 7, Oct. 18, 1972, 86 Stat. 898, provided that: “The President shall undertake to enter into international agreement to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums.”

NATIONAL POLICIES AND GOAL STUDY

Pub. L. 92-500, § 10, Oct. 18, 1972, 86 Stat. 899, directed President to make a full and complete investigation and study of all national policies and goals established by law to determine what the relationship should be between these policies and goals, taking into account the resources of the Nation, and to report results of his investigation and study together with his recommendations to Congress not later than two years after Oct. 18, 1972.

EFFICIENCY STUDY

Pub. L. 92-500, § 11, Oct. 18, 1972, 86 Stat. 899, directed President, by utilization of the General Accounting Office, to conduct a full and complete investigation and study of ways and means of most effectively using all of the various resources, facilities, and personnel of the Federal Government in order to most efficiently carry out the provisions of this chapter and to report results of his investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

SEX DISCRIMINATION

Pub. L. 92-500, § 13, Oct. 18, 1972, 86 Stat. 903, provided that: “No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [see Short Title note above] the Federal Water Pollution Control Act [this chapter], or the Environmental Financing Act [set out as a note under section 1281 of this title]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee.”

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION AT FEDERAL FACILITIES

Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public

Health and Welfare, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, formerly set out as a note under section 1321 of this title.

EX. ORD. NO. 11742. DELEGATION OF FUNCTIONS TO SECRETARY OF STATE RESPECTING THE NEGOTIATION OF INTERNATIONAL AGREEMENTS RELATING TO THE ENHANCEMENT OF THE ENVIRONMENT

Ex. Ord. No. 11742, Oct. 23, 1973, 38 F.R. 29457, provided:

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

DEFINITION OF “ADMINISTRATOR”

Pub. L. 100-4, § 1(d), Feb. 4, 1987, 101 Stat. 8, provided that: “For purposes of this Act [see Short Title of 1987 Amendment note above], the term ‘Administrator’ means the Administrator of the Environmental Protection Agency.”

§ 1252. Comprehensive programs for water pollution control

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) Planning for reservoirs; storage for regulation of streamflow

(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a

tion, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, ch. 758, title III, §302, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100-4, title III, §308(e), Feb. 4, 1987, 101 Stat. 39.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-4, §308(e)(2), inserted “or as identified under section 1314(l) of this title” after “Administrator” and “public health,” after “protection of”.

Subsec. (b). Pub. L. 100-4, §308(e)(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

“(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

“(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this

chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.”

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant

to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such

calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative ef-

fect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term “water quality standards” includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B) of this section, the Administrator shall publish any revised or

new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) of this section apply to this subsection, including the requirement in subsection (c)(2)(A) of this section that the criteria protect public health and welfare.

(June 30, 1948, ch. 758, title III, § 303, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100-4, title III, § 308(d), title IV, § 404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub. L. 106-284, § 2, Oct. 10, 2000, 114 Stat. 870.)

REFERENCES IN TEXT

This Act, referred to in subsecs. (a)(1), (2), (3)(B), (C) and (b)(1), means act June 30, 1948, ch. 758, 62 Stat. 1155, prior to the supersedure and reenactment of act June 30, 1948 by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816. Act June 30, 1948, ch. 758, as added by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816, enacted this chapter.

AMENDMENTS

2000—Subsec. (i). Pub. L. 106-284 added subsec. (i). 1987—Subsec. (c)(2). Pub. L. 100-4, § 308(d), designated existing provision as subpar. (A) and added subpar. (B). Subsec. (d)(4). Pub. L. 100-4, § 404(b), added par. (4).

§ 1313a. Revised water quality standards

The review, revision, and adoption or promulgation of revised or new water quality standards pursuant to section 303(c) of the Federal Water Pollution Control Act [33 U.S.C. 1313(c)] shall be completed by the date three years after December 29, 1981. No grant shall be made under title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.] after such date until water quality standards are reviewed and revised pursuant to section 303(c), except where the State has in good faith submitted such revised water quality standards and the Administrator has not acted to approve or disapprove such submission within one hundred and twenty days of receipt.

(Pub. L. 97-117, § 24, Dec. 29, 1981, 95 Stat. 1632.)

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in text, is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816. Title II of the Act is classified generally to subchapter II (§1281 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of this title and Tables.

CODIFICATION

Section was enacted as part of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

§ 1314. Information and guidelines

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(c) Application of State law

Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

(June 30, 1948, ch. 758, title III, §308, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 858; amended Pub. L. 95-217, §67(c)(1), Dec. 27, 1977, 91 Stat. 1606; Pub. L. 100-4, title III, §310, title IV, §406(d)(1), Feb. 4, 1987, 101 Stat. 41, 73.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-4, §406(d)(1), substituted “1345, and 1364” for “and 1364” in cl. (4).

Subsec. (a)(B). Pub. L. 100-4, §310(a)(2), inserted “(including an authorized contractor acting as a representative of the Administrator)” after “representative”.

Subsec. (b). Pub. L. 100-4, §310(a)(1), substituted a period and “Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.” for “, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.”

Subsec. (d). Pub. L. 100-4, §310(b), added subsec. (d). 1977—Subsec. (a)(4). Pub. L. 95-217 inserted “1344 (relating to State permit programs),” after “sections 1315, 1321, 1342,” in provisions preceding subpar. (A).

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of “federally assumed enforcement”), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that

any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this

chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was con-

sented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term “organization” means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term “serious bodily injury” means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as “person”

For the purpose of this subsection, the term “person” means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term “hazardous substance” means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste

the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,¹ or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the

district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the “Secretary”) finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed \$10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator’s or Secretary’s proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on

¹So in original.

the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(June 30, 1948, ch. 758, title III, §309, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 859; amended Pub. L. 95-217, §§54(b), 55, 56, 67(c)(2), Dec. 27, 1977, 91 Stat. 1591, 1592, 1606; Pub. L. 100-4, title III, §§312, 313(a)(1), (b)(1), (c), 314(a), Feb. 4, 1987, 101 Stat. 42, 45, 46; Pub. L. 101-380, title IV, §4301(c), Aug. 18, 1990, 104 Stat. 537.)

REFERENCES IN TEXT

The Solid Waste Disposal Act, referred to in subsec. (c)(7), is title II of Pub. L. 89-272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§6901 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of Title 42 and Tables.

AMENDMENTS

1990—Subsec. (c)(1)(A), (2)(A), (3)(A). Pub. L. 101-380 inserted “1321(b)(3),” after “1318.”

1987—Subsec. (c). Pub. L. 100-4, §312, amended subsec. (c) generally, revising provisions of par. (1), adding pars. (2), (3), (5), and (7), redesignating former pars. (2) and (4) as (3) and (6), respectively, and revising provisions of redesignated par. (4).

Subsec. (d). Pub. L. 100-4, §313(a)(1), inserted “, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title,” after second reference to “State.”

Pub. L. 100-4, §313(b)(1), substituted “\$25,000 per day for each violation” for “\$10,000 per day of such violation”.

Pub. L. 100-4, §313(c), inserted at end “In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.”

Subsec. (g). Pub. L. 100-4, §314(a), added subsec. (g).

1977—Subsec. (a)(1). Pub. L. 95-217, §§55(a), 67(c)(2)(A), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and “1342 or 1344 of this title” for “1342 of this title”.

Subsec. (a)(2). Pub. L. 95-217, §56(a), substituted “except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation” for “the Administrator shall enforce any permit condition or limitation”.

Subsec. (a)(3). Pub. L. 95-217, §§55(b), 67(c)(2)(B), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and inserted “or in a permit issued under section 1344 of this title by a State” after “in a permit issued under section 1342 of this title by him or by a State”.

Subsec. (a)(4). Pub. L. 95-217, §56(b), struck out provision that any order issued under this subsection had to be by personal service and had to state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Administrator determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. See section subsec. (a)(5) of this section.

Subsec. (a)(5), (6). Pub. L. 95-217, §56(c), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-217, §67(c)(2)(C), substituted “by a State or in a permit issued under section 1344 of this title by a State, shall be punished” for “by a State, shall be punished”.

Subsec. (d). Pub. L. 95-217, §§55(c), 67(c)(2)(D), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and inserted “or in a permit issued under section 1344 of this title by a State,” after “permit issued under section 1342 of this title by the Administrator, or by a State,”.

Subsec. (f). Pub. L. 95-217, §54(b), added subsec. (f).

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-380 applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub. L. 101-380, set out as an Effective Date note under section 2701 of this title.

SAVINGS PROVISION

Pub. L. 100-4, title III, §313(a)(2), Feb. 4, 1987, 101 Stat. 45, provided that: “No State shall be required before July 1, 1988, to modify a permit program approved or submitted under section 402 of the Federal Water Pollution Control Act [33 U.S.C. 1342] as a result of the amendment made by paragraph (1) [amending this section].”

DEPOSIT OF CERTAIN PENALTIES INTO OIL SPILL LIABILITY TRUST FUND

Penalties paid pursuant to subsection (c) of this section and sections 1321 and 1501 et seq. of this title to be deposited in the Oil Spill Liability Trust Fund created under section 9509 of Title 26, Internal Revenue Code, see section 4304 of Pub. L. 101-380, set out as a note under section 9509 of Title 26.

INCREASED PENALTIES NOT REQUIRED UNDER STATE PROGRAMS

Pub. L. 100-4, title III, §313(b)(2), Feb. 4, 1987, 101 Stat. 45, provided that: “The Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act [33 U.S.C. 1319(d)] which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1) [amending this section]. Nothing in this paragraph shall affect the Administrator’s authority to establish or adjust by regulation a minimum acceptable State civil penalty.”

ACTIONS BY SURGEON GENERAL RELATING TO INTERSTATE POLLUTION

Act July 9, 1956, ch. 518, §5, 70 Stat. 507, provided that actions by the Surgeon General with respect to water pollutants under section 2(d) of act June 30, 1948, ch. 758, 62 Stat. 1155, as in effect prior to July 9, 1956, which had been completed prior to such date, would still be subject to the terms of section 2(d) of act June 30, 1948, in effect prior to the July 9, 1956 amendment, but that actions with respect to such pollutants would nevertheless subsequently be possible in accordance with the terms of act June 30, 1948, as amended by act July 9, 1956.

§ 1320. International pollution abatement

(a) Hearing; participation by foreign nations

Whenever the Administrator, upon receipts of reports, surveys, or studies from any duly constituted international agency, has reason to believe that pollution is occurring which endangers the health or welfare of persons in a foreign country, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State or States in which such discharge or discharges originate and to

the appropriate interstate agency, if any. He shall also promptly call such a hearing, if he believes that such pollution is occurring in sufficient quantity to warrant such action, and if such foreign country has given the United States essentially the same rights with respect to the prevention and control of pollution occurring in that country as is given that country by this subsection. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the hearing, and the representative of such country shall, for the purpose of the hearing and any further proceeding resulting from such hearing, have all the rights of a State water pollution control agency. Nothing in this subsection shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of pollution in waters covered by those treaties.

(b) Functions and responsibilities of Administrator not affected

The calling of a hearing under this section shall not be construed by the courts, the Administrator, or any person as limiting, modifying, or otherwise affecting the functions and responsibilities of the Administrator under this section to establish and enforce water quality requirements under this chapter.

(c) Hearing board; composition; findings of fact; recommendations; implementation of board’s decision

The Administrator shall publish in the Federal Register a notice of a public hearing before a hearing board of five or more persons appointed by the Administrator. A majority of the members of the board and the chairman who shall be designated by the Administrator shall not be officers or employees of Federal, State, or local governments. On the basis of the evidence presented at such hearing, the board shall within sixty days after completion of the hearing make findings of fact as to whether or not such pollution is occurring and shall thereupon by decision, incorporating its findings therein, make such recommendations to abate the pollution as may be appropriate and shall transmit such decision and the record of the hearings to the Administrator. All such decisions shall be public. Upon receipt of such decision, the Administrator shall promptly implement the board’s decision in accordance with the provisions of this chapter.

(d) Report by alleged polluter

In connection with any hearing called under this subsection, the board is authorized to require any person whose alleged activities result in discharges causing or contributing to pollution to file with it in such forms as it may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall

amended Pub. L. 95–217, §§61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to

such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Admin-

istrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such applica-

tion has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement**(1) Agricultural return flows**

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) OTHER REQUIREMENTS.—Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section¹ 1365(a) of this title does not apply to any non-permitting program established under 1342(p)(6)² of this title for the silviculture activities listed in 1342(l)(3)(A)² of this title, or to any other limitations that might be deemed

¹So in original. Probably should not be capitalized.

²So in original. Probably should be preceded by "section".

to apply to the silviculture activities listed in 1342(l)(3)(A)² of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater dis-

charges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(June 30, 1948, ch. 758, title IV, §402, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 880; amended Pub. L. 95-217, §§33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub. L. 100-4, title IV, §§401-404(a), 404(c), formerly 404(d), 405, Feb. 4, 1987, 101 Stat. 65-67, 69, renumbered §404(c), Pub. L. 104-66, title II, §2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub. L. 102-580, title III, §364, Oct. 31, 1992, 106 Stat. 4862; Pub. L. 106-554, §1(a)(4) [div. B, title I, §112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; Pub. L. 110-288, §2, July 29, 2008, 122 Stat. 2650; Pub. L. 113-79, title XII, §12313, Feb. 7, 2014, 128 Stat. 992.)

AMENDMENTS

2014—Subsec. (l)(3). Pub. L. 113-79 added par. (3).
2008—Subsec. (r). Pub. L. 110-288 added subsec. (r).

2000—Subsec. (q). Pub. L. 106-554 added subsec. (q).
1992—Subsec. (p)(1), (6). Pub. L. 102-580 substituted “October 1, 1994” for “October 1, 1992” in par. (1) and “October 1, 1993” for “October 1, 1992” in par. (6).
1987—Subsec. (a)(1). Pub. L. 100-4, §404(c), inserted cl. (A) and (B) designations.

Subsec. (c)(1). Pub. L. 100-4, §403(b)(2), substituted “as to those discharges” for “as to those navigable waters”.

Subsec. (c)(4). Pub. L. 100-4, §403(b)(1), added par. (4).
Subsec. (l). Pub. L. 100-4, §401, inserted “Limitation on permit requirement” as subsec. heading designated existing provisions as par. (1) and inserted par. heading, added par. (2), and aligned pars. (1) and (2).

Subsecs. (m) to (p). Pub. L. 100-4, §§402, 403(a), 404(a), 405, added subsecs. (m) to (p).

1977—Subsec. (a)(5). Pub. L. 95-217, §50, substituted “section 1314(i)(2)” for “section 1314(h)(2)”.

Subsec. (b). Pub. L. 95-217, §50, substituted in provisions preceding par. (1) “subsection (i)(2) of section 1314” for “subsection (h)(2) of section 1314”.

Subsec. (b)(8). Pub. L. 95-217, §54(c)(1), inserted reference to identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into treatment works and programs to assure compliance with pretreatment standards by each source.

Subsec. (c)(1), (2). Pub. L. 95-217, §50, substituted “section 1314(i)(2)” for “section 1314(h)(2)”.

Subsec. (d)(2). Pub. L. 95-217, §65(b), inserted provision requiring that, whenever the Administrator objects to the issuance of a permit under subsec. (d)(2) of this section, the written objection contain a statement of the reasons for the objection and the effluent limitations and conditions which the permit would include if it were issued by the Administrator.

Subsec. (d)(4). Pub. L. 95-217, §65(a), added par. (4).

Subsec. (e). Pub. L. 95-217, §50, substituted “subsection (i)(2) of section 1314” for “subsection (h)(2) of section 1314”.

Subsec. (h). Pub. L. 95-217, §66, substituted “where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,” for “where no State program is approved.”

Subsec. (l). Pub. L. 95-217, §33(c), added subsec. (l).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy sub-

sequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PERMIT REQUIREMENTS FOR DISCHARGES FROM CERTAIN VESSELS

Pub. L. 110-299, §§1, 2, July 31, 2008, 122 Stat. 2995, as amended by Pub. L. 111-215, §1, July 30, 2010, 124 Stat. 2347; Pub. L. 112-213, title VII, §703, Dec. 20, 2012, 126 Stat. 1580; Pub. L. 113-281, title VI, §602, Dec. 18, 2014, 128 Stat. 3061, provided that:

“SECTION 1. DEFINITIONS.

“In this Act:

“(1) ADMINISTRATOR.—The term ‘Administrator’ means the Administrator of the Environmental Protection Agency.

“(2) COVERED VESSEL.—The term ‘covered vessel’ means a vessel that is—

“(A) less than 79 feet in length; or

“(B) a fishing vessel (as defined in section 2101 of title 46, United States Code), regardless of the length of the vessel.

“(3) OTHER TERMS.—The terms ‘contiguous zone’, ‘discharge’, ‘ocean’, and ‘State’ have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

“SEC. 2. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

“(a) NO PERMIT REQUIREMENT.—Except as provided in subsection (b), during the period beginning on the date of the enactment of this Act [July 31, 2008] and ending on December 18, 2017, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for—

“(1) any discharge of effluent from properly functioning marine engines;

“(2) any discharge of laundry, shower, and galley sink wastes; or

“(3) any other discharge incidental to the normal operation of a covered vessel.

“(b) EXCEPTIONS.—Subsection (a) shall not apply with respect to—

“(1) rubbish, trash, garbage, or other such materials discharged overboard;

“(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when—

“(A) used as an energy or mining facility;

“(B) used as a storage facility or a seafood processing facility;

“(C) secured to a storage facility or a seafood processing facility; or

“(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

“(3) any discharge of ballast water; or

“(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge—

“(A) contributes to a violation of a water quality standard; or

“(B) poses an unacceptable risk to human health or the environment.”

STORMWATER PERMIT REQUIREMENTS

Pub. L. 102-240, title I, §1068, Dec. 18, 1991, 105 Stat. 2007, provided that:

“(a) GENERAL RULE.—Notwithstanding the requirements of sections 402(p)(2)(B), (C), and (D) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(B), (C), (D)], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter

in this section referred to as the ‘Administrator’) pursuant to the requirements of this section.

“(b) PERMIT APPLICATIONS.—

“(1) INDIVIDUAL APPLICATIONS.—The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

“(2) GROUP APPLICATIONS.—With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require—

“(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

“(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

“(c) MUNICIPALITIES WITH LESS THAN 100,000 POPULATION.—The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

“(d) UNCONTROLLED SANITARY LANDFILL DEFINED.—For the purposes of this section, the term ‘uncontrolled sanitary landfill’ means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 U.S.C. 6941 et seq.].

“(e) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

“(f) REGULATIONS.—The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992.”

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Pub. L. 100-4, title III, §306(c), Feb. 4, 1987, 101 Stat. 36, provided that:

“(1) ISSUANCE OF PERMIT.—As soon as possible after the date of the enactment of this Act [Feb. 4, 1987], but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)] with respect to facilities—

“(A) which were under construction on or before April 8, 1974, and

“(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 U.S.C. 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

“(2) LIMITATIONS ON STATUTORY CONSTRUCTION.—Nothing in this section [amending section 1311 of this title and enacting this note] shall be construed—

“(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,

“(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)], and

“(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act.”

LOG TRANSFER FACILITIES

Pub. L. 100-4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

“(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

“(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

“(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term ‘log transfer facility’ means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.”

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95-217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95-217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior

to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98-67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

“(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act.”

LOG TRANSFER FACILITIES

Pub. L. 100-4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

“(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

“(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

“(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term ‘log transfer facility’ means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.”

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95-217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95-217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior

to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98-67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

charge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five

years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are

susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent

reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Ad-

ministrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator

intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including

consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action¹ shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material

¹ So in original. Probably should be "action".

in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, ch. 758, title IV, §404, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95-217, §67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub. L. 100-4, title III, §313(d), Feb. 4, 1987, 101 Stat. 45.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (r), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1987—Subsec. (s). Pub. L. 100-4 redesignated par. (5) as (4), substituted “\$25,000 per day for each violation” for “\$10,000 per day of such violation”, inserted provision specifying factors to consider in determining the penalty amount, and struck out former par. (4) which read as follows:

“(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

“(B) For the purposes of this paragraph, the term ‘person’ shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.”

1977—Subsec. (a). Pub. L. 95-217, §67(a)(1), substituted “The Secretary” for “The Secretary of the Army, acting through the Chief of Engineers,” and inserted provision that, not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary publish the notice required by this subsection.

Subsecs. (b), (c). Pub. L. 95-217, §67(a)(2), substituted “the Secretary” for “the Secretary of the Army”.

Subsecs. (d) to (t). Pub. L. 95-217, §67(b), added subsecs. (d) to (t).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers’ dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army

relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

MITIGATION AND MITIGATION BANKING REGULATIONS

Pub. L. 108-136, div. A, title III, §314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

“(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

“(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003].”

REGULATORY PROGRAM

Pub. L. 106-377, §1(a)(2) [title I], Oct. 27, 2000, 114 Stat. 1441, 1441A-63, provided in part that: “For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, \$125,000,000, to remain available until expended: *Provided*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use funds appropriated herein to: (1) by March 1, 2001, supplement the report, Cost Analysis For the 1999 Proposal to Issue and Modify Nationwide Permits, to reflect the Nationwide Permits actually issued on March 9, 2000, including changes in the acreage limits, preconstruction notification requirements and general conditions between the rule proposed on July 21, 1999, and the rule promulgated and published in the Federal Register; (2) after consideration of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106-377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers’ progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal

Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106-60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army, acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission."

**AUTHORITY TO DELEGATE TO STATE OF WASHINGTON
FUNCTIONS OF THE SECRETARY RELATING TO LAKE
CHELAN, WASHINGTON**

Pub. L. 95-217, § 76, Dec. 27, 1977, 91 Stat. 1610, provided that: "The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation."

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such dis-

posal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limita-

“(B) an aggregate aboveground storage capacity greater than or equal to 20,000 gallons; or

“(C) a reportable oil discharge history; or

“(2) allow certification by the owner or operator of the farm (via self-certification) for a farm with—

“(A) an aggregate aboveground storage capacity less than 20,000 gallons and greater than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(3) not require compliance with the rule by any farm—

“(A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(4) not require compliance with the rule by any farm with an aggregate aboveground storage capacity of less than 2,500 gallons.

“(c) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b), the aggregate aboveground storage capacity of a farm excludes—

“(1) all containers on separate parcels that have a capacity that is 1,000 gallons or less; and

“(2) all containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of Food and Drugs.

“(d) STUDY.—

“(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [June 10, 2014], the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water.

“(2) ADJUSTMENT.—Not later than 18 months after the date on which the study described in paragraph (1) is complete, the Administrator, in consultation with the Secretary of Agriculture, shall promulgate a rule to adjust the exemption levels described in paragraphs (2) and (3) of subsection (b) in accordance with the study.”

ENVIRONMENTAL COURT FEASIBILITY STUDY

Pub. L. 92-500, §9, Oct. 18, 1972, 86 Stat. 899, authorized the President, acting through the Attorney General, to study the feasibility of establishing a separate court or court system with jurisdiction over environmental matters and required him to report the results of his study, together with his recommendations, to Congress not later than one year after Oct. 18, 1972.

TRANSFER OF PUBLIC HEALTH SERVICE OFFICERS

Pub. L. 89-234, §2(b)-(k), Oct. 2, 1965, 79 Stat. 904, 905, authorized the transfer of certain commissioned officers of the Public Health Service to classified positions in the Federal Water Pollution Control Administration, now the Environmental Protection Agency, where such transfer was requested within six months after the establishment of the Administration and made certain administrative provisions relating to pension and retirement rights of the transferees, sick leave benefits, group life insurance, and certain other miscellaneous provisions.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term “State water pollution control agency” means the State agency designated by the Governor having responsibility for enforcing

State laws relating to the abatement of pollution.

(2) The term “interstate agency” means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term “municipality” means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

(8) The term “territorial seas” means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term “contiguous zone” means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term “ocean” means any portion of the high seas beyond the contiguous zone.

(11) The term “effluent limitation” means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term “toxic pollutant” means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm-water discharges and return flows from irrigated agriculture.

(15) The term “biological monitoring” shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term “schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term “industrial user” means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of “Division D—Manufacturing” and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term “pollution” means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term “medical waste” means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) COASTAL RECREATION WATERS.—

(A) IN GENERAL.—The term “coastal recreation waters” means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) EXCLUSIONS.—The term “coastal recreation waters” does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) FLOATABLE MATERIAL.—

(A) IN GENERAL.—The term “floatable material” means any foreign matter that may float or remain suspended in the water column.

(B) INCLUSIONS.—The term “floatable material” includes—

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) PATHOGEN INDICATOR.—The term “pathogen indicator” means a substance that indicates the potential for human infectious disease.

(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) RECREATIONAL VESSEL.—

(A) IN GENERAL.—The term “recreational vessel” means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION.—The term “recreational vessel” does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) TREATMENT WORKS.—The term “treatment works” has the meaning given the term in section 1292 of this title.

(June 30, 1948, ch. 758, title V, § 502, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 886; amended Pub. L. 95–217, § 33(b), Dec. 27, 1977, 91 Stat. 1577; Pub. L. 100–4, title V, §§ 502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub. L. 100–688, title III, § 3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 104–106, div. A, title III, § 325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub. L. 106–284, § 5, Oct. 10, 2000, 114 Stat. 875; Pub. L. 109–58, title III, § 323, Aug. 8, 2005, 119 Stat. 694; Pub. L. 110–288, § 3, July 29, 2008, 122 Stat. 2650; Pub. L. 113–121, title V, § 5012(b), June 10, 2014, 128 Stat. 1328.)

AMENDMENTS

2014—Par. (26). Pub. L. 113–121 added par. (26).

2008—Par. (25). Pub. L. 110-288 added par. (25).
 2005—Par. (24). Pub. L. 109-58 added par. (24).
 2000—Pars. (21) to (23). Pub. L. 106-284 added pars. (21) to (23).
 1996—Par. (6)(A). Pub. L. 104-106 substituted “‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’” for “‘sewage from vessels’”.
 1988—Par. (20). Pub. L. 100-688 added par. (20).
 1987—Par. (3). Pub. L. 100-4, § 502(a), inserted “the Commonwealth of the Northern Mariana Islands,” after “Samoa.”
 Par. (14). Pub. L. 100-4, § 503, inserted “agricultural stormwater discharges and” after “does not include”.
 1977—Par. (14). Pub. L. 95-217 inserted provision that “point source” does not include return flows from irrigated agriculture.

EFFECTIVE DATE OF 2014 AMENDMENT

Amendment by Pub. L. 113-121 effective Oct. 1, 2014, see section 5012(c) of Pub. L. 113-121, set out as a note under section 1292 of this title.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

DEFINITION OF “POINT SOURCE”

Pub. L. 100-4, title V, § 507, Feb. 4, 1987, 101 Stat. 78, provided that: “For purposes of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the term ‘point source’ includes a landfill leachate collection system.”

§ 1363. Water Pollution Control Advisory Board**(a) Establishment; composition; terms of office**

(1) There is hereby established in the Environmental Protection Agency a Water Pollution Control Advisory Board, composed of the Administrator or his designee, who shall be Chairman, and nine members appointed by the President, none of whom shall be Federal officers or employees. The appointed members, having due regard for the purposes of this chapter, shall be selected from among representatives of various State, interstate, and local governmental agencies, of public or private interests contributing to, affected by, or concerned with pollution, and of other public and private agencies, organizations, or groups demonstrating an active interest in the field of pollution prevention and control, as well as other individuals who are expert in this field.

(2)(A) Each member appointed by the President shall hold office for a term of three years, except that (i) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the members first taking office after June 30, 1956, shall expire as follows: three at the end of one year after such date, three at the end of two years after such date, and three at the end of three years after such date, as designated by the President

at the time of appointment, and (iii) the term of any member under the preceding provisions shall be extended until the date on which his successor’s appointment is effective. None of the members appointed by the President shall be eligible for reappointment within one year after the end of his preceding term.

(B) The members of the Board who are not officers or employees of the United States, while attending conferences or meetings of the Board or while serving at the request of the Administrator, shall be entitled to receive compensation at a rate to be fixed by the Administrator, but not exceeding \$100 per diem, including travel-time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons in the Government service employed intermittently.

(b) Functions

The Board shall advise, consult with, and make recommendations to the Administrator on matters of policy relating to the activities and functions of the Administrator under this chapter.

(c) Clerical and technical assistance

Such clerical and technical assistance as may be necessary to discharge the duties of the Board shall be provided from the personnel of the Environmental Protection Agency.

(June 30, 1948, ch. 758, title V, § 503, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 887.)

REFERENCES IN TEXT

Travel expenses, including per diem in lieu of subsistence as authorized by law, referred to in subsec. (a)(2)(B), probably means the allowances authorized by section 5703 of Title 5, Government Organization and Employees.

CONTINUATION OF TERM OF OFFICE

Pub. L. 87-88, § 6(c), July 20, 1961, 75 Stat. 207, provided that members of the Water Pollution Control Advisory Board holding office immediately preceding July 20, 1961 were to remain in office as members of the Board as established by section 6(a) of Pub. L. 87-88 until the expiration of the terms of office for which they were originally appointed.

TERMS OF OFFICE OF MEMBERS OF WATER POLLUTION CONTROL ADVISORY BOARD

Act July 9, 1956, ch. 518, § 3, 70 Stat. 507, provided that the terms of office of members of the Water Pollution Control Advisory Board, holding office on July 9, 1956, were to terminate at the close of business on that date.

TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law. See sections 3(2) and 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 1364. Emergency powers**(a) Emergency powers**

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evi-

litical subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, ch. 758, title V, § 510, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 893.)

§ 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899, (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

(June 30, 1948, ch. 758, title V, § 511, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 893; amended Pub. L. 93-243, § 3, Jan. 2, 1974, 87 Stat. 1069.)

REFERENCES IN TEXT

Act of March 3, 1899, referred to in subsec. (a), is act Mar. 3, 1899, ch. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

The Rivers and Harbors Act of 1910, referred to in subsec. (b), probably means act June 23, 1910, ch. 359, 36 Stat. 593.

The Supervisory Harbors Act of 1888, referred to in subsec. (b), probably means act June 29, 1888, ch. 496, 25 Stat. 209, as amended, which is classified generally to subchapter III (§ 441 et seq.) of chapter 9 of this title. For complete classification of this Act to the Code, see Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (c), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1974—Subsec. (d). Pub. L. 93-243 added subsec. (d).

§ 1372. Labor standards

The Administrator shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this chapter shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor, in accordance with sections 3141-3144, 3146, and 3147 of title 40. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection,¹ the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176) and section 3145 of title 40.

(June 30, 1948, ch. 758, title V, § 513, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 894.)

REFERENCES IN TEXT

Reorganization Plan Numbered 14 of 1950, referred to in text, is Reorg. Plan No. 14 of 1950, eff. May 24, 1950,

¹So in original. Probably should be "section,".

(aa) “zero emission vehicle” means a vehicle that produces zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions.

SEC. 20. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91-190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91-213, §§1-9, Mar. 16, 1970, 84 Stat. 67-69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91-213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use

of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment

of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.¹

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91-190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94-83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104-88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose.* The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appro-

¹ So in original. The period probably should be a semicolon.

priate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition.* As used in this order, the term “cooperative conservation” means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities.* To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

- (i) facilitates cooperative conservation;
- (ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;
- (iii) properly accommodates local participation in Federal decisionmaking; and
- (iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation.* The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision.* This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, admin-

istrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91–190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91–190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91–190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the “Council”). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

human health or environmental effects on minority or low-income populations, because it does not adversely affect the level of protection provided to human health or the environment.

The rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of “waters of the United States” is intended to benefit all regulators, stakeholders, and interested parties. In addition, this rule is national in scope and, therefore, is not specific to a particular geographic area.

In the spirit of E.O. 12898, input from environmental justice stakeholders was requested during the rule development process, through a series of stakeholder meetings between April and November 2014. On May 12, 2014, EPA held a focused teleconference with non-traditional stakeholders, including environmental justice and faith-based stakeholders, to solicit their individual input on the proposed rule. The agencies have used the feedback from public outreach as the source of early guidance and recommendations for refining the proposed rule. Stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in today’s rule, and incorporate increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as “waters of the United States.”

The agencies prepared a report summarizing their outreach to the environmental justice community, analysis of potential impacts, and how these results informed the development of the rule. This report, *Environmental Justice Report for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

K. Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2) based on potential indirect costs.

L. Environmental Documentation

In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing

sections 301, 304, 306, 311, 402 and 404, while the Army is making substantively identical revisions to its regulations under section 404 of the CWA. Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes “a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”

The Army has prepared a final environmental assessment and Findings of No Significant Impact consistent with the National Environmental Policy Act (NEPA). The Army has determined that the rule is not a major federal action significantly affecting the quality of the human environment that would require the preparation of an environmental impact statement. The assessment is contained in the record for this rulemaking. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for general permits and specifically for each and every standard individual permit application before making final permit decisions.

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927 (6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

See **DATES** section for information regarding the timing for seeking judicial review of this rule.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401

Environmental protection, Water pollution control.

Dated: May 27, 2015.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: May 27, 2015.

Jo-Ellen Darcy,

Assistant Secretary of the Army, (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1)

through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions*. In this section, the following definitions apply:

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this

section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this

section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by removing the definition of “wetlands” and revising the definition of “navigable waters” to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank,

shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 6. Section 112.2 is amended by removing the definition of “wetlands” and revising the definition of “Navigable waters” to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vi)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vi)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the

100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow

sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the

chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent

aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of “Navigable waters” to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*.

Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire

water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider

the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (i)(3)(iii) of this section, of waters identified in paragraphs (i)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through

(v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (i)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (i)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this

section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (i)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to

a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in

paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

**PART 122—EPA ADMINISTERED
PERMIT PROGRAMS: THE NATIONAL
POLLUTANT DISCHARGE
ELIMINATION SYSTEM**

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by:

■ a. Lifting the suspension of the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620);

■ b. Removing the definition of “wetlands” and revising the definition of “Waters of the United States” and

■ c. Suspending the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620).

The revision reads as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters

identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to

meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus

to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified

in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 14. Section 230.3 is amended by:
■ a. Removing paragraph (b) and reserved paragraphs (f), (g), (j) and (l).

- b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).
- c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f).
- d. Redesignating paragraph (k) as paragraph (g).
- e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l).
- f. Redesignating paragraph (q-1) as paragraph (m).
- g. Redesignating paragraph (r) as paragraph (n).
- h. Redesignating paragraph (s) as paragraph (o).
- i. Revising newly redesignated paragraph (o).
- j. Removing paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(o) The term *waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis.

If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for

any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 16. Section 232.2 is amended by removing the definition of “wetlands” and revising the definition of “Waters of the United States” to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this

definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges,

intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for

rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands

generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the

land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 18. Section 300.5 is amended by revising the definition of “navigable waters” to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition

where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of

this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater

recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is

characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant

nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

■ 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “navigable waters” to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands

found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into

a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified

in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by

physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 21. Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of

waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus,

the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary

structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These

physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with

similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 23. Section 401.11 is amended by revising paragraph (I) to read as follows:

§ 401.11 General definitions.

* * * * *

(I) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (I)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (I)(3)(iii) of this section, of waters identified in paragraphs (I)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (I)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (I)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (I)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (I)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (I)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (I)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (I)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (I)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (I)(1)(iv) through (viii) of this section.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (I)(1)(i) through (iii) of this section.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (l), the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (l)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (l)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (l)(1)(i) through (v) or are located at the head of a water identified in paragraphs (l)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (l)(1)(i) through (v) of this section. The entire water is neighboring if a portion is

located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (l)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (l)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (l)(1)(iv) of this section), to a water identified in paragraphs (l)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (l)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence

of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (l)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (l)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the

foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure

from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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