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Cc:  
Bcc:  
Subject: Fw: Eric Schneiderman awarded the Earth Day New York/NRDC 2012 Public Official of the Year  
Date: Mon Mar 26 2012 14:00:49 EDT  
Attachments:

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Message sent from a Blackberry device

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Subject: Eric Schneiderman awarded the Earth Day New York/NRDC 2012 Public Official of the Year

Hey, Neal.

I am pleased to inform you that the Board of Directors of Earth Day New York has selected Eric as our 2012 Public Official of the Year in recognition of his stellar achievements both past and present on behalf of the environment. Past recipients have included Senators Chuck Schumer and Hillary Clinton, Mayor Michael Bloomberg, Speaker Christine Quinn and Congressman Jerry Nadler, to name a few.

The awards party is scheduled for Monday, April 16 about 7pm at Rouge Tomate in Manhattan. I wanted to see if it is possible for Eric to attend. If not, we can explore some other possibilities for him to receive it at one of our other public events.

I'll look forward to hearing back from you at your earliest convenience.

Best regards,

Pamela Lippe

President and Executive Director

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Bcc:  
Subject: New NRDC Report on Methane Leakage  
Date: Wed Mar 28 2012 13:38:22 EDT  
Attachments: Leaking Profits Fact Sheet Final.pdf  
Leaking Profits Final (sm).pdf

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Alan

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# Leaking Profits

The U.S. Oil and Gas Industry Can Reduce Pollution, Conserve Resources, and Make Money by Preventing Methane Waste

March 2012



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### **About the Natural Resources Defense Council**

The Natural Resources Defense Council is a national nonprofit environmental organization with more than 1.3 million members and online activists. Since 1970, our lawyers, scientists, and other environmental specialists have worked to protect the world's natural resources, public health, and the environment. NRDC has offices in New York City, Washington, D.C., Los Angeles, San Francisco, Chicago, Montana, and Beijing.

### **About Harvey Consulting LLC**

Susan Harvey has 25 years of experience as a Petroleum and Environmental Engineer, working on oil and gas exploration and development projects. Ms. Harvey is the owner of Harvey Consulting, LLC, a consulting firm providing oil and gas, environmental, regulatory compliance advice and training to clients. Ms. Harvey held engineering and management positions at both Arco and BP. Ms. Harvey has planned, engineered, executed and managed both onshore and offshore exploration and production operations, and has been involved in the drilling, completion, stimulation, testing and oversight of hundreds of wells in her career. Ms. Harvey's experience also includes air and water pollution abatement design and execution, best management practices, environmental assessment of oil and gas project impacts, and oil spill prevention and response planning. Ms. Harvey taught air pollution control engineering courses at the University of Alaska in the Graduate Engineering Program.

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# 1. EXECUTIVE SUMMARY

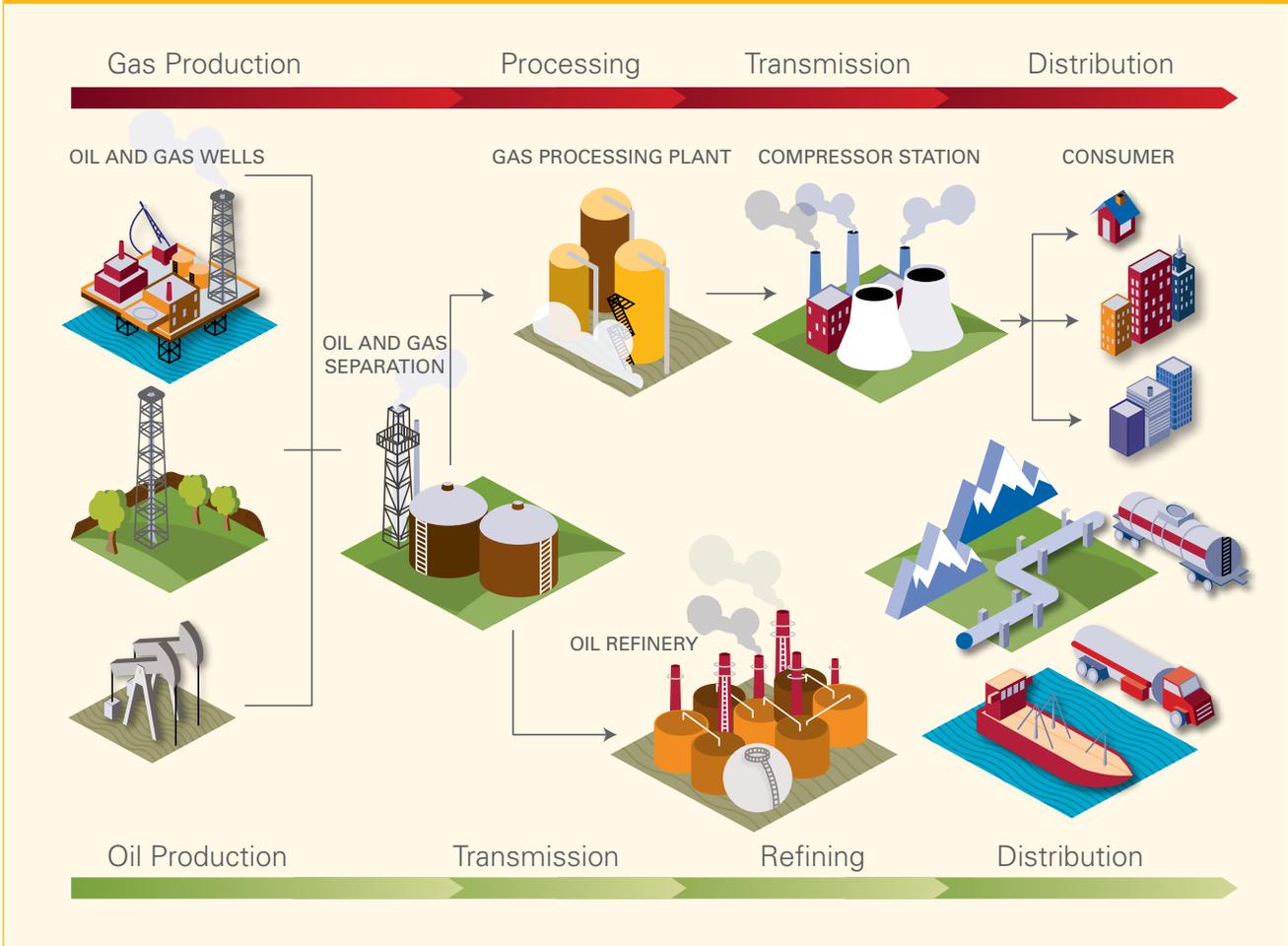
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**M**ethane is valuable as a fuel, but it is also a greenhouse gas at least 25 times more potent than carbon dioxide over a 100 year period, with even greater relative impacts over shorter periods. Methane makes up as much as 90 percent of natural gas. Currently the United States loses at least 2 to 3 percent of its total natural gas production each year when gas is leaked or vented to the atmosphere. Natural gas is routinely allowed to escape into the atmosphere from oil and gas industry equipment and processes. This is a waste of a valuable fuel resource as well as a source of local pollution and climate change.

A focus on reducing methane waste can produce not only benefits for the climate but also substantial profits for oil and gas companies, and revenues for royalty owners including taxpayers, who own public lands. This report focuses on 10 profitable and widely applicable methane emission reduction opportunities in the United States oil and gas (O&G) industry. If these technologies are used throughout the industry, they have the potential to reduce U.S. methane emissions by more than 80 percent of current levels, based on the U.S. Environmental Protection Agency's (EPA) estimates, an amount greater than the annual greenhouse gas emissions from 50 coal fired power plants. This methane, if captured and sold, can bring in billions of dollars in revenues while benefiting the environment.

A combination of voluntary and mandatory programs implemented by the EPA and many states has already reduced the industry's U.S. methane emissions by more than 20 percent. Given industry practice to date, it appears that available control technologies, while profitable, do not provide sufficient incentive to drive further voluntary reductions. While voluntary programs have resulted in some progress, additional mandatory programs are needed to get closer to the more than 80 percent methane reduction level that this report demonstrates is within our reach.

**Figure 1: Oil and Gas Production, Processing, Transmission, Refining, and Distribution System Simplified Schematic**

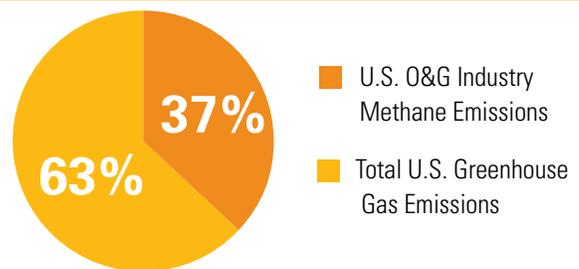


The U.S. O&G industry, which includes both liquid petroleum (crude oil, condensate, and natural gas liquids) and natural gas systems (Figure 1), produced 26,000 Bcf (billion cubic feet) of gas in 2009.<sup>1</sup> The industry lost an estimated 623 Bcf of methane to the atmosphere in 2009, a loss of 2.4 percent of the total U.S. gas produced. This amount of methane, 623 Bcf, is roughly 37 percent of total U.S. methane emissions (Figure 2).<sup>2</sup> Natural gas systems contribute most of the O&G industry’s methane emissions, 547 Bcf/year (88 percent of the total). Liquid petroleum systems, which currently result in methane emissions of about 76 Bcf/year (12 percent of the total), represent an additional emission source (Table 1).

The 10 technologies covered in this report are technically proven, commercially available, and profitable ways for operators to capture methane that would otherwise be leaked or vented to the atmosphere from oil and gas production, processing and transportation systems.<sup>3</sup> These 10 methane control solutions are only a starting point for the O&G industry. The EPA’s Natural Gas STAR Program, the O&G industry, and equipment vendors have identified nearly 100

methane control options that have merit.<sup>4</sup> We selected these 10 technologies because they have been proven by the EPA and industry to be both profitable and technically feasible, time and time again.

**Figure 2: Methane from the O&G Industry as a Percent of Total U.S. Methane Emissions**



Note: Methane made up 10.3 percent of U.S. greenhouse gas emissions in 2009.  
Source: U.S. EPA 2011 *Greenhouse Gas Inventory*

Together, these 10 technologies have the ability to capture more than 80 percent of the O&G sector's methane emissions:

1. **Green Completions** to capture oil and gas well emissions
2. **Plunger Lift Systems** or other well deliquification methods to mitigate gas well emissions
3. **Tri-Ethylene Glycol (TEG) Dehydrator Emission Controls** to capture emissions from dehydrators
4. **Desiccant Dehydrators** to capture emissions from dehydrators
5. **Dry Seal Systems** to reduce emissions from centrifugal compressor seals
6. **Improved Compressor Maintenance** to reduce emissions from reciprocating compressors
7. **Low-Bleed or No-Bleed Pneumatic Controllers** used to reduce emissions from control devices
8. **Pipeline Maintenance and Repair** to reduce emissions from pipelines
9. **Vapor Recovery Units** used to reduce emissions from storage tanks
10. **Leak Monitoring and Repair** to control fugitive emissions from valves, flanges, seals, connections and other equipment

Methane control technologies provide economic, health, safety, and environmental benefits for both operators and the public. These control technologies reduce not only greenhouse gas emissions, but also potentially explosive vapors, hazardous air pollutants, and volatile organic compounds (VOC), improving worker safety and limiting corporate liability. Using these technologies, captured methane can be turned into a supply of natural gas to meet ever-growing market demands, or used as a source of energy for operations. When development occurs on public lands, use of the technologies can result in royalty payments to the government from the sale of captured methane, as well as improved stewardship of our natural resources.<sup>5</sup>

In its 2011 *Greenhouse Gas Inventory*, the EPA estimated that the O&G industry reduced emissions by 168 Bcf in 2009. At a price of \$4 per thousand standard cubic foot (Mcf), the industry generated \$672 million in gross revenue by keeping this gas in the revenue stream. About a quarter (39 Bcf) of the emissions reductions came from Federal regulations such as NESHAPs (National Emission Standards for Hazardous Air Pollutants), and three quarters (129 Bcf) from voluntary emissions reductions under the EPA's Natural Gas STAR program.

The 10 technologies discussed in this report can capture more than 80 percent of the 623 Bcf wasted by the O&G industry. Selling this methane at the average 2011 price of \$4/Mcf would generate more than \$2 billion annually.

This is equivalent to reducing greenhouse gas emissions from more than:

- 40,000,000 passenger vehicles
- The electric use of 25,000,000 homes
- 50 coal fired power plants, or
- 500,000,000 barrels of oil<sup>6</sup>

Despite these environmental and financial benefits, in some instances there are technical, financial and institutional barriers that prevent O&G operators or companies from voluntarily investing in methane control. Nevertheless, most of the methane control technologies highlighted in this report can be achieved simply by modernizing outmoded business practices, commanding resource and budget allocations, and instilling a corporate commitment to methane emission reduction. If better operating conditions and profits are not enough incentive to implement these projects, policies that mandate emissions control will be necessary to achieve the full potential of these methane control technologies.

## EMISSION REDUCTION POTENTIAL OF 10 PROFITABLE TECHNOLOGIES

Each methane emission control technology evaluated in this report contributes to the goal of treating methane as a valued resource and keeping it out of the atmosphere. Just two methane control technologies, green completions and plunger lift systems, can potentially address nearly 40 percent of methane emissions (Figure 3). All 10 technologies discussed in this report together could address an estimated 88 percent of emissions from the O&G industry. This is equivalent to reducing gross emissions from 3 percent of production to about 0.4 percent of production.

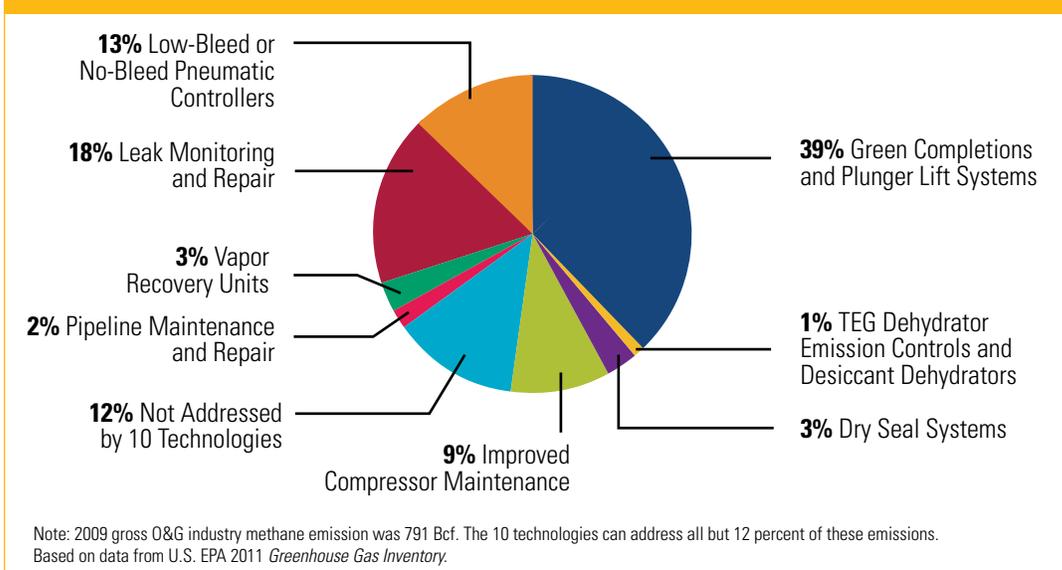
**Table 1: Methane Emissions (in Billion Cubic Feet)**

	Natural Gas System	Petroleum System	O&G Industry
Gross emissions	715	76	791
Emissions reductions*	168	-	168
Net emissions	547	76	623

\*From Natural Gas STAR program and federal regulations  
Source: U.S. EPA 2011 *Greenhouse Gas Inventory*

Only gross emissions estimates are available from the EPA in sufficient detail by source to use as a basis for analysis. The following emissions estimates, from the EPA's 2011 *Greenhouse Gas Inventory*, are based on gross emissions (corresponding to total gross emissions of 791 Bcf/year).<sup>7</sup>

- **Green completions**, also known as reduced emissions completions, are closed loop systems that capture liquids and gases coming out of the well during "completions" using temporary processing equipment brought to a well site, then routing fluids and gases to a tank for separation to enable sale of gas and condensate. Historically, the fluids and gases flowing back out of the well have been routed to an open air pit or perhaps a tank, allowing substantial amounts of methane to vent directly into the atmosphere. The EPA estimates that approximately 8,200 Mcf of natural gas is emitted per well completion, on average. Well completions, workovers and cleanups

**Figure 3: O&G Industry Methane Emission Reduction Potential by Technology**

emit approximately 305 Bcf gross of methane per year. Green completions may be used to control considerable emissions from well completions and workovers (68 Bcf). Green completions can also be used to control a portion of the 237 Bcf/year in emissions from cleanups of low pressure wells (also known as liquids unloading).

- **Plunger Lift Systems** are installed on gas wells that stop flowing when liquid (water and condensate) accumulates inside the wellbore. These systems lift accumulated liquids in the wellbore to the surface. Using this method, methane gas can be captured and sold rather than vented to atmosphere as waste. Approximately 4,500 to 18,000 Mcf/year of methane gas is emitted per well, mainly from normal cleanup operations. This contributes to the EPA's estimate of total gross emissions of 237 Bcf/year from liquids unloading.
- **TEG Dehydrator Emission Controls** or Desiccant Dehydrators can be used to reduce methane waste while removing moisture from natural gas from oil or gas wells. Methane is often vented during the process of dehydrating gas, but it can be captured using either emission control equipment placed on TEG dehydrators, or with desiccant dehydrators. Desiccant dehydrators dry gas by passing it through a bed of sacrificial hygroscopic salt (the desiccant); there are no pumps, contactors, regenerators, or reboilers. Only a small amount of methane is released intermittently when the unit is opened to replace the salt. Desiccant dehydrators are best suited for low gas flow rates and low gas temperatures. Alternatively, where glycol dehydrators are still required, there are emission control solutions that can capture methane gas for use as fuel. The EPA estimates that 20,000 Mcf/year of natural gas is emitted per well on average (including both old and new wells), and that smaller dehydrators still cumulatively emit approximately

8 Bcf of methane per year despite mandatory emission controls on most large dehydrator systems. A significant fraction of this 8 Bcf/year of gross emissions from this source can and should be captured.

- **Dry Seal Systems** can be used throughout the O&G industry to reduce emissions from centrifugal compressors that compress natural gas so that it can be efficiently moved through a pipeline. Methane can leak from the seals in centrifugal compressors and the rod packing mechanisms in reciprocating compressors. Installation of improved dry seals in centrifugal compressors, and **improved compressor maintenance** by replacing worn rod packing in reciprocating compressors, have the potential to significantly reduce the amount of methane emitted. The EPA estimates that leaking compressors emit about 102 Bcf/year (27 Bcf/year from centrifugal compressors and 75 Bcf/year from reciprocating compressors). A significant fraction of this can and should be captured.
- **Low-Bleed or No-Bleed Pneumatic Controllers** can be used throughout the O&G industry to reduce emissions while regulating pressure, gas flow, and liquid levels, and automatically operating valves. High-bleed pneumatic devices are designed to release methane gas to the atmosphere. Converting high-bleed gas devices to low-bleed devices, or moving away from gas-operated devices altogether in favor of instrument air, reduces methane emissions. The EPA estimates that 80 percent of all high-bleed pneumatic devices can be retrofitted, and that there is an opportunity to reduce a very large fraction of the 99 Bcf/year of gross methane emissions from pneumatic controllers.

- **Pipeline Maintenance and Repair** can result in methane venting to the atmosphere when an oil or gas pipeline is cut or when methane is vented to reduce potential fire or explosion risk while the pipe is under repair. Instead, to mitigate methane release, subject to a thorough safety evaluation, gas can either be re-routed and burned as fuel during the repair and maintenance, or work can be conducted on the pipeline while it is in operation. Methane gas venting can also be mitigated by using hot tap connections, de-pressuring the pipeline to a nearby low pressure fuel system, or using a pipeline pump-down technique to route gas to sales. The EPA estimates that pipeline maintenance and upset conditions requiring venting result in emission of 19 Bcf of methane per year, a sizeable fraction of which can and should be captured.
- **Tank Vapor Recovery Units (VRUs)** capture methane that otherwise would escape from crude oil and condensate tanks and be vented to the atmosphere through three different mechanisms: (1) flashing losses, (2) working losses, and (3) standing losses. To reduce these losses, a vapor recovery unit can be installed on the tank to capture methane gas for sale or for use as fuel. The EPA estimates these methane emissions amount to about 21 Bcf/year, a sizeable fraction of which can and should be captured. In addition to methane, tank vapor recovery units can also reduce emissions of hazardous air pollutants (HAPs), such as benzene, toluene, ethylbenzene, xylenes, and volatile organic compounds (VOCs).
- **Leak Monitoring and Repair** prevents leaks at oil or natural gas facilities that would otherwise result in fugitive methane emissions, which may occur due to normal wear and tear, improper or incomplete assembly of components, inadequate material specifications, manufacturing defects, damage during installation or use, corrosion, or fouling. As gas moves through equipment under high pressure, methane gas leaks can occur from numerous locations at oil and gas facilities: valves, drains, pumps, threaded and flanged connections, pressure relief devices, open-ended valves and lines, and sample points. Because methane is a colorless, odorless gas, methane leaks often go unnoticed. Leak monitoring programs, and prompt repair when leaks are detected, can be effective in controlling fugitive emissions. Control can be achieved through a two-part process: (1) a monitoring program to identify leaks, and (2) a repair program to fix the leaks. The EPA estimates that equipment leaks result in gross emissions of 143 Bcf of methane per year. A large part of this may be controlled by improved leak monitoring and repair programs.

## POLICY RECOMMENDATIONS

The EPA's *Greenhouse Gas Inventory* in recent years represents the agency's best current understanding of methane emissions from the O&G industry based on available data, recognizing that significant uncertainties exist. Changes to the inventory in recent years highlight challenges in understanding methane emissions from the O&G industry. NRDC calls upon the industry to provide improved data to aid the EPA in resolving uncertainties. NRDC strongly supports rigorous, mandatory reporting, especially from numerous small sources that in aggregate may result in significant emissions. Improved data can support more robust analyses of methane emissions, which will help with the development of appropriate emissions reduction solutions.

In its 2011 *Greenhouse Gas Inventory*, the EPA provides an excellent breakdown of emissions by both O&G sector (production, processing, transmission) and by source. It does not, however, provide enough detail of emissions reduction by leakage source. Emissions reduction is only identified at a broad sector level. NRDC recommends that the EPA provide a more detailed breakdown of emissions reduction by leakage source.

On broader policies to control methane emissions, NRDC supports the EPA's steps to improve the O&G industry proposed New Source Performance Standards (NSPS) to control VOCs, which will achieve significant methane reduction co-benefits.<sup>8</sup> For example, methane emitted during well completions and recompletions will be controlled to a much larger extent once the proposed VOC regulations are implemented. The EPA's proposed NSPS regulations are a good starting point.

However, NRDC recommends that the EPA's proposed NSPS regulations go much further.<sup>9</sup> First, the EPA should directly regulate methane. In addition, while the EPA has proposed federal performance standards for new and modified sources, the proposal does not cover the many existing sources of methane. The EPA should issue guidelines for existing sources, which states would then be required to adopt through their State Implementation Plans. The EPA's guidelines should cover all significant sources of emissions, and all segments of the natural gas supply chain, and require compliance with stronger standards and procedures.

While the Natural Gas STAR voluntary program has achieved some success in controlling methane emissions, mandatory control requirements such as under the NSPS and NESHAPs programs are necessary for greater industry-wide emissions reductions.

Federal land management agencies should also exercise their authority to control methane waste from oil and gas lease operations on federal lands.

Finally, state governments also can do more to require methane emission controls. Colorado, Montana, and Wyoming have rules covering existing methane emission sources including wells, pneumatic devices, and storage tanks. While these rules provide a good start, they and other states should develop even stronger regulations.

## 2. METHANE CONTROL: OPPORTUNITIES AND ISSUES

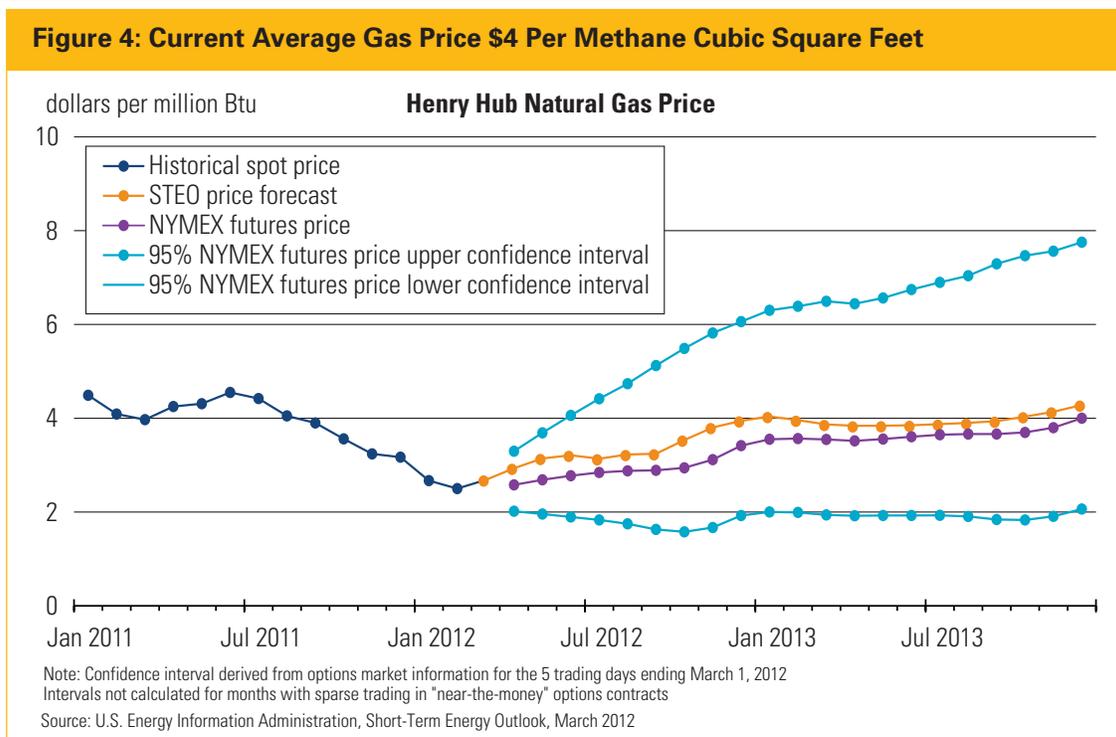
There is well established international scientific consensus, as demonstrated in the findings of the Intergovernmental Panel on Climate Change and the National Academy of Sciences, that greenhouse gas emissions are a significant cause of climate change. Methane gas is a well known and well-documented greenhouse gas, with a much greater global warming potential than carbon dioxide on a mass basis. Significant greenhouse gas emission controls, and methane emission control in particular, help to mitigate global warming.

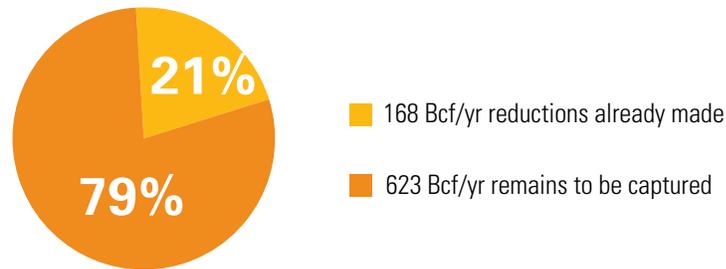
Methane is the primary component of natural gas, which typically contains 80 to 90 percent methane, ranging up to as high as 98 percent in some cases.<sup>10</sup> Every standard cubic foot (scf) of methane gas lost to the atmosphere is a standard cubic foot of methane not sold—a direct, real, and measurable loss of revenue. Methane control ensures that the gas produced at the well is kept in the revenue stream.<sup>11</sup>

Not only are methane capture projects in the O&G industry critical for addressing the climate crisis, but such projects also can be profitable, improve safety, maximize energy resources, reduce economic waste, protect human health, and reduce environmental impacts. Furthermore, upgrading production assets with modern and efficient equipment

has improved operational and economic performance, making assets more robust and less susceptible to upsets and downtime.

Using a gas price of \$4/Mcf, based on average 2011 prices, every Bcf of methane captured and sold, rather than vented into the atmosphere, can generate approximately \$4 million in gross revenue. The EPA used \$4/Mcf as a conservative estimate in its 2011 NSPS proposed rulemaking (Figure 4). Many of the control technologies pay out their investment and start generating profits after a short period of time for the O&G industry, as well as those, including the U.S. government, who receive royalties and taxes on gas sales.



**Figure 5: O&G Industry Methane Reduction and Remaining Opportunity**

Source: U.S. EPA 2011 *Greenhouse Gas Inventory*

## 2.1 INCENTIVES TO INVEST

In light of the fact that methane controls have been shown to be profitable, a commonly asked question is: “Why doesn’t the O&G industry voluntarily invest in methane emission control?”

In some limited cases, site-specific factors, such as flow rate, temperature, and low gas pressure, make methane emissions control technically infeasible or unprofitable. However, for most of the methane control technologies highlighted in this report, it is simply a matter of modernizing outmoded business practices, commanding resource and budget allocations, and instilling a corporate commitment to greenhouse gas emission reduction.

The American Petroleum Institute (API) explains that in order to maximize profit and provide shareholders with the highest possible return on investment, the O&G industry operates with a strict ranking of capital projects for maximum yield.<sup>12</sup> Thus, even though methane control can be profitable, other core business projects with an even higher rate of return often compete successfully for available corporate funding. Payout periods for methane control technologies discussed in this report range from immediate to three years, yet this may not be attractive enough to compare with oil and gas companies’ high expected rates of return. In other cases, factors such as reserves booking (accounting for oil and assets on the balance sheet), and short- and long-term acquisition and divestment strategies can outweigh even high return, low capital methane reduction projects.

Obstacles to implementing even profitable methane control technologies—whether site-specific, financial, or institutional arising from company culture—may seem hard to overcome. But there is an especially compelling case for fixing market failures where limiting greenhouse gas emissions and profits go hand in hand. This is why NRDC finds that where companies do not adopt these technologies voluntarily, regulations requiring mandatory reductions should be implemented. For companies that lack the technical expertise or staff resources in house, there are excellent private and federal resources for technical assistance on methane control.

## 2.2 METHANE EMISSION TRACKING

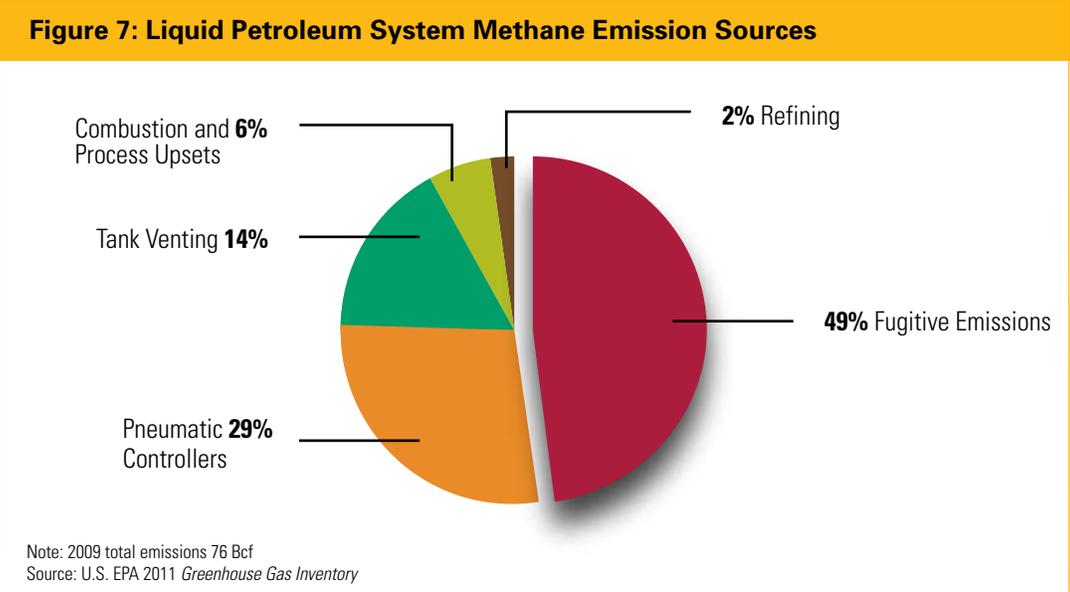
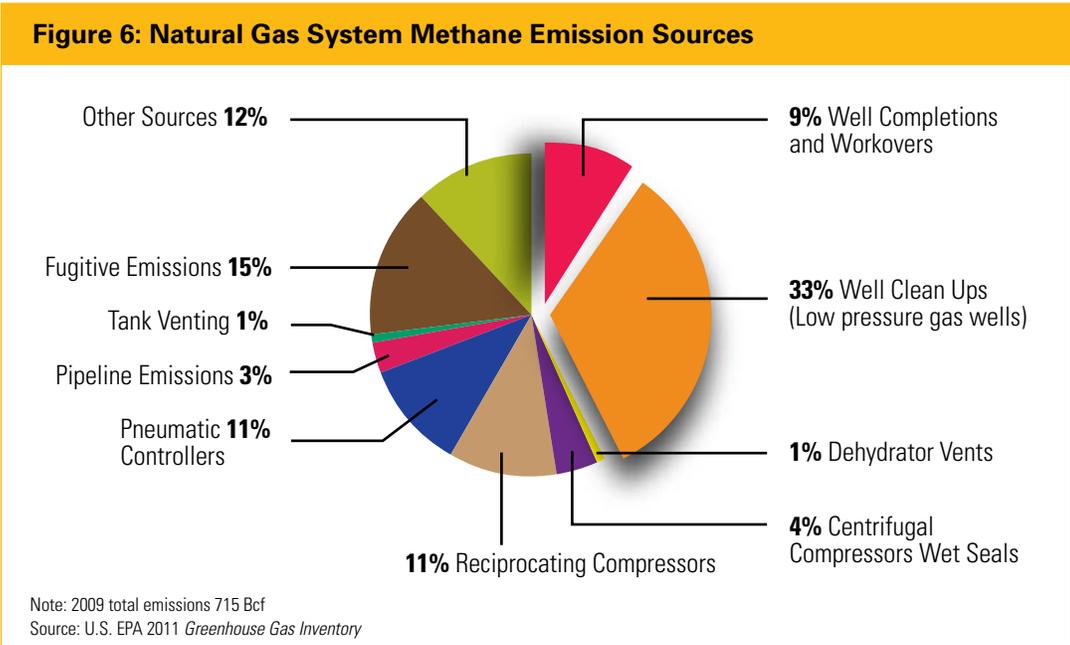
In its 2011 *Greenhouse Gas Inventory*, the EPA estimated that the O&G sector emitted 623 Bcf of methane, with natural gas systems accounting for 547 Bcf and liquid petroleum systems contributing 76 Bcf. The EPA also estimated that the industry captured 168 Bcf of gross methane emissions in 2009, exclusively from natural gas systems.<sup>13</sup> If no reductions were implemented, the gross leak rate would be an estimated 791 Bcf/year (623 Bcf/year net emissions plus 168 Bcf/year) as shown in Figure 5. The United States produces approximately 26,000 Bcf of natural gas per year. Thus, at the gross leak rate of 791 Bcf/year, the U.S. O&G industry is losing 3 percent of its total gas production to the atmosphere. At the EPA’s net leak rate of 623 Bcf/year, the industry is losing 2.4 percent of its total gas to the atmosphere.

As discussed in Section 2.3 below, the EPA numbers are quite uncertain. Other sources indicate that the amount of methane lost to the atmosphere each year in the United States could be substantially higher.<sup>14</sup>

According to the 2011 *Greenhouse Gas Inventory*, industry achieved the 168 Bcf in reductions through a combination of the EPA’s successful voluntary emission reduction program, Natural Gas STAR (77 percent), and federal emission regulations imposed on industry in the past decade to curb emissions (23 percent). The EPA did not identify any emission reductions achieved in the petroleum systems category. Most oil production operations also produce associated gas. Based on EPA estimates, there is a 76 Bcf methane reduction opportunity for the petroleum systems category.

The 2011 *Greenhouse Gas Inventory* tracks methane emissions by leakage source for natural gas systems (Figure 6) and liquid petroleum systems (Figure 7). In natural gas systems, methane emissions primarily come from wells, pneumatic controllers, compressors, and fugitive emissions. In liquid petroleum systems, methane emissions primarily come from equipment leaks, pneumatic controllers, and tank venting. Table 2 shows natural gas and liquid petroleum methane emissions in Bcf and identifies the applicable methane control technologies covered in this report.

A detailed breakdown of the methane emissions from both natural gas and liquid petroleum systems by source is shown in Appendix C.



**Table 2: Methane Emission Sources and Control Technologies**

2009 Natural Gas Systems		% of Total	Control Technologies
	Bcf	%	
Well Completions and Workovers	68	9%	No. 1 Green Completions
Well Clean Ups (Low pressure gas wells)	237	33%	No. 1 & 2 Green Completions & Plunger Lift Systems or Other Deliquification Methods
Dehydrator Vents	8	1%	No. 3 & 4 Dehydrator Controls
Centrifugal Compressors Wet Seals	27	4%	No. 5 Dry Seal Systems
Reciprocating Compressors	75	11%	No. 6 Improved Compressor Maintenance
Pneumatic Controllers	77	11%	No. 7 Low -Bleed or No-Bleed Controllers
Pipeline Emissions	19	3%	No. 8 Pipeline Maintenance and Repair
Tank Venting	10	1%	No. 9 Vapor Recovery Units
Fugitive Emissions	106	15%	No. 10 Leak Monitoring and Repair
Total of Emissions Controllable by the 10 Technologies	627	88%	
Other Sources	88	12%	
<b>Total Emissions - Natural Gas</b>	<b>715</b>	<b>100%</b>	
2009 Liquid Petroleum Systems		% of Total	Control Technologies
	Bcf	%	
Pneumatic Controllers	22	29%	No. 7 Low-Bleed or No-Bleed Controllers
Tank Venting	11	14%	No. 9 Vapor Recovery Units
Fugitive Emissions	37	49%	No. 10 Leak Monitoring and Repair
Total of Emissions Controllable by the 10 Technologies	70	92%	
Other Sources	6	8%	
<b>Total Emissions - Liquid Petroleum</b>	<b>76</b>	<b>100%</b>	

Source: U.S. Environmental Protection Agency Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009.

## 2.3 UNCERTAINTY IN EMISSION ESTIMATES

The EPA has been tracking methane emissions since 1990. For more than 20 years, significant uncertainty has accompanied estimates of emissions from the O&G industry, with a general theme of underestimation. Some emissions have been underestimated by and for the O&G industry because sources have not been metered or tested to accurately determine the emission rate. Small emission sources that may result in cumulatively large emission totals have escaped emission monitoring or reporting, and not all emission sources are accounted for.

Evidence for underestimation due to uncertainty is found in the 2010 *Greenhouse Gas Inventory*, which states that “[n]atural gas well venting due to unconventional well completions and workovers, as well as conventional gas well blowdowns to unload liquids have already been identified as sources for which Natural Gas STAR reported reductions are significantly larger than the estimated inventory emissions.”<sup>15</sup>

Historically, the *Greenhouse Gas Inventory* was based on an emission factor of approximately 3,000 standard cubic feet (3 Mcf) per gas well drilled and completed.<sup>16</sup> Yet Natural Gas STAR program partner experience shows several cases where emission factors were thousands of times higher:

- BP employed green completions at 106 wells and reported 3,300 Mcf of gas recovered per well<sup>17</sup>
- Devon Barnett Shale employed green completions at 1,798 wells between 2005 and 2008 and reported 6,300 Mcf of gas recovery per well<sup>18</sup>
- Williams employed green completions at 1,064 wells in the Piceance Basin and reported 23,000 Mcf of gas recovered per well<sup>19</sup>

All of these examples show gas recovery estimates more than 1,000 times higher than the 3 Mcf of gas per well estimated in the 2008 *Greenhouse Gas Inventory*.<sup>20</sup> Clearly, errors in emission inventory estimations have occurred.

### *Well completion emission estimates were underestimated by a factor of 1,000*

The source of much of this uncertainty regarding well venting is the EPA’s historic reliance on a 1997 study jointly funded with the Gas Research Institute (GRI) to quantify methane emissions from United States natural gas operations.<sup>21</sup> The study concluded that methane emitted (leaked and vented) from natural gas facilities at an amount of 1.4 percent +/- 0.5 percent (approximately 1 to 2 percent) of gross natural gas production, and that additional emission controls could significantly reduce the amount of methane gas leaked and vented to atmosphere.

However, the study did not include important equipment leaks and venting that took place at the wellhead or at the well pad processing facilities in natural gas systems.

The largest change in methane emission estimates has been in accounting for wellhead and well pad processing facilities emissions that were substantially underestimated.

Since 1990, the EPA has more than doubled its methane emission estimate for natural gas systems from 220 Bcf to 464 Bcf. For many years the EPA quoted a 300 to 400 Bcf/year methane emission estimate for the entire O&G industry, yet now the EPA reports a 322 to 464 Bcf range for natural gas production alone (Figure 8). While some of the methane emission increase is attributed to growth in natural gas production, most of the increase represents continuous improvement in and revisions to the EPA’s emission estimates as it furthers its understanding of methane emissions sources from the O&G industry. For instance, in past years emissions arising from poor connections from the wellhead to processing equipment to transmission equipment were overlooked. Low emissions from the distribution stage as a result of low-leakage welded joints may have contributed to a misconception that equipment upstream of the distribution stage was also similarly leak-free.

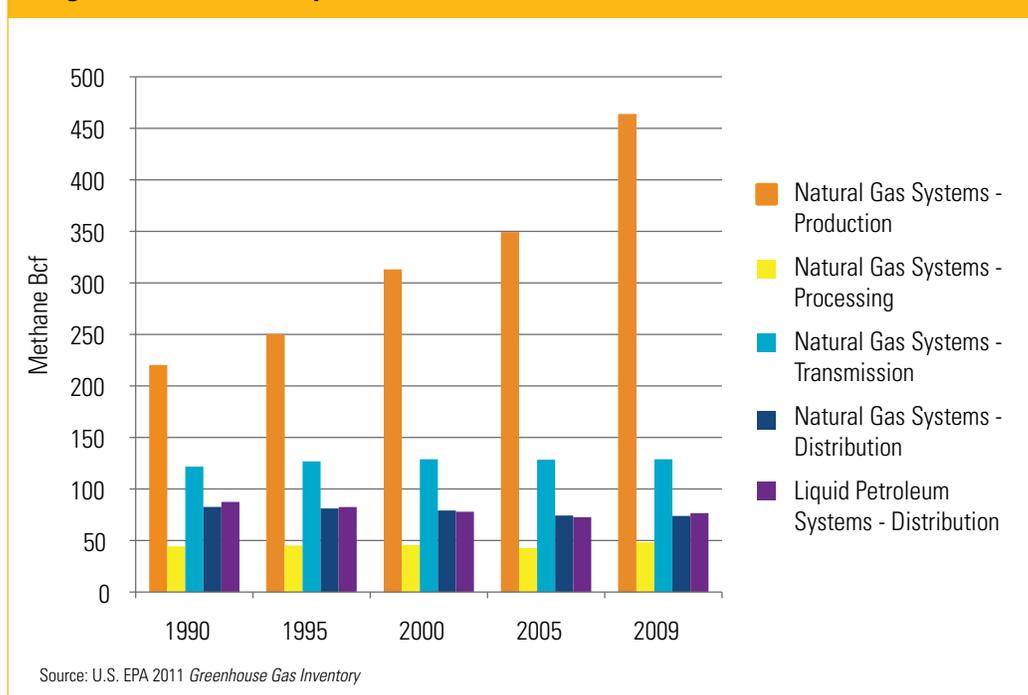
In 2010, the EPA undertook to develop a set of greenhouse gas reporting requirements for the O&G industry as part of a general charge from Congress to develop greenhouse gas reporting rules for all U.S. industries. The EPA assessed uncertainty in O&G emission estimates during this undertaking. The EPA explained the historic underestimation of natural gas systems, critiquing the “outdated and potentially understated” emissions estimates from the 1997 report.<sup>22</sup> The EPA cited several significant sources of underestimated emissions:

*The following emissions sources are believed to be significantly underestimated in the United States GHG Inventory: well venting for liquids unloading; gas well venting during well completions; gas well venting during well workovers; crude oil and condensate storage tanks; centrifugal compressor wet seal degassing venting; and flaring.*

In its 2011 *Greenhouse Gas Inventory*, the EPA raised its gross emissions estimate to 791 Bcf/year by adding the amount of gas that may be vented at the wellhead to the amount of gas that leaks from the processing equipment and pipeline infrastructure once the gas enters the system.

According to the EPA’s O&G Reporting Rule Technical Support Document, the emissions estimates for these sources “do not correctly reflect the operational practices of today.” In fact, the EPA believes that “emissions from some sources may be much higher than currently reported in the United States GHG Inventory.”<sup>23</sup>

The EPA revised emissions factors for four of these underestimated sources. Revised emissions estimates range from 11 times higher for well venting from liquids unloading, to 36 times higher for gas well venting from conventional well completions, to 3,540 and 8,800 times higher for gas well venting during well workovers and completions of unconventional wells, respectively.<sup>24</sup> Even with the EPA’s revisions to the O&G Reporting Rule, uncertainty continues to exist in the estimates of emissions from gas well completions and well workovers. As the EPA noted in the preamble to its proposed reporting rule:

**Figure 8: O&G Industry Methane Emissions 1990 to 2009**

*“[N]o body of data has been identified that can be summarized into generally applicable emissions factors to characterize emissions from these sources [(i.e., from well completion venting and well workover venting)] in each unique field. In fact, the emissions factor being used in the 2008 U.S. GHG Inventory is believed to significantly underestimate emissions based on industry experience as included in the EPA Natural Gas STAR Program publicly available information (<http://www.epa.gov/gasstar/>). In addition, the 2008 U.S. GHG Inventory emissions factor was developed prior to the boom in unconventional well drilling (1992) and in the absence of any field data and does not capture the diversity of well completion and workover operations or the variance in emissions that can be expected from different hydrocarbon reservoirs in the country.”<sup>25</sup>*

The EPA continues to report substantial uncertainty in its overall greenhouse gas emission estimates in its ongoing work on the *Greenhouse Gas Inventory*,<sup>26</sup> with uncertainty particularly evident for natural gas systems. In its 2011 *Greenhouse Gas Inventory*, the EPA used an average emission factor of 7,700 Mcf per well completion—much higher than its previous emissions factor of 3,000 Mcf per well completion—more than doubling the amount of emissions expected from the increasing number of unconventional well completions (e.g. horizontal and shale gas wells). Furthermore, the EPA did not include emissions from completions for tight gas wells in the 2011 *Greenhouse Gas Inventory*, which, as the EPA noted previously in its O&G Reporting Rule Technical Support Document, is a “significant underestimate” of total emissions.<sup>27</sup> The EPA also reported zero emissions from well completions in the Northeast

region, which is the location of extensive shale gas drilling and well completions in the Marcellus Shale.

Emissions estimates will likely continue to evolve and improve as the EPA obtains additional information from the O&G industry, including information submitted under its mandatory reporting rule. As with past inventories, it is expected that both emissions factors and activity factors will continue to be updated. If past trends hold, these factors are likely to be revised upward as a result of both better understanding of emissions associated with each process, and the aggressive pace of drilling and development across the country. However, emissions estimates for an individual source may also be revised downward as the EPA obtains better information about the type and amount of control technology in use.

Incidentally, the United States is not the only country that has struggled with estimating the O&G industry’s greenhouse gas emissions. Canada reports that its natural gas processing plants also discovered that methane emissions were roughly an order of magnitude higher than estimated.<sup>28</sup>

Despite all the uncertainty about the precise amount of methane emissions, we do know that there is a significant amount of methane that is leaking or being vented into the atmosphere that could be captured and sold or used as fuel.

## 2.4 VOLUNTARY CONTROL WITH EPA NATURAL GAS STAR

For a number of years, the EPA has coordinated the Natural Gas STAR Program, which describes itself as a “flexible, voluntary partnership that encourages oil and natural gas

companies—both domestically and abroad—to adopt cost-effective technologies and practices that improve operational efficiency and reduce emissions of methane, a potent greenhouse gas and an important transitional energy source.”<sup>29</sup>

To its credit, the EPA actively encourages O&G operators to invest in methane reduction technology through its Natural Gas STAR Program. Those members of the O&G industry that have recognized the adverse economic and environmental implications of methane emissions, and have voluntarily invested in greenhouse gas emission reduction technology at their facilities, also deserve credit.

While the Natural Gas STAR Program has been successful in identifying and documenting profitable methane emission reduction opportunities that aid in methane capture and in bringing captured methane into the revenue stream, to date the program remains voluntary and participation is limited.

Companies that participate in Natural Gas STAR sign a Memorandum of Understanding with the EPA, then evaluate and implement identified methane emission reduction opportunities. Companies can participate at any level they choose, from company-wide to site-specific to small pilot projects.<sup>30</sup> There is no mandatory requirement to identify or implement all methane reduction opportunities.

The extent to which enrolled companies participate is difficult to confirm. Natural Gas STAR publishes a list of participating companies, but all reports on the actual locations of emission control implementation, which methane control measures have been implemented by each company, and the emission reductions achieved, are confidential.

Despite these demonstrated solutions for capturing methane, many companies still have not participated in the Natural Gas STAR Program at all, and others have only implemented a few methane control measures.<sup>31</sup> Effective as the EPA's Natural Gas STAR efforts have been, vast quantities of methane continue to leak into the atmosphere. It is therefore clear that voluntary measures alone will not ensure that industry installs even profitable capture technologies.

## 2.5 PROPOSED EPA RULES NOT STRONG ENOUGH

On August 23<sup>rd</sup> 2011, the EPA published proposed regulations for a suite of technologies to reduce harmful air pollution from the oil and natural gas industry.<sup>32</sup> The rules are to be finalized by April 2012, after an opportunity for public comment.

The proposed EPA rules include NSPS for source categories as well as air toxics standards, or NESHAPs. In particular, the EPA is proposing stringent new NSPS for controls for VOCs from the oil and gas sector, which will also capture significant amounts of methane (referred to as “co-benefits” of the regulation).

The EPA estimates that the proposed NSPS for VOCs would reduce 540,000 tons of VOCs, an industry-wide reduction of 25 percent. The air toxics standards would reduce air toxics emissions by 30,000 tons, an overall reduction of nearly 30 percent.<sup>33</sup> The EPA estimates that the proposed standards would also reduce about 3.4 million tons per year of methane. This equates to roughly 160 Bcf/year. As an interim measure, the EPA quantified the global social benefits of these methane reductions in mitigating climate change at up to \$4.7 billion in 2015 co-benefits. For reasons set forth in NRDC's comments to the EPA on the proposed NSPS, we believe even this figure is a substantial underestimation.

Finally, the emissions baseline used in the EPA's proposed NSPS differs somewhat from the 791 Bcf/year gross emissions baseline in this report derived from the EPA's 2011 *Greenhouse Gas Inventory*. The differences reflect, among other things, the evolving nature of the emissions inventory. However, the differences do not meaningfully alter the analysis and recommendations made in this report.

The EPA's proposed standards do not control methane directly or cover existing sources, which account for the bulk of VOC and methane emissions. Further, the EPA omits other significant sources of VOCs and methane, in part due to exclusion of these sources altogether and in part because methane is not directly regulated. These omissions contrast with areas where the NSPS would in fact more effectively control emissions, such as from well completions and recompletions, and new sources of emission from pneumatic controllers, compressors, and equipment leaks.

This report does not provide a comprehensive assessment of the proposed NSPS, but the control technologies described here can serve as a guide to the EPA and the states in their control efforts.

Methane emissions reductions should be a high priority, as they provide economic, health, safety, and environmental benefits for both operators and the public. Existing market forces, government regulations, and voluntary programs are only leading to the capture of a small percentage of methane emissions at present. The EPA's proposed NSPS is a step in the right direction.

### 3. ANALYTIC APPROACH

While it would have been useful for the EPA to report the 168 Bcf emission reductions by leakage source, to clarify which sources and associated emissions reduction technologies are making progress in reducing emissions, that level of detail is not necessary to analyze the data and describe in layman's terms why methane control technologies are profitable and point out large potential methane control opportunities.

Since the EPA does not provide sufficient data in its inventory to break down the emission reductions by natural gas leakage source, the methane emission estimates used in this report correspond to EPA's emission estimate of 791 Bcf for natural gas and liquid petroleum systems.

This 791 Bcf estimate of gross emissions from both natural gas (715 Bcf) and petroleum (76 Bcf) systems has been reduced, the EPA reports, by 168 Bcf from Natural Gas STAR programs and regulations. All of these reductions have been achieved in natural gas systems. The total net emissions from both systems is therefore 623 Bcf (791 Bcf less 168 Bcf).

The total net emissions from natural gas systems is 547 Bcf (715 Bcf less 168 Bcf), and from petroleum systems it is 76 Bcf (Table 3). Additionally, it is important to note that the EPA's Natural Gas STAR Program emission reduction estimates are based on data voluntarily submitted by industry. These data represent a very rough estimate of the amount of methane control that may have been achieved to date, because they were not developed using common and rigorous metering, measurement, quality control, or audit procedures. Therefore, some caution should be exercised in assuming that this amount of emissions reduction has been fully achieved.

Table 3: Methane Emission Control Opportunity						
2009 Natural Gas Systems		Natural Gas STAR Reductions	EPA Regulation Reductions	Total Reductions	Estimated Remaining Target	
	Gg	Bcf	Bcf	Bcf	Bcf	Bcf
Production	8,931	464	104	38	142	322
Processing	931	48	4	1	5	43
Transmission	2,482	129	19	0	19	110
Distribution	1,422	74	2	0	2	72
<b>Total</b>	<b>13,766</b>	<b>715</b>	<b>129</b>	<b>39</b>	<b>168</b>	<b>547</b>
2009 Liquid Petroleum Systems						
Production	1,444	75	0	0	0	75
Transmission	5	0	0	0	0	0
Refining	24	1	0	0	0	1
<b>Total</b>	<b>1,473</b>	<b>76</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>76</b>

Source: U.S. EPA 2011 *Greenhouse Gas Inventory*

\*Slight rounding error accumulated in EPA tables. EPA records 715 Bcf and 168 Bcf as final estimates for 2009. Conversion: Gg/19.26=Bcf

### 3.1 PROFITABILITY

Profitable emission control opportunity, for purposes of this report, means an investment in methane emission control technology that results in more revenue generated or costs offset than the cost to install, operate, and maintain the emission control technology. To assist in identification of such opportunities, this analysis used the following criteria:

1. Control technology that either allows methane to be captured and placed into a natural gas pipeline for sale, or captured and used as fuel to offset operating cost
2. Technology that is commercially available, meaning that it has been developed, tested, and is available in the market for purchase and installation
3. Technology that has been used successfully in actual O&G operations
4. Emission control solutions that are well documented and reported by the O&G industry as profitable

The analysis recognizes that some emission reduction measures can be implemented quickly, while others may require more extensive planning, procurement, and execution timing.

Most of the emission control technologies described in this report have a very short payout period of a few months or years. The term “payout” means the period of time that it takes for the net cash flow to equal the investment expenditure, at which point the investment breaks even and starts to generate positive cash flow, as shown in Figure 9.<sup>34</sup> The revenue stream is calculated using constant dollars over the payout period.<sup>35</sup>

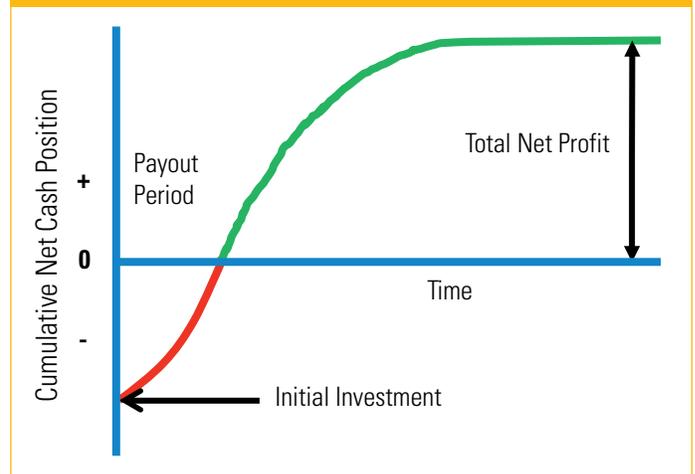
### 3.2 EXAMINATION OF METHANE CONTROL OPTIONS

Each of the 10 methane control options examined in this report is considered with a six-part analysis.

1. **Technology Description.** The technology description section identifies the equipment required and processes used in each control technology to capture methane emissions.
2. **Opportunity.** The opportunity section identifies the gross amount of methane emissions in the 2011 *Greenhouse Gas Inventory* that could be captured by each control technology for its associated leakage source.
 

The per-unit emission estimates provided in the opportunity section of the report are intended to provide an average emission control number, to use as a starting basis in a feasibility assessment. Individual consideration may be appropriate based on unique or exceptional circumstances at each site.
3. **EPA Proposed Regulations.** This section analyzes the proposed regulations from the EPA that are relevant to emissions from each source. It also discusses the emission reductions anticipated from the proposed EPA regulations, and concludes with a description of possible shortcomings of and improvements to the EPA proposal.

Figure 9: Payout Period Diagram



4. **Profit.** The profit section analyzes the costs of implementing each technology, along with any associated operational savings and revenues from methane sales. The revenues are calculated by multiplying the amount of methane controlled by a price of \$4/Mcf. The report does not attempt to quantify the additional financial benefits from offsetting fuel costs. Comparing the costs with the savings and additional revenues provides the profit. The average payout period is also calculated using these numbers. The cost data are intended to provide an average cost to use as a starting basis in a feasibility assessment. Again, individual consideration may be appropriate based on the particulars of a given application.

The proposed EPA regulations provide some estimates of the profitability of the various control technologies. However, in the supporting documentation for the proposed rulemaking, the EPA was not transparent enough about its methodology for cost-benefit estimates.<sup>36</sup> As a result, we were unable to independently verify sources and incorporate them into profitability estimates. Instead, we have relied on estimates from prior EPA and company reports. For the sake of completeness, in the appendix we provide tables of profitability estimates by control technology from this report, and compare them with the EPA estimates from the proposed rulemaking supporting documentation. In general, the EPA's proposed rulemaking estimates are somewhat more conservative than NRDC estimates. A more detailed analysis of NRDC's profitability comparisons can be found in the EPA's rulemaking docket.<sup>37</sup>

5. **Additional Benefits.** Beyond generating revenue, the additional benefits of methane capture for each technology are highlighted in this section.
6. **Limitations and Evaluation.** All emission control options have some technological (and, potentially, economic) limitations, and where those are known, they are summarized in this section for use as a starting

point in a feasibility assessment. In some cases, a certain emission control technology may not be suitable because it cannot handle a gas flow rate, temperature, or pressure. In other cases, the technology may not be appropriate for a retrofit, but would be a logical choice for designing and installing a new unit. This section includes flow charts to depict the basic decision steps of a feasibility analysis. The flow charts are intended to be simplistic outlines of the steps that might be taken to determine the feasibility of using a particular emission control method. This simplified approach is not intended to replace any company-specific evaluation processes, but rather to provide a basic outline of the evaluation steps in laymen's terms.

### 3.3. METHANE EMISSION REPORTING UNITS

While greenhouse gas emission estimates are often reported in terms of million metric tons of carbon dioxide equivalent (MMtCO<sub>2</sub>e), all methane emission and methane control estimates in this report are shown in terms of standard cubic feet, and most often reported in billions of standard cubic feet (Bcf). The report uses this emission reporting convention because gas is sold and used on a basis of standard cubic feet, and this unit can readily be converted to a profit estimate using a market price assumption of four dollars per thousand standard cubic feet (\$4/Mcf). This reporting convention prevents the reader from having to routinely convert from MMtCO<sub>2</sub>e to Bcf.

## 4. TEN PROFITABLE TECHNOLOGIES: AN ANALYSIS

The emission control potential, uses, benefits, and economics of each of the 10 methane control technologies are discussed in greater detail in this chapter. While many of the technologies are profitable on a very short time scale, many operators still have not installed them. In order to realize the methane control potential to limit greenhouse gas emissions, NRDC also proposes policy options to encourage the use of these technologies.

**Table 4: Methane Capture Technology Costs and Benefits**

Technology	Investment Cost	Methane Capture	Profit	Payout
<b>Green Completions</b>	\$8,700 to \$33,000 per well	7,000 to 23,000 Mcf/well	\$28,000 to \$90,000 per well	< 0.5 – 1 year
<b>Plunger Lift Systems</b>	\$2,600 to \$13,000 per well	600 to 18,250 Mcf/year	\$2,000 to \$103,000 per year	< 1 year
<b>TEG Dehydrator Emission Controls</b>	Up to \$13,000 for 4 controls	3,600 to 35,000 Mcf/year	\$14,000 to \$138,000 per year	< 0.5 years
<b>Desiccant Dehydrators</b>	\$16,000 per device	1,000 Mcf/year	\$6,000 per year	< 3 years
<b>Dry Seal Systems</b>	\$90,000 to \$324,000 per device	18,000 to 100,000 Mcf/year	\$280,000 to \$520,000 per year	0.5 – 1.5 years
<b>Improved Compressor Maintenance</b>	\$1,200 to \$1,600 per rod packing	850 Mcf/year per rod packing	\$3,500 per year	0.5 years
<b>Pneumatic Controllers Low-Bleed</b>	\$175 to \$350 per device	125 to 300 Mcf/year	\$500 to \$1,900 per year	< 0.5 – 1 year
<b>Pneumatic Controllers No-Bleed</b>	\$10,000 to \$60,000 per device	5,400 to 20,000 Mcf/year	\$14,000 to \$62,000 per year	< 2 years
<b>Pipeline Maintenance and Repair</b>	Varies widely	Varies widely but significant	Varies widely by significant	< 1 year
<b>Vapor Recovery Units</b>	\$36,000 to \$104,000 per device	5,000 to 91,000 Mcf/year	\$4,000 to \$348,000 per year	1 – 3 years
<b>Leak Monitoring and Repair</b>	\$26,000 to \$59,000 per facility	30,000 to 87,000 Mcf/year	\$117,000 to \$314,000 per facility per year	< 0.5 years

Note: Profit includes revenue from deployment of technology plus any O&M savings or costs, but excludes depreciation. Additional details provided in Appendix A.

Source: NRDC analysis of available industry information. Individual technology information sources cited in Chapter 4.

### 4.1 GREEN COMPLETIONS

Methane gas is often released into the atmosphere when natural gas or oil wells are drilled, stimulated (e.g. hydraulically fractured), or repaired. Green completions can be used to capture methane gas and gas liquids (condensate).<sup>38</sup> Rather than being vented or flared into the atmosphere, methane captured in a green completion can be sold, used as fuel, or re-injected to improve well performance. Green completions also capture gas liquids that can be sold.

This technology is also called reduced emission completions, or REC, but throughout this report we use the term “green completions.”

When a well is drilled and completed, stimulated, or repaired, it is standard procedure to flow the well for a period of time to remove stimulation materials and other debris from the wellbore. This procedure is called “wellbore cleanup” and occurs before connecting the well to permanent processing equipment. Wellbore cleanup allows the operator to remove and dispose of unwanted material

without contaminating production facilities and pipelines. It also improves well recovery rates by reducing wellbore formation damage downhole. Historically, wells were “cleaned up” flowing liquid hydrocarbons to an open pit or tank, and by routing the associated methane gas to a gas vent or flare (Figure 10).

Venting gas near well operations creates potentially explosive vapor levels and can pose a human health hazard. Flaring resolves much of the explosive vapor problem by routing gas away from the well operations to a flare stack that burns the gas at a distance from the well and associated facilities, but flaring creates economic waste by combusting gas that could otherwise be collected and sold. Flaring also varies in efficiency, so not all pollutants may be combusted, and also generates air, light, and noise pollution.

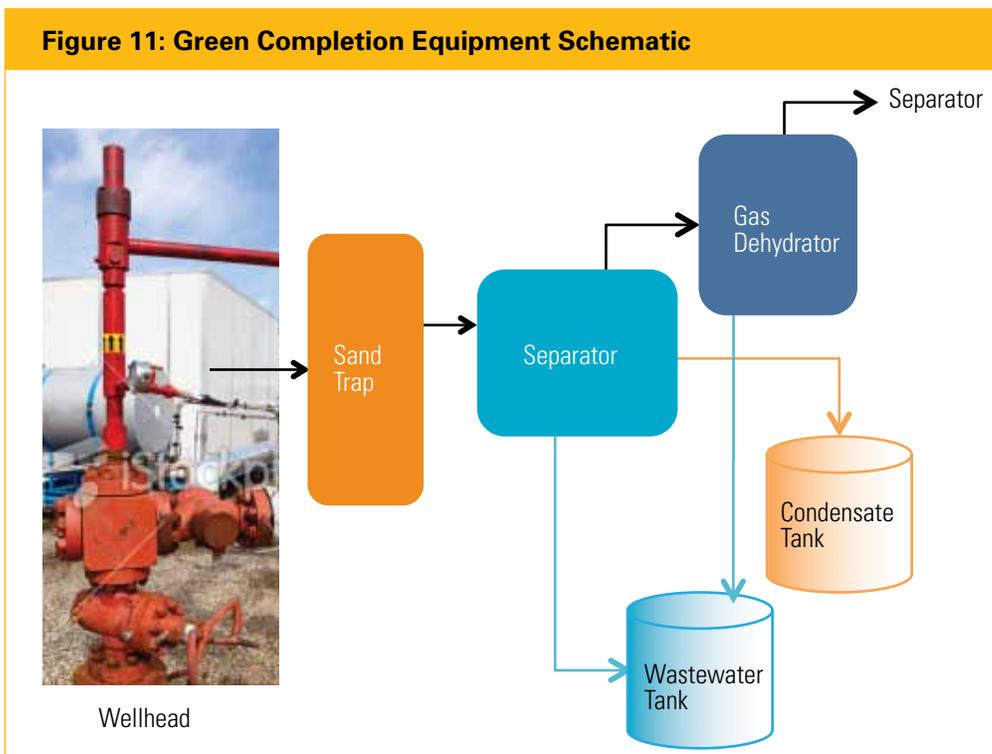
### 4.1.1 Technology Description

In a green completion, the operator brings temporary processing equipment to a well site during wellbore cleanup. Well cleanup fluids and gases are routed to the temporary processing equipment. Fluids, debris, and gas are separated, and gas and condensate are recovered for sale. The temporary processing equipment required for a green completion typically includes gas-liquid-sand separator traps, portable separators, portable gas dehydration units, additional tanks, and, sometimes, small compressors. A simplified schematic showing the equipment required for a green completion is shown in Figure 11.

Green completion processing equipment, which provides temporary gas processing capability, is typically mounted on a truck or trailer to move it from well to well (Figure 12).



© Robert Doman



**Figure 12: Green Completion Equipment**

Colorado Oil & Gas Conservation Commission, "Proposed Rules for Green Completions" presentation June 27, 2008

Portable green completion units are either owned by the operator or rented from a service provider. For new wells, equipment may need to be brought to the well site to provide temporary gas processing capability. However, at existing well sites, where wells have already been drilled but may need to be repaired or stimulated to improve hydrocarbon production rates, gas processing equipment may already be available onsite.

While the processing equipment is portable, some permanent facility infrastructure must be in place at the well site to make a green completion possible. Gas collected from a green completion can be used in several ways. It can be sold in a pipeline, used as fuel at the well site, or used as gas lift to enhance hydrocarbon production in low pressure wells. Each of these uses requires piping infrastructure to be in place at the well site to route the gas to the appropriate destination. Therefore, a green completion is typically not an option for exploration wells with no offset wells or pipeline infrastructure nearby.

**The EPA estimates that an average of 8,200 Mcf can be recovered per green completion**

Typically, gas produced from a well contains liquid ("wet gas") that exceeds the acceptable moisture content allowed in a gas sales pipeline. Depending on the gas composition, hydrocarbons may also condense from a gas to a liquid under certain temperature and pressure conditions. The pressure drop from the wellhead through the gas processing equipment can also yield gas-liquids (condensate) that can be captured and sold. Therefore, in most cases, before

gas from a green completion can be routed to a gas sales pipeline, it must be dehydrated to remove liquids to meet the gas pipeline specifications. Gas dehydration can be accomplished by bringing in a portable gas dehydration unit, or using a permanent gas dehydrator installed upstream of a gas pipeline. Condensate can either be collected in a temporary stock tank, or routed to a permanent stock tank if one is located on site.

#### 4.1.2 Opportunity

**Reduction Target: 68 Bcf/year and a portion of 237 Bcf/year**

The 2011 *Greenhouse Gas Inventory* estimates that well completions, workovers, and well cleanups emit approximately 305 Bcf of methane annually, 43 percent of total natural gas systems methane emissions.<sup>39</sup> Of this amount, well completions and workovers contributed about 68 Bcf/year, and well cleanups contributed about 237 Bcf/year, as shown in Table 2. Green completions may be used to control a significant fraction of emissions from well completions and workovers. Green completions can also be used to control a portion of the emissions from well cleanups, also known as liquids unloading.

There remains considerable uncertainty in wellhead emissions. In the decade prior to the 2011 *Greenhouse Gas Inventory*, the EPA revised its well emission estimates upward several times, and it reports continued uncertainty in the 2011 inventory estimates. It is likely that well methane emissions are still underestimated.

**Green completions alone could enable the United States to achieve more than 30 percent of its O&G industry methane reduction opportunity**

In 2005, the EPA estimated that an average of 7,000 Mcf of natural gas can be recovered during each green completion.<sup>40</sup> In 2011, the EPA increased its reduction estimate to 8,200 Mcf per green completion.<sup>41</sup> As part of its analyses relating to Subpart W of the Greenhouse Gas Reporting Rule, the EPA calculated the average emissions reduction to be 9,175 Mcf per green completion.<sup>42</sup> In a 2011 *Lessons Learned* report, the EPA estimated that an average of 10,800 Mcf could be saved per green completion.<sup>43</sup>

The EPA has found that green completions can be a major contributor to methane reductions on a national scale. In 2008, the EPA's Natural Gas STAR Program attributed 50 percent of the program's total reductions for the O&G production sector to green completions.<sup>44</sup> Considering the promising technical and economic feasibility of green completions, a very large fraction of the emissions from

well completions and workovers, and a portion of the emissions from well cleanups, could be captured using green completions.

The commercial viability of green completion equipment has been so well demonstrated that it is now required in several states:

- Colorado requires green completions on all oil and gas wells unless it is not technically and economically feasible.<sup>45</sup>
- Fort Worth, Texas requires green completions for all wells that have a sales line nearby, and for wells that are shut-in while gas is conserved, unless the operator can show that this requirement would endanger the safety of personnel or the public.<sup>46</sup>
- Montana requires VOC vapors (including methane) greater than 500 British Thermal Units (BTUs) per cubic foot from wellhead equipment with the potential to emit 15 tons per year or greater, to be routed to a control device (such as a flare), or to a pipeline for sale.<sup>47</sup>
- Wyoming has required green completions in the Jonah-Pinedale Anticline Development Area (JPAD) since 2007. More recently, Wyoming has expanded this requirement to all Concentrated Development Areas of oil and gas in the state.<sup>48</sup>

Such rules mandating green completions are an excellent method to help reduce emissions of greenhouse gases and toxic air pollutants, and exceptions written into these rules allowing operators not to use green completion technology should be very narrow, limited to only when it is proven to be unsafe or technically infeasible.

The API reports that there are only 300 green completion units in operation in the United States with the ability to complete 4,000 wells per year.<sup>49</sup> This corroborates the upper end of the EPA's estimate that the U.S. O&G industry has a capacity to implement approximately 3,000 to 4,000 green completions per year.<sup>50</sup>

While some operators report use of green completions at a portion of their operations in the United States, it is clear that opportunities abound for much wider deployment of green completions to reduce methane emissions. The API estimates that only 20 percent of U.S. gas well emissions are currently being captured by green completions and that an additional 16,000 wells per year could be processed if there were sufficient green completion equipment capacity.

### 4.1.3 Proposed EPA Regulations

The EPA is proposing to require green completions to control emissions from all production wells that undergo a hydraulic fracture treatment. The EPA proposes to exempt exploration wells and all other gas wells that are not hydraulically fractured.

Therefore, the EPA expects that more than 95 percent of emissions from well completions and workovers would be controlled using green completions. NRDC applauds the EPA's proposed regulations for targeting significant emissions

reductions during well completions and recompletions. Still, green completions should be required for all wells where technically feasible, including well cleanups and wells that are not hydraulically fractured. Such a requirement can be expected to lead to the rapid increase in availability of green completion equipment.

### 4.1.4 Profit

Green completions provide an immediate revenue stream by routing to a gas sales line gas (methane and condensates) which would otherwise be vented into the atmosphere or flared. Alternatively, captured gas can be used for fuel, offsetting operating costs or be re-injected to improve well performance. Industry has demonstrated that green completions are both an environmental best practice and profitable.

For each unconventional gas well green completion, there is an opportunity to generate about \$28,000 to \$90,000 in profit, based on capture rates of 7,000 to 23,000 Mcf per well, as shown in additional detail in Appendix A, Table A1. The EPA currently estimates the cost of implementing a green completion as high as \$33,000 (for rented equipment).<sup>51,52</sup> Based on these and other estimates, green completions using rented equipment will typically pay out immediately while those with purchased equipment will pay out within a year.<sup>53</sup> NRDC recognizes wells currently chosen for green completions are likely to be more productive and therefore profitable than average wells going forward.

Operators with a sufficient number of wells to amortize the cost of the equipment are finding it economically attractive to invest in their own green completion technology rather than to rent equipment. Most companies that have gone this route report a one- to- two year payout for investment in purchasing green completion equipment, and substantial profitability thereafter.<sup>54</sup>

Smaller operators can rent green completion equipment from a contractor. Renting equipment will result in a lower profit margin because there is usually a slightly higher operating cost attributed to equipment rental versus equipment ownership. Still, the payout for this investment would occur quickly if a contractor was hired and the operator paid only a per well green completion equipment rental charge. As long as the gas captured and sold exceeded the equipment rental charge, payout would be immediate.

In a 2009 study conducted for New York State, ICF Incorporated found that equipment payouts may be as short as three months. ICF also found that companies electing to conduct green completions in 2005 made more than \$65 million in profits.<sup>55</sup>

Examples listed below demonstrate how profitable green completions can be. The data is provided in the form reported by each company. However, these examples show that green completions are profitable, and generally pay out in less than two years:

- In 2004, Devon Energy reported an average incremental cost to perform a green completion of \$8,700 per well at its Texas Fort Worth Basin operations. Devon estimated that it made a profit of \$50,000 per well by selling the captured gas to market and achieved a total emission reduction of 6.16 Bcf at its operations in year 2005. 78 percent of the methane captured (4.8 Bcf) was attributed to green completion methods.<sup>56,57</sup>
- BP reported an initial investment cost of \$1.4 million to purchase a portable three-phase separator, sand trap, and tanks to conduct green completions. By 2005, BP completed 106 wells using this equipment and reported an average gas recovery of 0.35 Bcf per year, and condensate recovery of 6,700 barrels per year. The company's investment paid out in less than two years. Thereafter, the equipment brought in a profit of at least \$840,000 per year.<sup>58</sup> In 2007, BP reported that green completions had netted a profit of \$3.4 million on an investment of \$1.2 million, with a payout of 0.7 years, and a capture of 130 Mt of methane per well.<sup>59</sup>
- Williams reported \$159 million in revenue from green completions in its Colorado Piceance Basin Operations from 2002 to 2006, on an investment of \$17 million, for a net profit of \$142 million.<sup>60</sup> Williams' data was based on 1,177 wells and an average gas recovery of approximately 91 percent.
- EnCana Corporation, the largest natural gas producer in North America, which produces 1.5 percent of United States daily gas needs, reported that green completion methods were extremely profitable in the Jonah Field in Wyoming, yielding a net present value (NPV) of more than \$190 million.<sup>61</sup> EnCana's initial investment in the portable green completion equipment for the Jonah Field paid out in the first year.
- Anadarko reported an increased operating profit of \$10.3 million per year for the period 2006 to 2008 due to green completions on an average of 613 wells per year.<sup>62</sup>

#### 4.1.5 Additional Benefits

Green completions provide a number of additional benefits, aside from profitability and methane emission reductions. Green completions:

- Collect potentially explosive gas vapors, rather than venting them into the atmosphere (improves well site safety, reduces worker exposure to harmful vapors, and limits overall corporate liability)
- Reduce or eliminate the need for flaring
- Reduce emissions, noises, odors, and citizen complaints associated with venting or flaring

- Reduce VOCs and HAPs contained in natural gas along with methane. If flared and not captured, VOCs and HAPs generate nitrogen oxides (NO<sub>x</sub>) and particulate matter (PM), contributors to ground-level ozone and regional haze
- Improve well cleanup and enhance well productivity, as wells flow back to portable separation units for longer periods than would be allowed with direct venting into the atmosphere or flaring
- Reduce the need to drill new wells as more methane is kept in the system and brought to market

#### 4.1.6 Limitations and Evaluation

Green completions are most successful and profitable on higher pressure wells that have sufficient gas reservoir pressure to both flow into a pressurized gas sales pipeline and adequately clean up the wellbore.<sup>63</sup>

For lower pressure wells, artificial lift may be required, using portable compressors to withdraw gas from a pressurized sales gas line. The pressurized gas is then injected into the well to unload wellbore liquids and solids (artificial lift), and initiate flow. Compressors may also be needed to boost the lower pressure gas back into the sales line until normal reservoir flow and pressure is established.<sup>64</sup> Adding compression to the equipment package required for a green completion will increase cost.

Recognizing the existence of technical limits, Colorado sets boundaries on when green completions should be required:

*"Green completion practices are required on oil and gas wells where reservoir pressure, formation productivity, and wellbore conditions are likely to enable the well to be capable of naturally flowing hydrocarbon gas in flammable or greater concentrations at a stabilized rate in excess of five hundred (500) MCFD to the surface against an induced surface backpressure of five hundred (500) psig or sales line pressure, whichever is greater. Green completion practices are not required for exploratory wells, where the wells are not sufficiently proximate to sales lines, or where green completion practices are otherwise not technically and economically feasible.*

*An operator may request a variance from the Director if it believes that employing green completion practices is not feasible because of well or field conditions or that following them in a specific instance would endanger the safety of well site personnel or the public."<sup>65</sup>*

In the event that Colorado issues a variance from using green completion techniques due to technical or safety constraints, it still requires the use of Best Management Practices to minimize the amount of methane emitted:

*"In instances where green completion practices are not technically feasible or are not required, operators shall employ Best Management Practices to reduce emissions. Such BMPs may include measures or actions, considering safety, to minimize the time period during which gases are emitted directly to the atmosphere, or monitoring and recording the volume and time period of such emissions."*

Because pipelines are typically not installed at a natural gas production site until it is confirmed that an economical gas supply is found, gas from the first well is often flared or vented during drilling and completion activities. However, once a pipeline is installed, subsequent wells drilled on that same pad would be in a position to implement green completion techniques. Operators often point to the lack of pipeline infrastructure as a primary reason a green completion may not be possible, in particular at oil production facilities that do not have a nearby gas sales line. However, there are also alternatives to piping methane, such as using it on-site to generate power, re-injecting it to improve well performance, or providing it to local residents as an affordable power supply.

Figure 13 provides a simplified flowchart showing the basic steps for evaluating whether a green completion is technically feasible and profitable.

### 4.2 PLUNGER LIFT SYSTEMS

Older gas wells stop flowing when liquids (water and condensate) accumulate inside the wellbore. As liquid builds up in the wellbore it creates backpressure on the hydrocarbon formation, further reducing the gas flow rate.

Methane gas is emitted when companies open wells to vent gas to the atmosphere to unload wellbore liquids (water and condensate that accumulate in the bottom of the well) in order to resume gas flow. The industry typically refers to this process as “blowing down the well,” a “well blowdown,” or a “well deliquification.”

Eventually, even a well’s own gas pressure becomes insufficient to flow accumulated liquids to the surface and the well is either shut-in as uneconomic, or some form of artificial lift is installed to transport the liquids to the surface.

Plunger lift systems are one method of lifting accumulated liquids in the wellbore to the surface. In this method, methane gas can be captured and sold, rather than vented to atmosphere as waste.

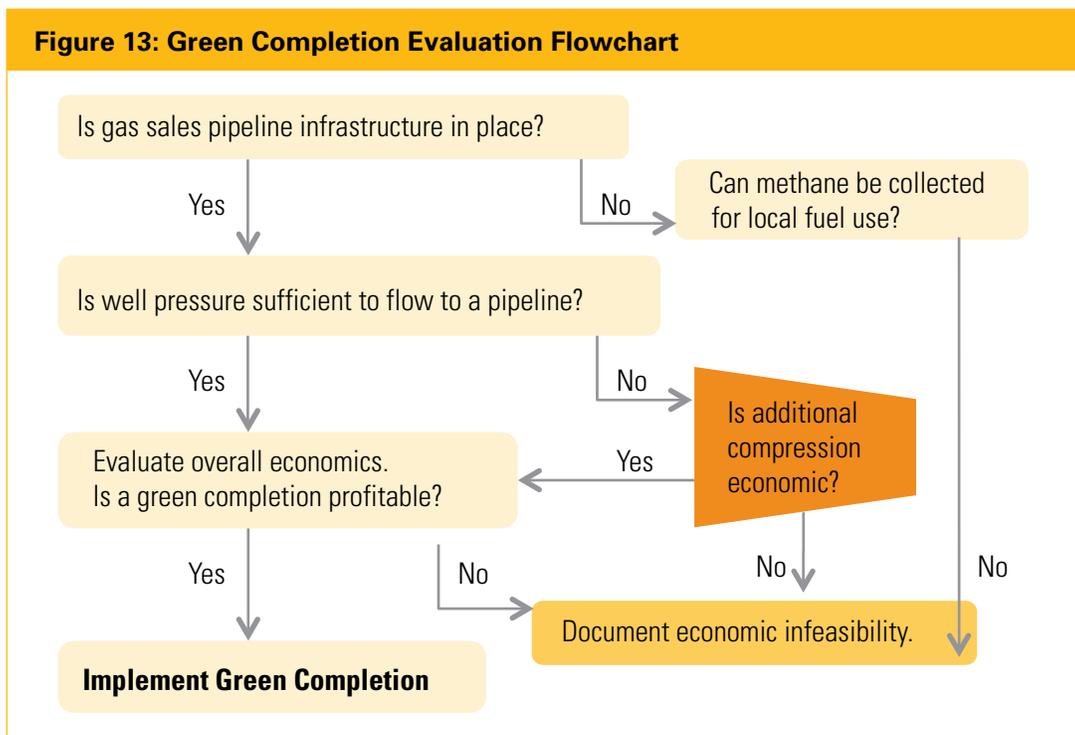
#### 4.2.1 Technology Description

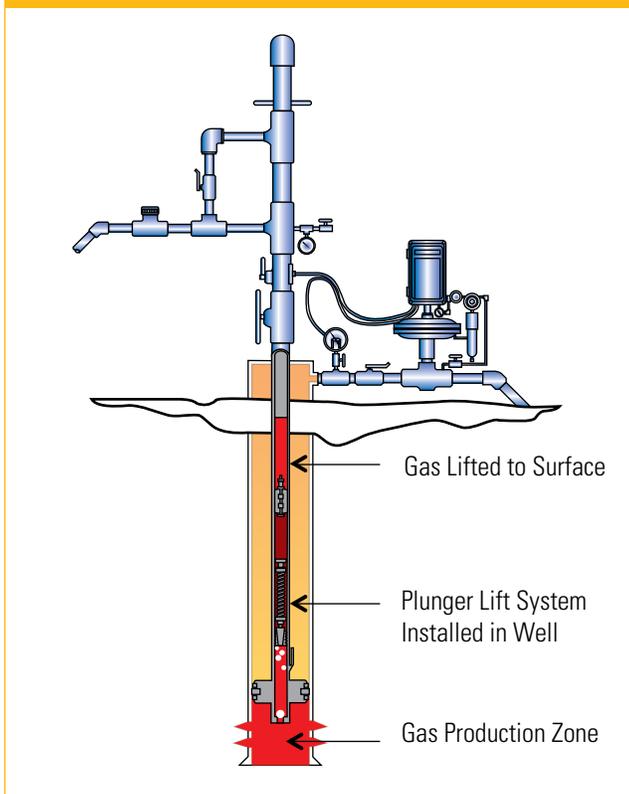
Installation of plunger lift systems provides an immediate revenue stream by routing methane gas to a gas sales line that would otherwise be vented. Industry has demonstrated that plunger lift systems are both an environmental best practice and profitable when addressing mature gas wells with back pressure from liquids.

Accumulation of liquid hydrocarbons and liquids in the well tubing of mature gas wells can halt or impede gas production. Historically, well operators would vent these mature gas wells to atmosphere to aid in expelling the liquids from the well tubing. Alternatively, plunger lift systems can be installed in a well to lift the liquids out of the well (Figure 14).

There are a number of deliquification methods that can be used on a mature gas well singly or in combination, such as sucker rod pumps, electric submersible pumps, progressing cavity pumps, compression, swabbing, gas lift, and smaller diameter tubing (velocity strings), but most of these methods require the addition of energy.<sup>66</sup> The plunger lift system is a low-cost system that uses the well’s own natural energy to complete the deliquification process. This technology is particularly useful at well sites that do not have power.

Plunger lift systems work by using the natural gas pressure that builds up in the casing tubing annulus to push a metal plunger up the well tubing, forcing a column of fluid to the surface. Gas and liquids are both collected. Liquids are separated from the gas, which is then routed to the pipeline for sale.



**Figure 14: Plunger Lift System Schematic**

Automated plunger lift systems have the added benefit of reducing the number of personnel that would be required to manually vent the well and extending the production life of the well.<sup>67</sup>

One vendor reports that plunger lift systems increase overall gas productivity and sales from each well by 10 to 20 percent.<sup>68</sup>

#### 4.2.2 Opportunity

##### **Reduction Target: 237 Bcf/year Less Green Completions Reduction**

Natural gas production is now predominantly occurring in unconventional formations: low permeability sands, shale, and coal bed methane reservoirs.<sup>69</sup> In its comments on the EPA's proposed NSPS regulations for plunger lift systems, the American Petroleum Institute said: "According to the Energy Information Administration...some 338,056 (73 percent) wells out of a total gas well inventory of 461,388 produce 90 Mcf of gas (15 BOE or less) or less per day...These low rate wells are either impaired by liquids accumulation or are using a deliquification method to produce."<sup>70</sup>

Maximizing production from each well drilled can minimize the need to drill new wells and therefore reduce overall environmental impacts from natural gas production. However, low gas rate wells eventually cease production due to liquid accumulation in the wellbore and are often shut-in,

unless a deliquification technique is employed on the well.

The EPA estimates that 4,700 to 18,250 Mcf/year of methane gas can be recovered per well with plunger lift systems.<sup>70,71</sup> In 2011, the EPA estimated that 237 Bcf of methane was emitted from well cleanups annually. A large fraction of these emissions could be controlled using plunger lift systems.

**Plunger lift systems are low cost and use a well's own natural energy**

#### 4.2.3 Proposed EPA Regulations

The EPA's proposed NSPS regulations would not require the use of plunger lift systems to address well cleanups. Even if plunger lifts are more widely used than previously assumed, we strongly recommend that the EPA revise its proposal to require plunger lift systems to ensure that such systems are in use at all feasible sites.

NRDC acknowledges that there are many options for well deliquification. In any case, there is a methane control target (237 Bcf) that should be addressed by plunger lifts or other well deliquification methods that capture methane with similar efficiency and effectiveness. NRDC recommends that, while operators should have flexibility in selecting among the options, the basis for selection should be minimizing methane emissions.

#### 4.2.4 Profit

Installing a plunger lift system in a gas well involves a small initial investment, estimated by the EPA to be between \$2,600 and \$10,400 per well.<sup>72</sup> Plunger lift system maintenance may cost about \$1,300 per year, but yields other operational savings such as avoided chemical treatment of about \$13,200 per year, resulting in a net savings.

Each plunger lift installed in an older gas well could result in 600 to 18,250 Mcf per year of recovered gas, valued at \$2,000 to \$103,000, when operations and maintenance savings are included. The value of methane gas recovered and sold rapidly covers that initial investment cost, as shown in greater detail in Appendix A, Table A2.

Most companies report a less than one-year payout and substantial profit thereafter, depending on the gas recovery rate. Future profits will be offset eventually by declines in gas recovery rates, and by minimal additional operating and maintenance costs, but since most plunger lift systems pay back in less than a year, plunger lift installations typically start profitable and remain profitable for many years after the initial investment.

The examples below, reported by industry, illustrate the profitability of plunger lift systems:

- Between 1995 and 1997, Mobil Oil installed plunger lifts in 19 wells at its Big Piney Field in Wyoming, reducing its emissions by 12,166 Mcf per year.<sup>73</sup>

- In 2000, BP installed plunger lift systems with automated controls on approximately 2,200 wells in the United States, and reported a 50 percent reduction in gas well blowdowns for liquid unloading by year 2004.<sup>74</sup> By 2006, BP reported the installation of “smarter” plunger lift automation systems, achieving a \$15.5 million per year profit on an average annual recovery of 1,424 Mcf of methane gas per well.<sup>75</sup>
- In 2000, Conoco reported that installation of plunger lift systems in its low-pressure gas wells in Lea County, New Mexico reduced operating costs by more than 70 percent.<sup>76</sup>
- In 2006, Amoco reported that it installed plunger lifts at a cost of \$13,000 per well at its Midland Texas field, resulting in electricity, well workover, and chemical treatment savings of \$24,000 per year per well. In addition there was a small increase in gas production, which added about an additional \$79,000 in profit to each well per year, for a total benefit of more than \$100,000 per well.<sup>77</sup>
- In 2007, Devon Energy reported a 1.2 Bcf reduction of vented methane gas in its operations due to installation of plunger lift systems.<sup>78</sup>
- In 2010, the New Mexico Oil and Gas Association submitted testimony to the New Mexico Environmental Improvement Board confirming that plunger lift systems have been technically viable and economically attractive in the San Juan Basin.<sup>79</sup>

#### 4.2.5 Additional Benefits

Automated plunger lift systems continuously optimize gas production. Regular fluid removal limits the periods of time that liquid loading “kills” the well and halts gas production.

The mechanical action of the plunger traveling up and down the tubing also prevents buildup of scale and paraffin

in the tubing. Preventing excess scale and paraffin buildup reduces the cost of the chemical or mechanical swabbing treatments required to remove this buildup, and, in more serious cases, the cost of well workovers. The EPA reports additional savings associated with plunger lift systems ranging from \$6,600 to \$14,500 per well for reduced chemical treatment and workover costs.<sup>80</sup>

Gas venting near well operations creates potentially explosive vapor levels that can pose a human health hazard. Collection of potentially explosive gas vapors, rather than venting the gas to atmosphere, improves well site safety, reduces worker exposure to harmful vapors, and limits overall corporate liability.

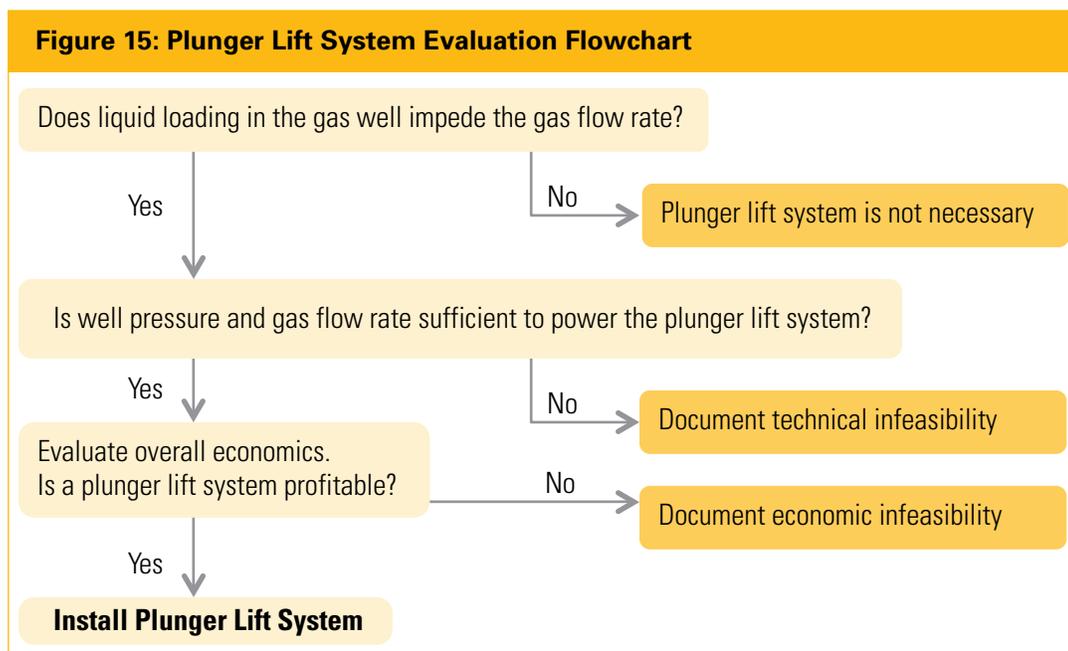
Additionally, gas capture and sale reduces emissions, noises, odors, and citizen complaints associated with venting.

Unprocessed natural gas contains VOCs and HAPs, along with methane. Therefore, capture of this gas also reduces VOCs and HAPs pollution.

#### 4.2.6 Limitations and Evaluation

Plunger lift systems are useful in gas wells that tend to fill with liquid, and have sufficient gas volume and pressure to power the plunger lift system. Such factors should be taken into account in determining applicability. In some cases, wells installed with plunger lifts may need to be vented for a short period of time to generate the differential pressure needed to resume well liquid removal. Even in this case, total methane emissions are substantially reduced. Also, a plunger cannot be run in a well bore with changing tube sizes, or wells with highly deviated directional or horizontal well bores.

Figure 15 provides a simplified evaluation flowchart showing the basic steps for evaluating whether a plunger lift system will be technically feasible and profitable.



### 4.3 TRI-ETHYLENE GLYCOL DEHYDRATOR EMISSION CONTROLS

Glycol dehydrators are used to remove moisture from natural gas to improve gas quality, minimize corrosion in the gas sales line, and mitigate gas hydrate formation. A number of different glycols can be used in dehydration systems (e.g. triethylene glycol (TEG), diethylene glycol (DEG), ethylene glycol (MEG), and tetraethylene glycol (TREG)). TEG is the most commonly used glycol in industry.<sup>81</sup> TEG dehydrators vent methane gas to the atmosphere, but in many cases methane gas can be captured instead.

#### 4.3.1 Technology Description

In some cases, if the design criteria can be met, a TEG dehydrator can be replaced with a desiccant dehydrator (see Section 4.4). However, desiccant dehydrators are limited to low gas flow rates—less than 5 MMcfd—and have temperature and pressure limitations. Therefore, for higher gas flow rates, the best solution is often to retrofit existing TEG dehydrators with emission controls.

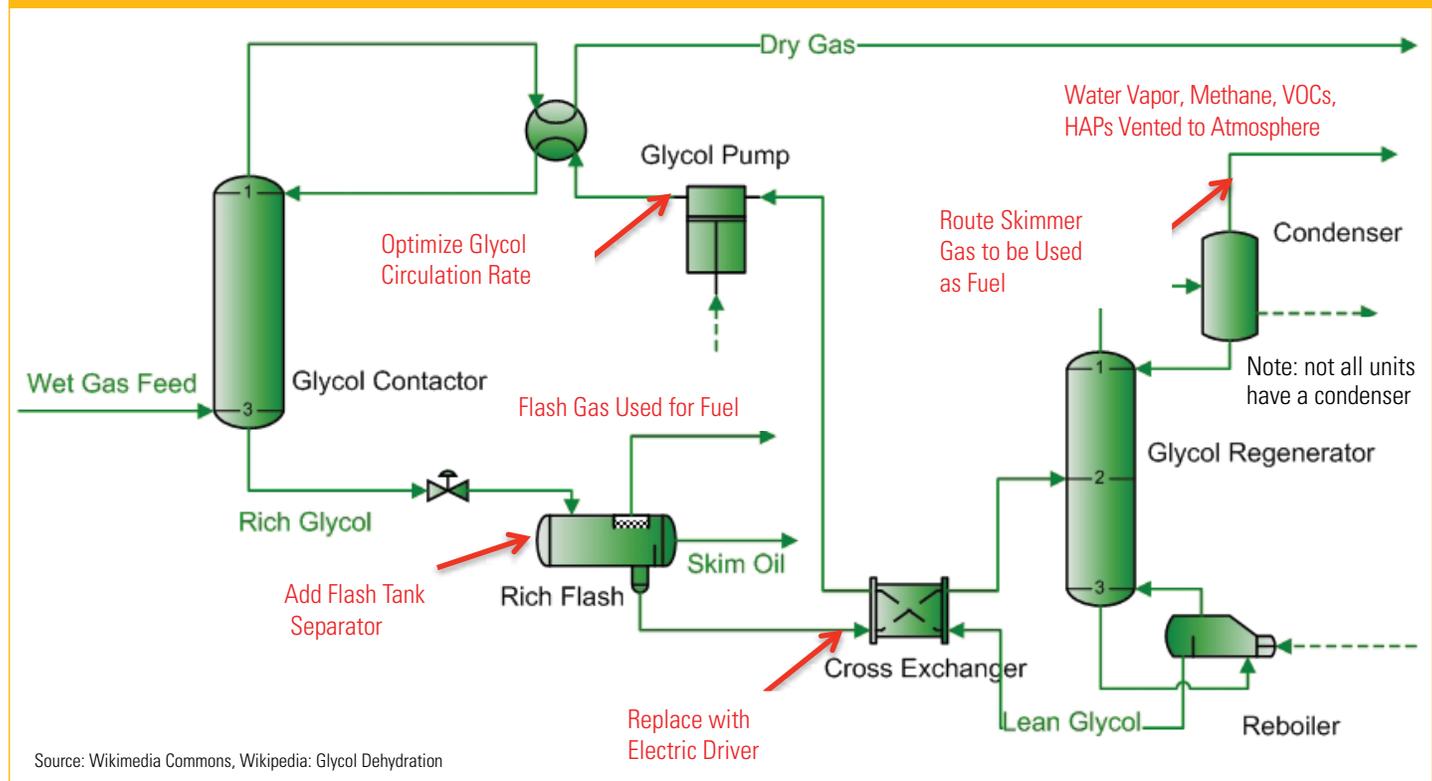
A typical glycol dehydration system includes a glycol contactor, a glycol exchange pump, a driver to run the pump, and a glycol regenerator and reboiler. In some cases, a condenser is also installed downstream of the glycol regenerator. Figure 16 provides a schematic for a typical glycol dehydration unit. As shown in the diagram, natural gas with moisture content exceeding pipeline specifications (“wet gas”) enters the glycol dehydration system and

moisture is removed to achieve pipeline specifications (“dry sales gas”).

A typical glycol dehydration system includes the following components:

- Glycol contactor:** Wet gas enters the glycol contactor. Glycol removes moisture from the gas by the process of physical absorption. Along with removing moisture, the glycol also absorbs methane, VOCs, and HAPs. Dry gas exits the glycol contactor absorption column and is either routed to a pipeline or a gas plant. The glycol contactor unit plays the primary role in dehydrating the gas to pipeline specifications, but the rest of the glycol dehydration system is required to convert the now moisture rich glycol back into a lean product that can be reused to dehydrate more incoming gas. Therefore, the next step in the process is to route the moisture rich glycol to regenerator and reboiler units to remove that moisture.
- Glycol regenerator & reboiler:** Glycol loaded with moisture, methane, VOCs, and HAPs (“rich glycol”) exits the bottom of the glycol contactor unit and is routed to the glycol regenerator and reboiler units to remove the absorbed components and return “lean” glycol back to the glycol contactor. If emission controls are not installed, methane, VOCs, HAPs, and water are boiled off and vented to atmosphere from the regenerator and reboiler units. One way to limit the amount of methane, VOCs, and HAPs emitted to the atmosphere from the regenerator and reboiler units is to install a flash tank separator.

Figure 16: Glycol Dehydration Unit Schematic



Source: Wikimedia Commons, Wikipedia: Glycol Dehydration

- **Flash tank separator:** Installation of a flash tank separator between the glycol contactor and the glycol regenerator/reboiler units creates a pressure drop in the system, allowing methane, and some VOCs and HAPs, to flash out of, or separate from, the glycol. The amount of pressure drop that can be created is a function of the fuel gas system pressure or compressor suction pressure because the methane gas flashed-off at the flash tank separator is then sent to be used as fuel in the TEG reboiler or compressor engine. Simply put, the pressure can only be dropped to a pressure that still exceeds the fuel gas pressure, allowing the collected methane gas to flow into the fuel system. Flash tank separators typically recover 90 percent of the methane and approximately 10 to 40 percent of the total VOCs that would otherwise be vented to atmosphere. Methane emissions can also be controlled by taking the simple step of adjusting the rate at which glycol circulates in the system.
- **Glycol recirculation pump:** Methane emissions are directly proportional to the glycol circulation rate. Circulating glycol at a rate that exceeds the operational need for removing water content from gas unnecessarily increases methane emissions. Glycol circulation rates are typically set at the maximum to account for peak throughput. Gas pressure and flow rate decline over time, requiring the glycol circulation rate to be adjusted to meet operational need. Optimizing the glycol circulation merely requires an engineering assessment and a field operating adjustment. If the glycol dehydration unit includes a condenser, methane emissions can be collected and used for fuel or destroyed rather than being vented to atmosphere.
- **Condensers:** Some glycol reboilers have still condensers to recover natural gas liquids and reduce VOCs and HAPs emissions. However, condensers do not capture methane (because it is a non-condensable gas); therefore, the addition of a condenser does not reduce methane emissions. In these cases, methane gas is typically vented to atmosphere. Alternatively, this methane gas (called “skimmer gas”) can be routed to the reboiler firebox or other low-pressure fuel gas systems.<sup>82</sup>
- **Electric pumps or energy-exchange pumps:** Historically, gas-assisted glycol pumps have been used. Where there is an electric supply, the gas-assisted glycol pumps can be replaced with an electric pump. Gas-assisted pumps are driven by expansion of the high-pressure gas entrained in the rich glycol that leaves the contactor, supplemented by the addition of untreated high-pressure wet (methane rich) natural gas. The high-pressure gas drives pneumatic pumps. Much like pneumatically operated valves, pneumatically operated pumps vent methane. Electric pumps would reduce emissions, since they do not vent methane.

Regarding electric pumps or energy-exchange pumps, the EPA reports:

*“The mechanical design of these pumps places wet, high-pressure TEG opposed to dry, low pressure TEG,*

*separated only by rubber seals. Worn seals result in contamination of the lean (dry) TEG making it less efficient in dehydrating the gas, requiring higher glycol circulation rates. Replacing gas-assisted pumps with electric pumps increases system efficiency and significantly reduces methane emissions.”<sup>83</sup>*

By comparison, electric pumps have lower emissions and no pathway for contamination of lean TEG by the rich TEG.

In summary, there are four straightforward solutions readily available to control methane emissions from TEG dehydrator units:

- Installing a flash tank separator
- Optimizing the glycol circulation rate
- Rerouting the skimmer gas
- Installing an electric pump to replace the natural gas driven energy exchange pump

### 4.3.2 Opportunity

#### Reduction Target 8 Bcf/year

The 2011 *Greenhouse Gas Inventory* estimates that gas dehydration systems emit approximately 8 Bcf of methane annually.<sup>84</sup>

In 2009, the EPA estimated that there were approximately 36,000 glycol dehydrators in operation in the U.S. natural gas sector.<sup>85</sup>

While a number of large glycol dehydrators are currently required by the EPA to install emission controls under the federal Maximum Achievable Control Technology standards (MACT standards at 40 CFR Part 63, Subpart HH), small glycol dehydrators are typically exempt from federal emission control requirements. Many small glycol dehydrator units do not have flash tank separators, condensers, electric pumps, or vapor recovery installed on the glycol regenerator.

*Many small glycol dehydrators operating in the United States are exempt from federal emission control*

**Table 5: Methane Capture Potential from TEG Dehydrator Controls**

Technology	Methane Capture Mcf/year
Flash Tank Separator	3,650
Optimize Glycol Circulation Rate	18,250
Reroute Skimmer Gas	7,665
Install Electric Pump	5,000
<b>Potential Methane Capture Range</b>	<b>3,650 to 34,565</b>

A significant fraction of this 8 Bcf/year of emissions from this source can and should be captured (Table 5).

**Installing Flash Tank Separator:** In 2005, the EPA estimated that the installation of a flash tank separator, on average, resulted in 10 Mcf/day (3,650 Mcf/year) of methane gas captured for use as fuel for each TEG dehydrator (typically a 90 percent reduction in methane emissions).

In 2009, the EPA reported that flash tank separators were only installed on 15 percent of the dehydration units processing less than 1 MMcfd, 40 percent of units processing 1 to 5 MMcfd, and between 65 and 70 percent of units processing more than 5 MMcfd.<sup>86</sup> Chevron reported it has installed flash tank separators, recovering 98 percent of the methane from the glycol and reducing methane emissions from 1,450 Mcf/year to 47 Mcf/year.<sup>87</sup>

**Optimizing Glycol Circulation Rate:** In 2005, the EPA estimated that optimizing the glycol circulation rate could result in a wide range of methane capture from 1 to 100 Mcf/day (18,250 Mcf/year using a median estimate of 50 Mcf/day).<sup>88</sup>

**Rerouting Glycol Skimmer Gas:** In 2005, the EPA estimated that rerouting glycol skimmer gas could result in an average methane capture of 21 Mcf/day (7,665 Mcf/year).<sup>89</sup>

**Installing Electric Pump:** In 2007, the EPA estimated that between 360 and 36,000 Mcf/year in methane emission reductions could be achieved by installing an electric pump to replace the natural gas-driven glycol energy exchange pump. The wide range in methane emission reductions is a function of the large variation in equipment sizes. In Table 5 we use the number 5,000 Mcf/year per electric pump.<sup>90</sup>

In 2007, the EPA determined that the total potential emission reductions at any given glycol dehydration unit is a function of how many of these emission control solutions

are installed, and estimated that the total reduction potential may range from 3,600 to 35,000 Mcf/year, or \$14,600 to \$138,000 of annual revenue. The 2011 *Greenhouse Gas Inventory* estimates the upper range of emissions at 38,000 Mcf/year.<sup>91</sup>

### 4.3.3 Proposed EPA Regulations

The EPA's proposed air toxics standards would cover new and existing small dehydrators located at major sources of HAPs.<sup>92</sup> The EPA classifies small dehydrators as units with an annual average gas flow rate less than 3 million Mcf/day at production sites, or 9.99 million Mcf/day at natural gas transmission and storage sites, or actual average benzene emissions less than 0.9 Mg/year.

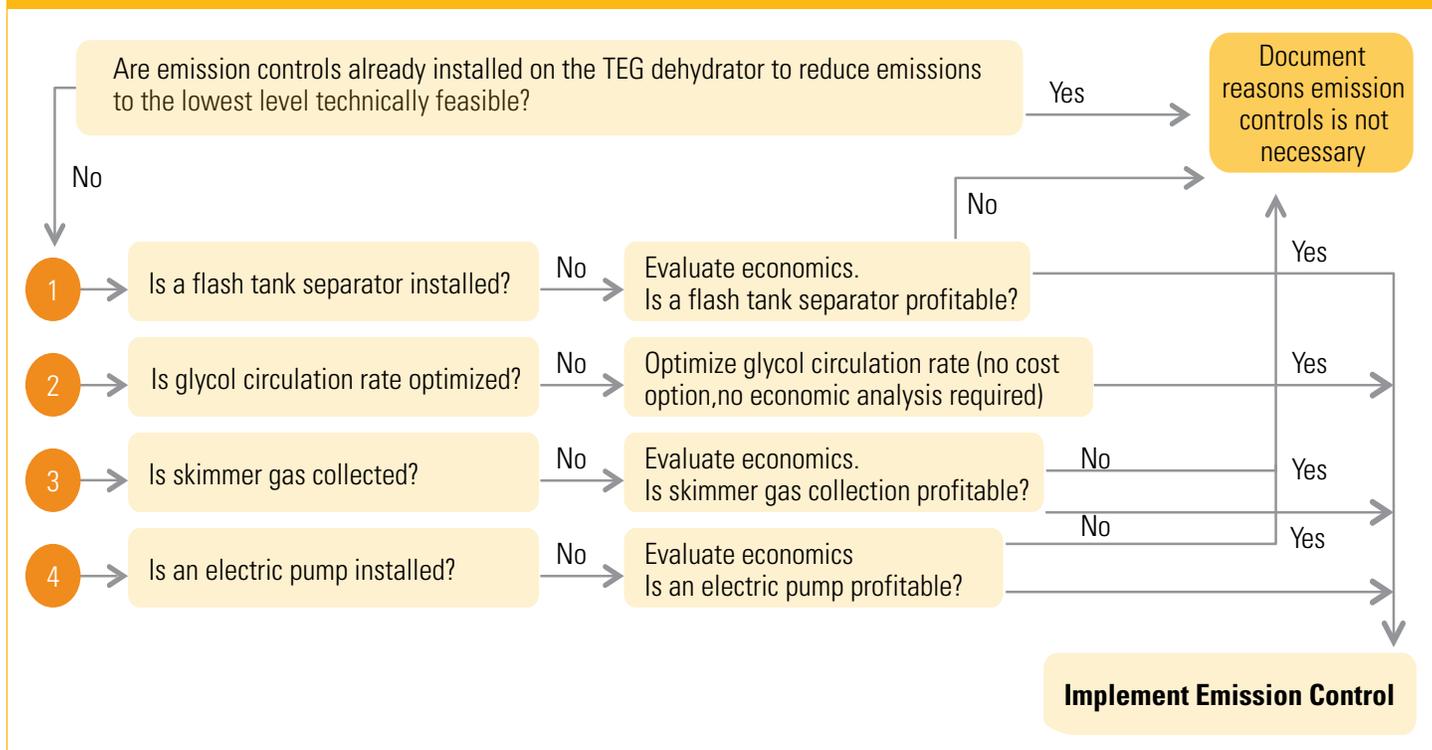
### 4.3.4 Profit

The EPA estimates that it costs on average:

- \$5,000 to install a flash tank separator
- Less than \$100 to adjust the glycol circulation rate
- \$1,000 per unit to reroute glycol skimmer gas, with \$100 per year of operating and maintenance costs<sup>93</sup>
- \$1,400 to \$13,000 to install an electric pump<sup>94</sup>

These technologies can be installed singly or in combination. Each unit, if equipped with the above technology, would capture approximately 3,600 to 35,000 Mcf per unit, per year. This translates to profits of between \$14,000 and \$138,000 per unit per year, as shown in greater detail in Appendix A Table A3. This technology has a payback period of less than a year, and can generate significant profits each year thereafter.

**Figure 17: TEG Dehydrator Emission Control Evaluation Flowchart**



### 4.3.5 Additional Benefits

One of the most important benefits of TEG dehydrator emission controls is the opportunity to reduce the amount of HAPs emitted to the atmosphere, especially benzene, a known human carcinogen. Along with methane gas, TEG dehydrators vent VOCs and HAPs to the atmosphere. In some cases, glycol dehydrators have still condensers and condensate separators to recover natural gas liquids and reduce VOCs and HAPs. But, if these units are not installed, VOC and HAP components (including benzene) are vented into the atmosphere.<sup>95</sup>

The installation of a flash tank separator reduces VOC and HAP emissions, improving air quality. The installation of a flash tank separator also improves the efficiency of downstream components (e.g. condensers) and reduces fuel costs by providing a fuel source to the TEG reboiler or compressor engine.<sup>96</sup>

### 4.3.6 Limitations and Evaluation

The option to reroute the skimmer gas can be employed only on dehydrators where a still condenser is installed. The following factors should be evaluated in assessing feasibility of installing an electric pump to replace the natural gas driven glycol energy exchange pump, as electricity may not be available at a remote well site: (1) the local electric grid's potential to make electric power available to a well site, (2) the potential to self-generate electricity on site using waste gas that might otherwise be vented or flared, or (3) availability of solar power.

Figure 17 provides a simplified evaluation flowchart showing the basic steps for evaluating whether TEG dehydrator emission controls are appropriate.

## 4.4 DESICCANT DEHYDRATORS

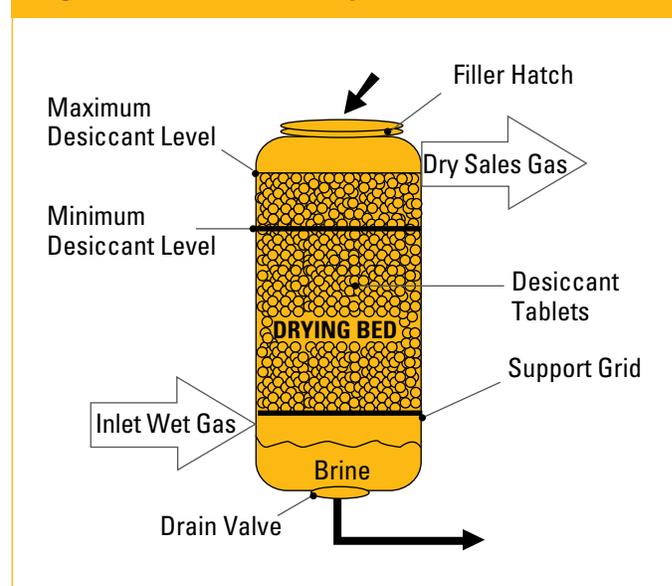
Desiccant dehydrators can be used as alternatives to glycol dehydrators to remove moisture from natural gas to improve gas quality, minimize corrosion in the gas sales line, and mitigate gas hydrate formation. Desiccant dehydrators do not emit significant quantities of methane gas into the atmosphere, and reduce emissions by up to 99 percent.

### 4.4.1 Technology Description

Desiccant dehydrators dry gas by passing the gas through a bed of sacrificial hygroscopic salt (the desiccant).<sup>97</sup> The salt type—typically calcium chloride ( $\text{CaCl}_2$ ) or lithium chloride ( $\text{LiCl}$ )—is selected based on gas temperature and pressure and to match the gas operating conditions, as shown in Figure 18. Unlike a traditional glycol dehydrator, there are no pumps, contactors, regenerators, or reboilers, and only a small amount of methane is released intermittently when the unit is opened to replace the salt.

The amount of moisture that can be removed from a gas

**Figure 18: Desiccant Dehydrator Schematic**



stream is a function of the gas pressure and temperature. At high gas temperatures, desiccant dehydrators can form gas hydrates, which can plug the unit. Therefore, desiccant dehydrators are best suited for 5 MMcfd gas flow rates or less, with a low wellhead gas temperature (less than 70 degrees Fahrenheit). Glycol dehydrators are needed for gas flow rates exceeding 5 MMcfd, for higher gas pressures, or when operation is required over a wide range of pressures.<sup>98</sup>

### 4.4.2 Opportunity

#### **Reduction Target: 8 Bcf/year**

The 2011 *Greenhouse Gas Inventory* estimates that gas dehydration systems emit approximately 8 Bcf of methane annually.<sup>99</sup>

Desiccant dehydrators can be used to replace an existing TEG dehydrator. When this occurs, there is an initial capital investment required. For example, a 1 MMcfd unit costs about \$12,500 to \$16,000, but the operating and maintenance costs for a desiccant dehydrator are lower than those for a TEG unit (cost savings of about \$1,800/year).<sup>100,101</sup> The EPA estimates that replacing a small TEG dehydrator with a desiccant dehydrator will capture about 1,000 Mcf/year of methane.<sup>102</sup> Larger units—up to 5 MMcfd—will cost incrementally more, but will have corresponding lower operating and maintenance costs and higher methane emission recovery.<sup>103</sup>

Of the 8 Bcf/year reduction target for dehydrators, most of the emissions are from small dehydrators that are exempt from MACT standards. Using desiccant dehydrators to replace aging glycol dehydrators, or as a lower emission alternative for new dehydration units, will reduce methane emissions from small dehydrators.

### 4.4.3 Proposed EPA Regulations

The EPA's proposed new air toxics standards include new and existing small dehydrators. Desiccant dehydrators are not specifically required.

While these proposed standards would cover both small and large glycol dehydrators, the EPA estimates that only 0.024 Bcf/year of methane would be captured (about 0.3 percent of the emissions from this source).

The EPA's proposed standards could be strengthened by requiring:

- Air toxics reductions of 98 percent (up from the proposed 95 percent)
- Better operational practices (e.g. optimized circulation rates)
- Portable desiccant dehydrators used during maintenance, and desiccant dehydrators for gas flow rates of 5 MMcfd or less.

### 4.4.4 Profit

If a desiccant dehydrator is technically feasible in a new installation, it will be more profitable than a TEG dehydrator. In addition to having lower capital and operating and maintenance costs than a TEG dehydrator, it has the added benefit of being able to collect methane for sale.

The EPA estimates that profit could amount to \$6,000 per year, including operations and maintenance savings. The initial investment of \$16,000 for replacing a glycol dehydrator with a desiccant dehydrator is paid out in less than three years, as shown in greater detail in Appendix A, Table A4.<sup>104</sup>

In 2007, BP reported that it eliminated 858 glycol dehydrators, replacing them with desiccant dehydrators, for a \$27 million profit and “immediate-payout.” This amounts to a profit of \$31,469 per unit total, or about \$31,000 per year averaged over a 10-year period.<sup>105</sup>

### 4.4.5 Additional Benefits

Unprocessed natural gas contains VOCs and HAPs, along with methane. Therefore, capture of this gas also reduces VOC and HAP pollution.

### 4.4.6 Limitations and Evaluation

Desiccant dehydrators produce a liquid brine waste that must be either routed to a produced water tank for reinjection or disposed of as waste. There are also pressure, temperature, and gas flow limitations.

Figure 19 provides a simplified evaluation flowchart showing the basic steps for evaluating whether a desiccant dehydrator would be an option.

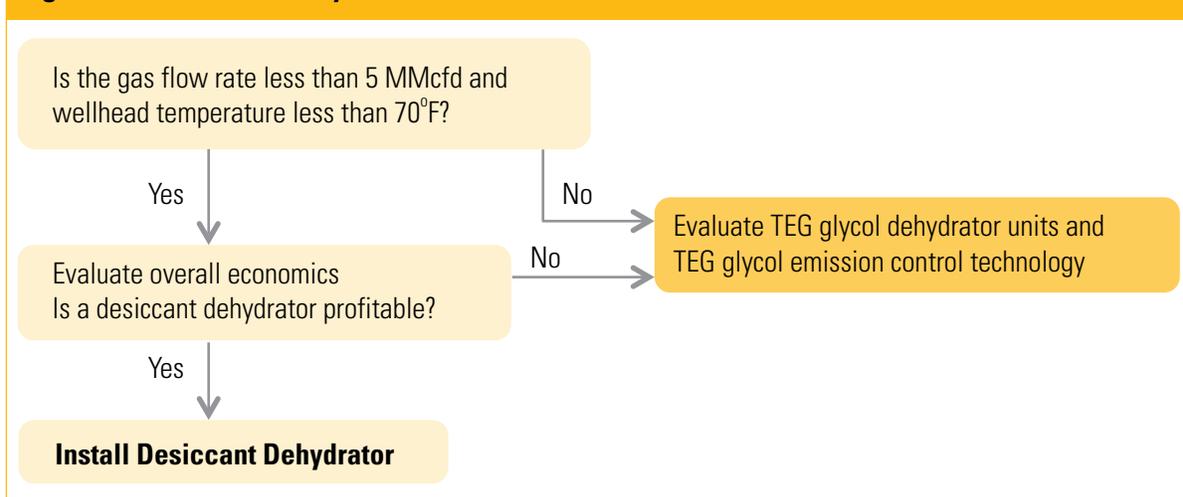
### 4.5 DRY SEAL SYSTEMS

Centrifugal compressors are used in the production and transportation of natural gas. Centrifugal compressors installed with wet seals have high-pressure seal oil that circulates between rings around the compressor shaft. This high-pressure oil is used as a barrier to prevent gas escape. The seal oil absorbs methane gas, however, and later the methane is vented to atmosphere, when the compressor seal oil gas is vented in a process called “seal oil degassing” (Figure 20).

Instead of using seal oil (wet seal), centrifugal compressors can use dry seals, in which high-pressure gas is used to seal the compressor. Changing out wet seals and installing dry seals reduces methane venting (Figure 21).

Wet seal technology is being phased out. In fact, more than 90 percent of new compressors are being sold with dry seal technology, due to the environmental and cost savings benefits it offers.

**Figure 19: Desiccant Dehydrator Evaluation Flowchart**



### 4.5.1 Technology Description

Dry seals prevent methane leaks by pumping gas between the seal rings, creating a high-pressure leak barrier when the compressor shaft is rotating (Figure 21). Typically, two dry seals are used in tandem to prevent gas leakage. When the compressor shaft is not rotating, the dry seal housing is pressed up tight against the rotating ring using a “dry seal spring,” thereby preventing gas leaks.<sup>106</sup>

### 4.5.2 Opportunity

#### Reduction Target: 27 Bcf/year

The 2011 *Greenhouse Gas Inventory* estimates that approximately 1,500 centrifugal compressors with wet seals were operating in the U.S. O&G industry, with rod packing systems emitting approximately 27 Bcf of methane annually, a significant fraction of which can and should be captured.<sup>107</sup>

The EPA estimates that 80 percent of natural gas compression station methane emissions are emitted from compressors.<sup>108</sup> If wet seals are used in compressors for other applications in gas production, those compressors can also emit large amounts of methane. According to the EPA, wet seal oil degassing may vent between 40 and 200 standard cubic feet per minute (scfm), compared to about 0.5 to 3 scfm with a dry seal.<sup>109</sup> Dry seal technology offers a technically and economically feasible alternative to reduce these methane emissions.

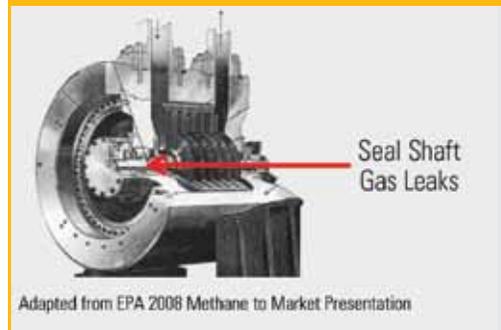
### 4.5.3 Proposed EPA Regulations

The EPA’s proposed NSPS regulations would require the use of dry seals for each new or modified centrifugal compressor located in the processing, transmission, and storage sectors. The standards would not apply to compressors at a well site or in the distribution sector.

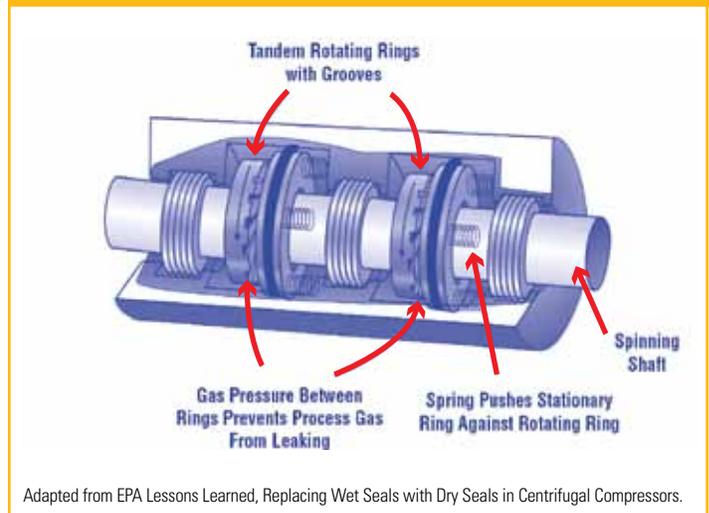
The EPA estimates that the proposed NSPS would reduce methane emissions from compressors with wet seals by about 0.25 Bcf/year, about 1 percent of the compressor methane emissions from this source. This low control percentage is primarily because the NSPS would only affect new or modified or replaced leakage sources, while the bulk of the emissions are from existing sources.

The proposed regulations could be further enhanced by requiring equipment and operational requirements for existing compressors. New compressors represent just 2 percent of all centrifugal compressors in the processing, transmission and storage sectors. Compressors are added or replaced in these sectors at an extremely low rate. Therefore, a standard applying only to such compressors would leave most of the emissions untouched.

**Figure 20: Centrifugal Compressor Leaks Schematic**



**Figure 21: Centrifugal Compressor Dry Seals**



### 4.5.4 Profit

The actual costs for a dry seal system will depend on compressor operating pressure, shaft size, rotation speed, and other site-specific factors. The EPA reports that a dry seal retrofit costs on average \$324,000, but results in an operations and maintenance cost savings of more than \$100,000 per year and can generate up to \$400,000 in additional annual revenue from captured methane, resulting in a payout of approximately one year.<sup>110,111</sup> One of the major factors in the profit equation is the lower O&M costs for dry seals—\$8,400 to \$14,000 per year—compared to wet seal costs of \$140,000 per year per compressor or more.

The EPA’s 2011 *Greenhouse Gas Inventory* and other sources estimate the leak rate to be approximately 18,000 to 100,000 Mcf per year. If captured and sold, this could annually yield up to \$400,000 in additional revenue, and up to \$120,000 in operations and maintenance savings. Additional details are provided in Appendix A, Table A5.

Using the EPA’s estimate that wet seal oil degassing may vent between 58 and 288 Mcf/day, compared to 0.7 to 4 Mcf/day with a dry seal, and using current gas prices, an

operator may save up to \$400,000 per year, per compressor.<sup>122</sup> However, the actual profits will vary based on site-specific circumstances.

In 2008, Petróleos Mexicanos (PEMEX) assessed the benefits of converting from wet seals to dry seals on centrifugal compressors at a compression station in southern Mexico.<sup>113</sup> PEMEX found a gas savings of 33.5 scfm per seal, and a gas savings of 35,000 Mcf/year (resulting in greenhouse gas emissions reduction of 7,310 metric tons of carbon dioxide equivalent per year), and a profit of \$126,690 annually.<sup>114</sup>

Targa Resources and the Gas Processors Association report that replacing a wet seal with a dry seal on a 6 inch shaft beam compressor that operates approximately 8,000 hours per year, leaking at 40 to 200 scfm, will pay out in four to 15 months, yielding more than \$1 million in net present value, assuming a 10 percent discount rate in a span of five years, and more than a 170 percent rate of return.<sup>115</sup>

#### 4.5.5 Additional Benefits

Upgrading compressor seals can reduce power requirements and downtime, improve compressor reliability, and lower operating costs by eliminating seal oil costs and associated maintenance.<sup>116</sup>

#### 4.5.6 Limitations and Evaluation

A compressor-specific, site-specific evaluation is necessary to determine if conversion to dry seals is technically feasible. A conversion to dry seals may not be possible on some

compressors because of compressor housing design or other operational or safety factors.

Figure 22 provides a simplified evaluation flowchart showing the basic steps for evaluating a dry compressor seal conversion.

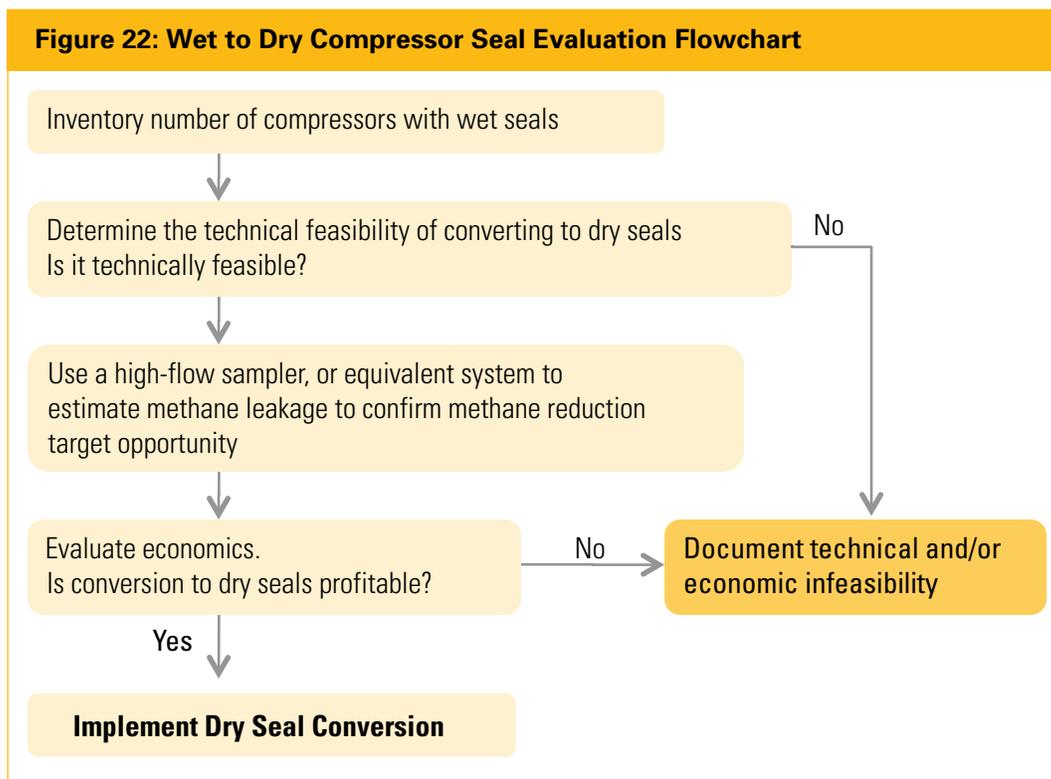
### 4.6 IMPROVED COMPRESSOR MAINTENANCE

Reciprocating compressors leak methane from a component called a rod packing case. A common practice is to route the rod packing emissions outside the compressor building and vent the methane emissions directly into the atmosphere. Methane emissions can be reduced by replacing worn out rod packing.

#### 4.6.1 Technology Description

Rod packing systems are used to maintain a seal around the piston rod, preventing gas compressed to a high pressure in the compressor cylinder from leaking, while still allowing the piston rod shaft to move freely. A series of flexible rings are fitted around the piston rod shaft, held in position by packing material and springs.

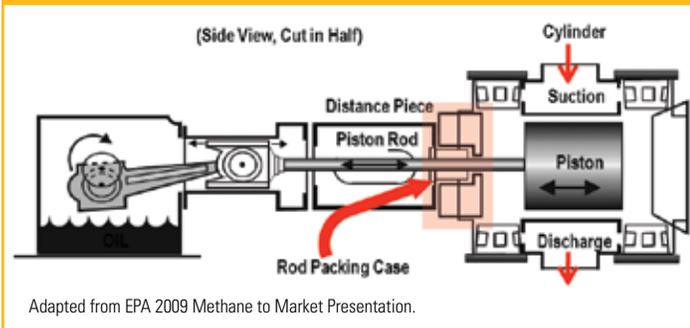
Methane leaks occur between the rings and piston rod shaft, around the outside of the rings, and between the packing (Figure 23). Packing leaks can occur for a number of reasons, such as a worn piston rod, an incorrect amount of lubrication, dirt or foreign matter in the packing, or packing material out of tolerance.<sup>117</sup> The amount of leakage will be a



function of the amount of misalignment between the piston rod, packing materials, and rings and packing case. Also, misalignment of the piston rod and any imperfections on the piston rod surface can cause leakage.<sup>118</sup>

Rod packing case leaks are also a function of the quality of initial installation, packing material selection, and the way in which the unit was operated during the initial, or break-in, operating period.

**Figure 23: Reciprocating Compressor Rod Packing Leaks Schematic**



#### 4.6.2 Opportunity

##### **Reduction Target: 75 Bcf/year**

In 2006, the EPA estimated that more than 51,000 reciprocating compressors were operating in the U.S. natural gas industry with, on average, four cylinders each, for a total of more than 200,000 piston rod packing systems in service.<sup>119</sup> The 2011 *Greenhouse Gas Inventory* estimates that these systems emit 75 Bcf of methane annually, a significant fraction of which can and should be captured.<sup>120</sup>

As with centrifugal compressors, an impediment to rod packing replacement is the equipment downtime required to make the replacement. However, routine repair and maintenance is a good business practice.

#### 4.6.3 Proposed EPA Regulations

The EPA's proposed NSPS regulations for reciprocating compressors require replacement of rod packing every 26,000 hours of operation (approximately every three years). These standards would only apply to reciprocating compressors at processing stations, gathering and boosting stations, transmission stations and underground storage facilities. The standards would not apply to compressors at a well site or beyond the city gate (distribution sector).

The EPA estimates that the proposed NSPS regulations would reduce emissions from reciprocating compressors by about 0.3 Bcf/year, less than 1 percent of the methane emissions from these sources. This is primarily because the NSPS would only apply to new or replaced reciprocating compressors starting from the time of installation, whereas

the bulk of the emissions come from existing compressors. It does not appear that the proposed standards would apply when an existing compressor is taken offline for maintenance.

The proposed regulations could be further strengthened by requiring equipment and operational requirements for existing compressors. New compressors represent just 3 percent of all reciprocating compressors in the processing, transmission and storage sectors. Compressors are added or replaced in these sectors at a low rate; therefore, a standard applying only to new compressors will leave most of the emissions untouched. The EPA should also require emission abatement at the wellhead (production sector). While replacement based on hours of operation is a good minimum threshold, the EPA should also consider requiring regular leak-rate tests and early replacement if leakage is deemed too high.

#### 4.6.4 Profit

Operators that carefully monitor and replace compressor rod packing systems on a routine basis can reduce methane emissions and reduce piston rod wear, both of which increase profit.<sup>121</sup>

The 2011 *Greenhouse Gas Inventory* uses a leak rate of 875 scf/hour (21,000 scf/day), equating to approximately \$100 of gas leaking from each compressor each day it is not repaired.

The EPA estimates that refurbishing the rings and packing material may cost between \$135 and \$2,500, depending on the size of the unit. Rod replacement can range from \$2,400 to \$13,500, depending on the number of rods replaced.<sup>122</sup>

The pace at which replacements are necessary is a function of the compressor type, use, maintenance and operating conditions, and is highly variable. In most cases, though, payout is achieved in less than a year. The EPA has estimated that on average, the annual investment expense of replacing one rod packing system is about \$600, with an initial investment of about \$1,600. The methane gas captured has a value of about \$3,500 per year, allowing payout to be achieved in less than half a year.<sup>123</sup> Another EPA reference reports a slightly lower initial cost for replacing rod packing of \$1,200, but with similar natural gas savings, to allow for payout in less than half a year.<sup>124</sup> Additional detail is shown in Appendix A, Table A6.

#### 4.6.5 Additional Benefits

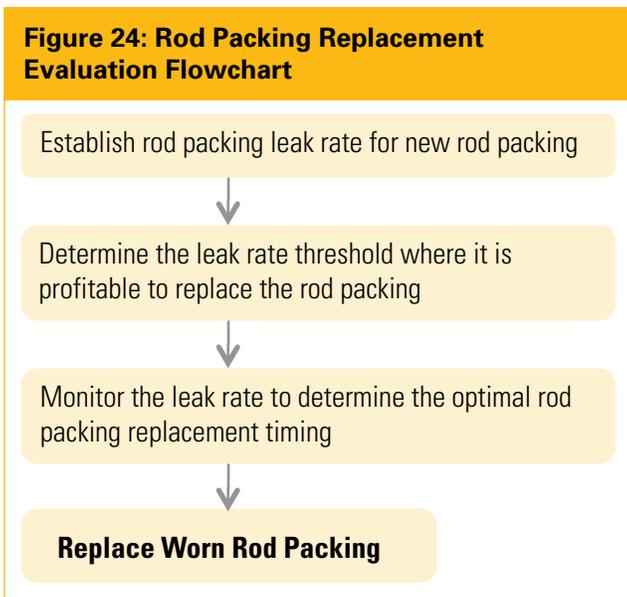
Collection of methane and other gas vapors at O&G operations creates a safer working environment by reducing potentially combustible vapors at the work site.

#### 4.6.6 Limitations and Evaluation

One major consideration in deciding whether to replace worn rod packing is the cost and feasibility of taking the compressor out of service to make the repair. Larger facilities with spare compressor capacity will not be as significantly

affected as smaller operations, where repairs may require a complete shutdown. Other variables affecting cost savings include the amount of wear already on the rings and rod shaft, fit and alignment of packing parts, and cylinder pressure.

Figure 24 provides a simplified evaluation flowchart showing the basic steps for evaluating rod packing replacement.



### 4.7 LOW-BLEED OR NO-BLEED PNEUMATIC CONTROLLERS

Pneumatic controllers are used to regulate pressure, gas flow, and liquid levels, and to automatically operate valves. They are used extensively in the O&G industry.

Pneumatic controllers are designed to release methane gas to the atmosphere as part of normal operations. Some pneumatic controllers bleed at a low rate (low-bleed) and others bleed at a high rate (high-bleed). A high-bleed

**Figure 25: Pneumatic Controller**



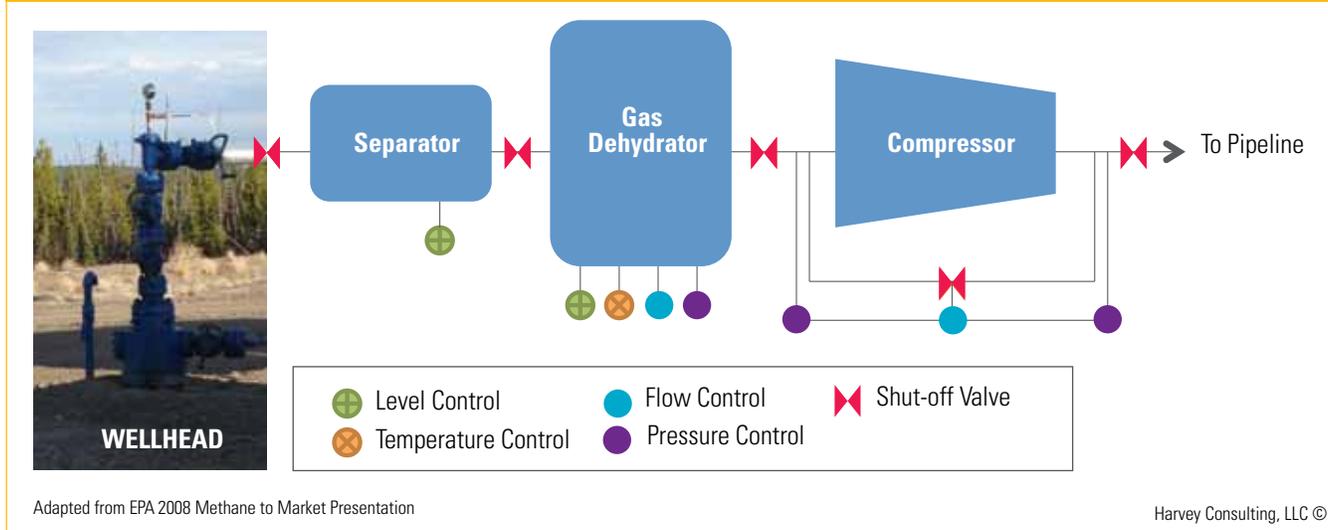
controller is defined by the EPA Natural Gas STAR Program as a device that releases 6 scf/hour or more. Converting high-bleed controllers to low-bleed controllers, or moving away from gas-operated controllers altogether in favor of instrument air controls, reduces methane emissions.

Colorado requires O&G operators to install low-bleed or no-bleed pneumatic controllers at all new facilities and whenever a device is repaired or replaced, if technically feasible.<sup>125</sup> Wyoming’s Oil and Gas Production Facility Guidance includes upgrading to low-bleed or no-bleed pneumatic controllers, or routing methane to a collection system during a repair or replacement.<sup>126</sup>

#### 4.7.1 Technology Description

Pneumatic controllers use clean, dry pressurized natural gas to provide a power supply to measure process conditions (e.g. liquid level, gas pressure, flow rate, temperature) and control

**Figure 26: Pneumatic Controller Locations in Natural Gas Production**



the conditions to a set point. Figure 25 shows a pneumatic controller. Figure 26 shows the locations in O&G operations where pneumatic controllers may be used.

There are three main pneumatic controller designs:

1. Intermittent bleed controllers that release gas only when the valve is stroked open or closed
2. Continuous bleed controllers that modulate flow, liquid levels, or pressures
3. Self-contained controllers that release gas back into piping and not to the atmosphere<sup>127</sup>

There are four main options for reducing methane emissions from pneumatic controllers:

1. Replacing high bleed pneumatic controllers with low- or no-bleed controllers
2. Retrofitting pneumatic controllers with bleed reduction kits
3. Converting natural gas pneumatics to instrument air
4. Performing routine maintenance to repair leaking gaskets, tube fittings, and seals

## 4.7.2 Opportunity

### **Reduction Target: 99 Bcf/year**

The 2011 *Greenhouse Gas Inventory* estimates that pneumatic controllers vented 99 Bcf of methane into the atmosphere.<sup>128</sup> Emissions are primarily generated from the production, processing, and transmission and storage sectors. The EPA also estimates that 84 percent of pneumatic controller emissions come from O&G production.<sup>129</sup> According to the American Petroleum Institute, there are approximately 1 million existing wells, and three controllers per well, indicating that there are a minimum of three million controllers in operation at well sites alone. The EPA reports that the typical high-bleed controller releases 140 Mcf/year of gas to the atmosphere.<sup>130</sup> Fortunately, nearly 80 percent of all high-bleed pneumatic controller can be replaced with low-bleed equipment or retrofitted to reduce methane emissions.<sup>131</sup>

Taking into account the EPA's assessment that 80 percent of high-bleed devices can be replaced or retrofitted, we consider that a very large fraction of the 99 Bcf/year emissions can be captured.

## 4.7.3 Proposed EPA Regulations

The EPA's proposed NSPS regulations require instrument air controllers that have zero methane emissions to be installed at processing plants. The EPA also proposes that low-bleed pneumatic controllers, with a limit of 6 scfh, be used in the production, transmission, and storage sectors. Requirements would apply to newly installed pneumatic controllers, including replacement of existing devices. The proposal

would exclude pneumatic controllers that are located in the distribution segment, as well as existing controllers.

The EPA estimates that the proposed NSPS regulations would reduce emissions from high-bleed pneumatic controllers by about 4.5 Bcf/year, or about 5 percent. The emission reduction is small because the proposed NSPS would only apply to pneumatic controllers at the time of installation, whereas the bulk of the emissions are from the existing fleet of controllers.

NRDC recommends that the EPA should require that existing sources be controlled to maximize methane emission reductions. The EPA should also consider regulating emission reductions from the distribution sector, and requiring no-bleed controllers at locations outside the processing sector where feasible.

## 4.7.4 Profit

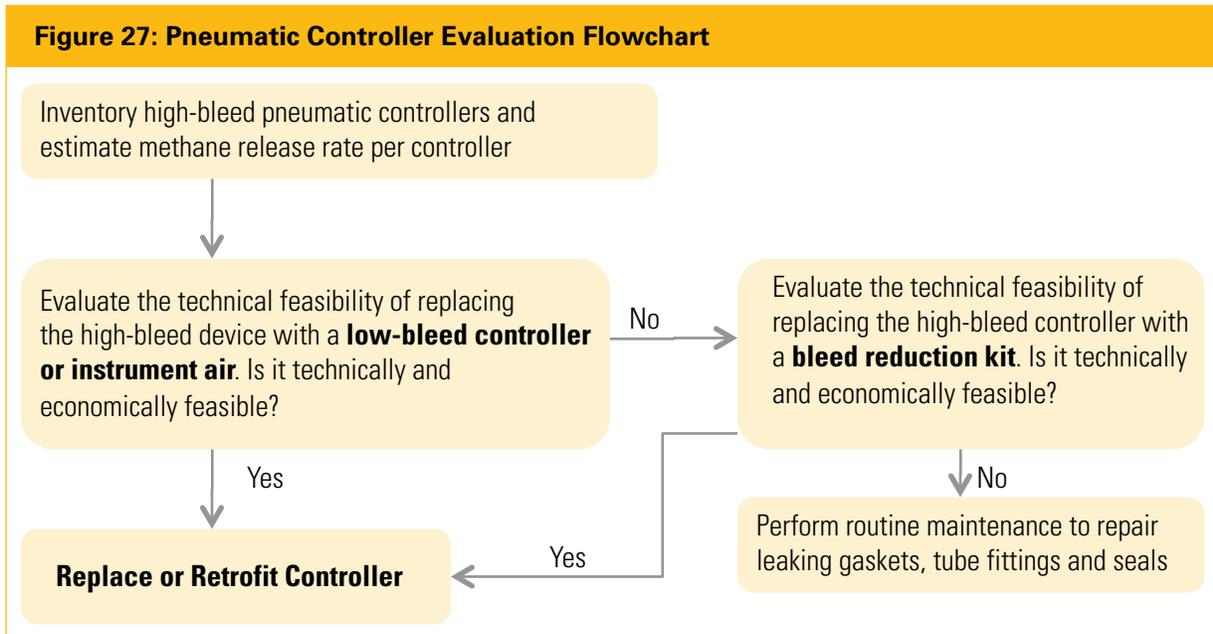
In 2005, the EPA reported that the incremental cost of replacing high-bleed controllers with low-bleed controllers was approximately \$350 per device, resulting in a \$1,100 annual operating and maintenance cost savings and a payback of less than one year for each device.<sup>132</sup> Natural gas savings of \$700 or more is also possible. The EPA estimates that retrofitting a pneumatic controller with a bleed reduction kit costs, on average, \$500, and pays out in nine months.<sup>133</sup> An EPA *Lessons Learned* report from 2006 also reports similar cost and natural gas savings, but with smaller operational and maintenance savings.<sup>134</sup>

While conversion from natural gas pneumatic controllers to instrument air is estimated to be more costly, at \$10,000 per conversion and \$7,500 in annual operating and maintenance costs, there are substantial annual natural gas savings of more than \$20,000 per year and payback in less than two years.<sup>135,136</sup> In 2006, the EPA estimated the cost/benefit of replacing large gas-operated controllers with instrument air controllers.<sup>137</sup> The EPA estimated the cost to be approximately \$60,000 per controller. The natural gas savings were commensurately larger at approximately \$80,000 per year, rendering the investment profitable with a payback period of just under one year. Additional detail is shown in Appendix A, Table A7 and A8.

BP reported that it replaced 11,500 high-bleed pneumatic controllers with low- or no-bleed controllers in six states, during the period of 1999 to 2002, capturing 3.4 Bcf/year.<sup>138</sup> The program yielded a net present value of \$65 million for a capital investment of \$4 million. BP also reported that it had installed 411 pneumatic pump pressure regulators, reducing gas use by 0.4 Bcf/year, at a cost of less than \$50,000, for a net present value of \$8.4 million.

QEP Resources Inc., Shell Upstream Americas, Ultra Petroleum, Devon Energy, EnCana, and other gas producers in Wyoming have replaced pneumatic controllers with new low-bleed controllers. Instead of gas venting the gas is routed to a pipeline for sale.<sup>139</sup>

**Figure 27: Pneumatic Controller Evaluation Flowchart**



#### 4.7.5 Additional Benefits

Upgrading pneumatic controllers to use instrument air increases operational efficiency, system-wide performance, and reliability. It also improves monitoring of gas flow, pressure, and liquid levels. Excess instrument air can be used for other equipment (e.g. pumps and compressor starters).

#### 4.7.6 Limitations and Evaluation

The EPA estimates that 80 percent of all high-bleed controllers can be retrofitted or replaced with low-bleed equipment, leaving 20 percent of the controller inventory not feasible for this technology.<sup>140</sup>

Figure 27 provides a simplified evaluation flowchart to show the basic steps for evaluating replacement of a high-bleed to a low or no-bleed pneumatic controller.

### 4.8 PIPELINE MAINTENANCE AND REPAIR

Methane is typically vented into the atmosphere when a gas pipeline is repaired or replaced, or must be cut to install a new connection point. Typically an operator will isolate the pipeline section to be worked on by shutting pipeline valves on either side of the repair, replacement, or connection point. The gas contained in the piping section is typically vented into the atmosphere to eliminate a potential fire or explosion risk while work is completed on the piping.

Subject to a thorough safety evaluation, alternatives exist to mitigate methane release. These alternatives involve either re-routing gas to be burned as fuel or allowing work to be conducted on the pipeline while it is in operation.

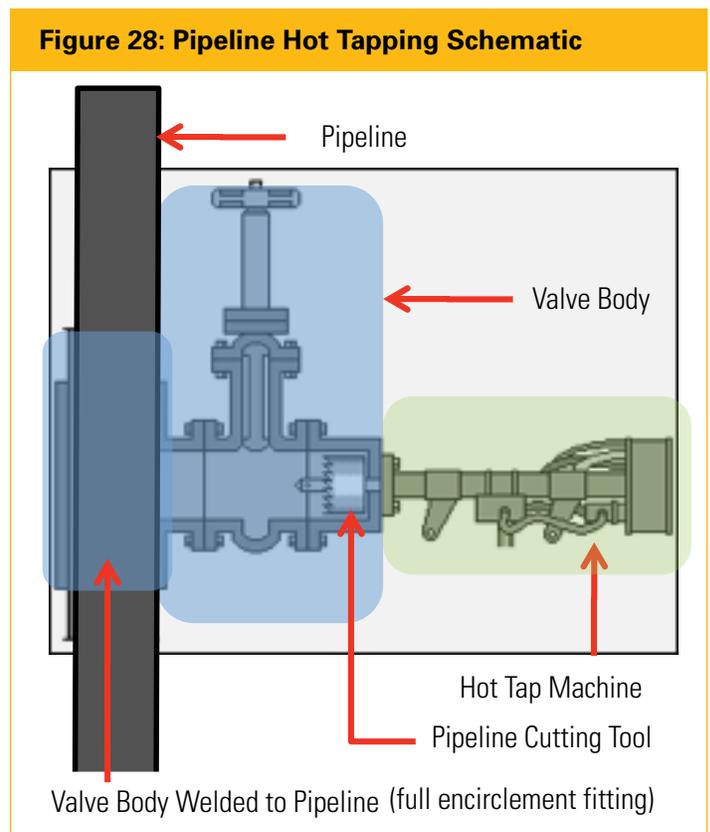
During pipeline repair, methane gas venting can be mitigated by:

- Using hot tap connections
- Re-injecting gas into a nearby low-pressure fuel system,
- Using a pipeline pump-down technique to route gas to sales

#### 4.8.1 Technology Description

**Hot Tap:** Hot tapping a pipeline allows an operator to make a connection to a pressurized piping system without causing any service interruption. Hot tapping is completed by first welding a branch fitting and permanent valve body onto the pipeline while the pipeline remains in service. Next, the hot tapping machine is installed on the valve body (Figure 28). The hot tap pipeline cutting tool is inserted through the valve body and used to cut into the pipeline while maintaining

**Figure 28: Pipeline Hot Tapping Schematic**



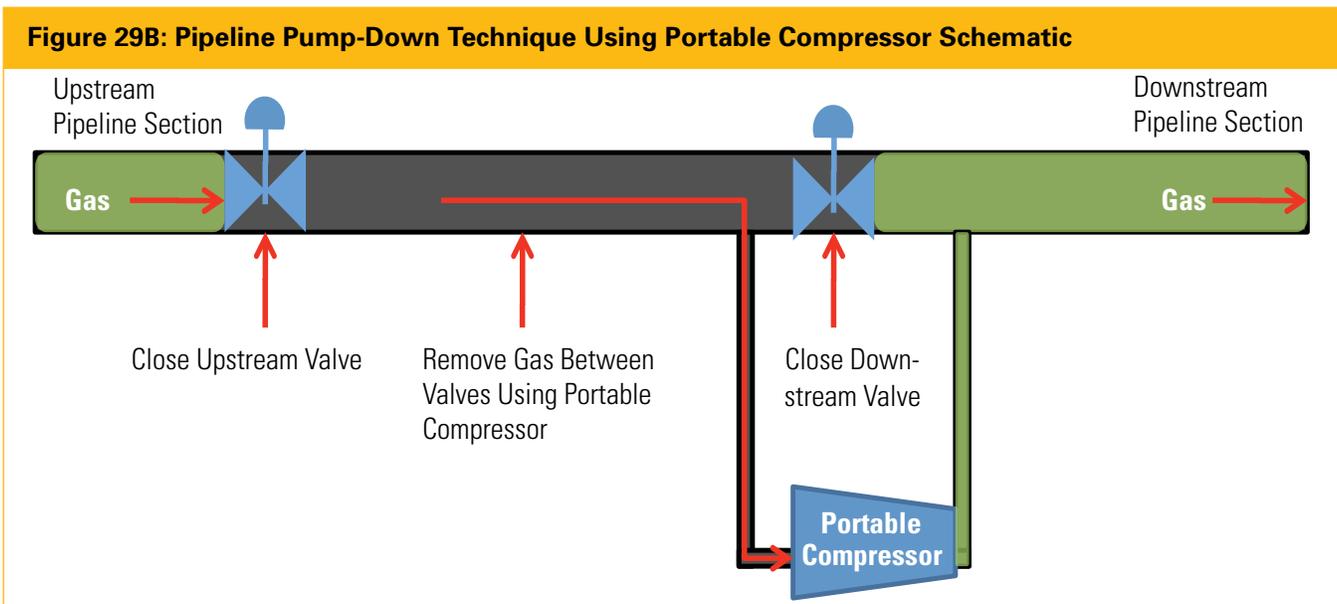
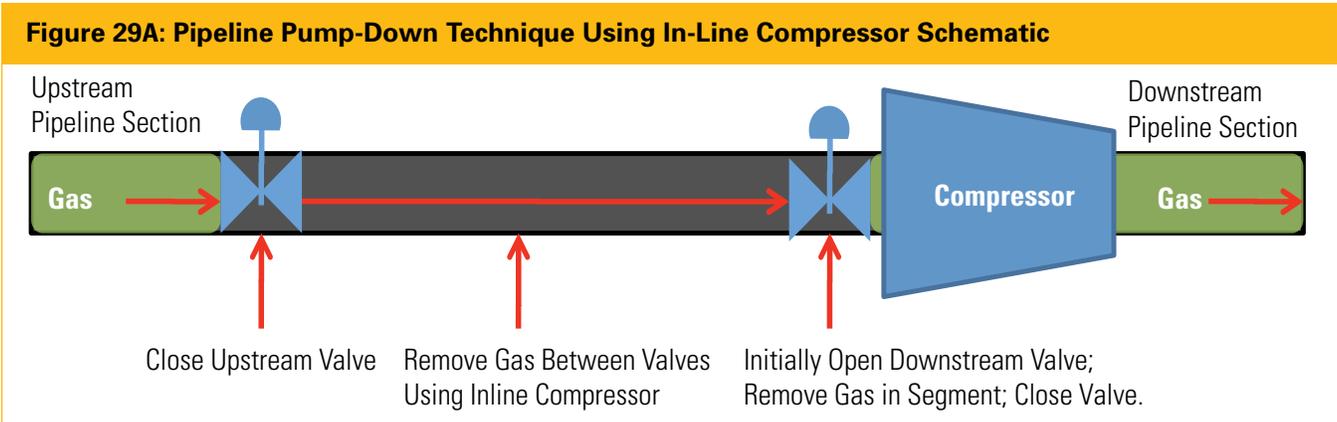
a complete seal between the valve body and the hot tap machine. This process does not allow any methane gas to escape. Once the pipeline wall is cut, the piece of pipe is removed along with the cutting tool by pulling both back through the valve body. The valve is closed and the hot tap machine is removed. Finally the branch line is connected and installed without releasing any methane into the environment.

Hot tapping is not a new technology; it has been in use for a number of years.<sup>141</sup> However, hot tapping techniques and equipment have improved in quality, availability, and safety. More technicians and engineers are trained on safe use and operation, and necessary equipment is now available in the sizes typically used.

**Re-injecting gas into a low pressure fuel system:** In some cases, complete gas evacuation is required to safely repair, replace, or conduct maintenance on a pipeline section. Rather than venting methane to the atmosphere, an operator can de-pressure the pipeline to a nearby low pressure fuel system. Some pipelines are initially designed and installed with a bypass connection from the high pressure pipeline to a lower pressure fuel gas system. If a permanent bypass connection does not exist, a temporary bypass connection can be installed.

**Pipeline pump-down technique:** Gas can be removed from the pipeline by using in-line compressors along, or in sequence with, portable compressors. As explained above, an operator often will isolate the pipeline section to be worked on by shutting in pipeline valves on either side of the repair, replacement, or connection point. The gas contained in the piping section is then vented into the atmosphere to eliminate a potential fire or explosion risk. Alternatively, in the pipeline pump-down technique, the operator only shuts in one valve (the upstream valve), which stops any new gas from entering the pipeline section to be worked on. Then gas is removed from the pipeline section by running an in-line compressor located downstream of the repair section. This technique will not completely remove all the gas in the pipeline section, but may reduce the gas pressure or concentration to a level that is safe for some repairs (Figure 29A).

Use of a portable compressor, alone or in addition to an existing in-line compressor, can remove up to 90 percent of the gas in the pipeline segment because portable compressors have a 5 to 1 compression ratio, compared to in-line compressors that are rated at 2 to 1.<sup>142</sup> To use a portable compressor, there must be a valve manifold at the downstream pipeline location to temporarily install the compressor during the repair work (Figure 29B).



## 4.8.2 Opportunity

### Reduction Target: 19 Bcf/year

The 2011 *Greenhouse Gas Inventory* estimates that routine maintenance and pipeline upsets resulted in 19 Bcf/year of methane vented into the atmosphere.<sup>143</sup>

For a pipeline ranging from 4 to 18 inches in diameter and operating between 100 and 1,000 psig, the EPA estimates that up to 2,000 Mcf of methane gas is vented when a pipeline is blown down to make a new connection, and 6,000 Mcf is vented when replacing pipe.<sup>144</sup> The amount of gas contained in the pipeline section will be a function of pipeline size, pipeline length between isolation valves, and gas pressure. Thus, gas venting rates and volumes will vary substantially.

## 4.8.3 Proposed EPA Regulations

The EPA's proposed NSPS and existing air toxics standards do not include pipeline maintenance and repair as a means to control methane. NRDC recommends that the EPA require methane control during maintenance and repair where safe and feasible.

## 4.8.4 Profit

Use of a hot tap tool prevents venting gas into the atmosphere, allowing that gas to reach market, and eliminates the cost of evaluating the pipeline to install the connection. Hot tap profitability will vary widely based on the pipeline size, flow rate and number of taps done in a period of time. However, in general the EPA reports that payback is short (less than one year) and the procedure is profitable.<sup>145</sup>

The EPA estimated that the capital cost of installing a

low pressure piping bypass to re-inject gas during a pipeline blowdown into a low-pressure fuel system is less than \$1,000.<sup>146</sup>

The pipeline pump-down technique is most profitable for higher pressure, higher volume pipelines with existing in-line compressors, or where valve manifolding exists to easily connect a portable compressor.

Overall, use of in-line compressors to remove gas from a pipeline during a pipeline pump-down technique is very profitable because there is no initial investment or rental costs, and payback is essentially immediate. If portable compressors are required, economics will vary and will require a site-specific evaluation. Still, this procedure is typically profitable, with a short payout.<sup>147</sup> Gas collected by the compressors can be routed to a gas sales line.

## 4.8.5 Additional Benefits

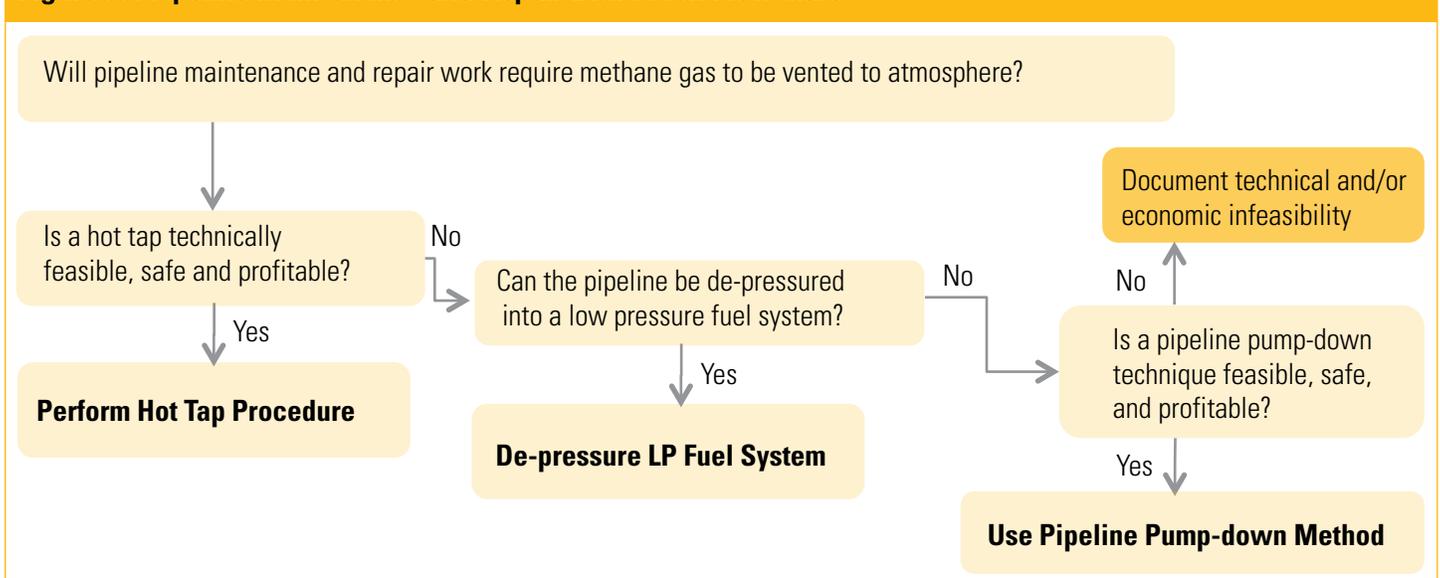
Continued operation of a pipeline during repair, maintenance, and installation of new connections eliminates disruption to gas service.

## 4.8.6 Limitations and Evaluation

The use of hot tap equipment and techniques requires a safety review and qualified personnel to safely operate the equipment, and there are some cases where use of hot tapping equipment is not safe or recommended. In these cases, advice can be sought from corporate health, safety, and environment experts to recommend alternate ways to avoid methane venting. Some repair, replacement, and pipeline connection plans require complete gas removal from the pipeline and a full purge to ensure the safety of personnel.

Figure 30 shows the basic steps for evaluating options to mitigate methane release from a pipeline during maintenance and repair work.

**Figure 30: Pipeline Maintenance and Repair Evaluation Flowchart**



## 4.9 VAPOR RECOVERY UNITS (VRUs)

Crude oil and condensate tanks that vent to atmosphere emit methane through three different mechanisms: flashing losses, working losses, and standing losses. To avoid methane emissions, a vapor recovery unit can be installed on the tank to capture methane gas for sale or to be used as fuel.

### 4.9.1 Technology Description

When liquid petroleum and natural gas are produced from a well, they are processed through a separator to partition oil, gas, and water. Oil, condensate, and gas are sold to market. Water is either re-injected or handled as waste.

Liquid petroleum is sometimes stored in tanks prior to delivery to a pipeline or other transportation method. Gas liquids (condensate), in some cases, are produced and collected in a tank. When oil leaves the last phase of separation, some amount of methane gas is still trapped in the oil; the amount of methane is dependent on the last-stage separator pressure.

Since the separator pressure is higher than the pressure in a crude oil or condensate tank, methane gas will escape from the crude oil or condensate during transfer into the tank. Liberation of natural gas is commonly referred to as “flashing” of natural gas from the oil. Flashed gas, typically, has a high BTU value and sales value.

Fewer flashing losses will be generated from an oil storage tank if a facility reduces the operating pressure of the low-pressure separator or heater equipment just upstream of the oil storage tank. In these cases, less gas will be routed to the tanks. These optimizations can be accomplished by adjusting operating pressures with minimal capital and operational costs.

Figure 31: Vapor Recovery Unit



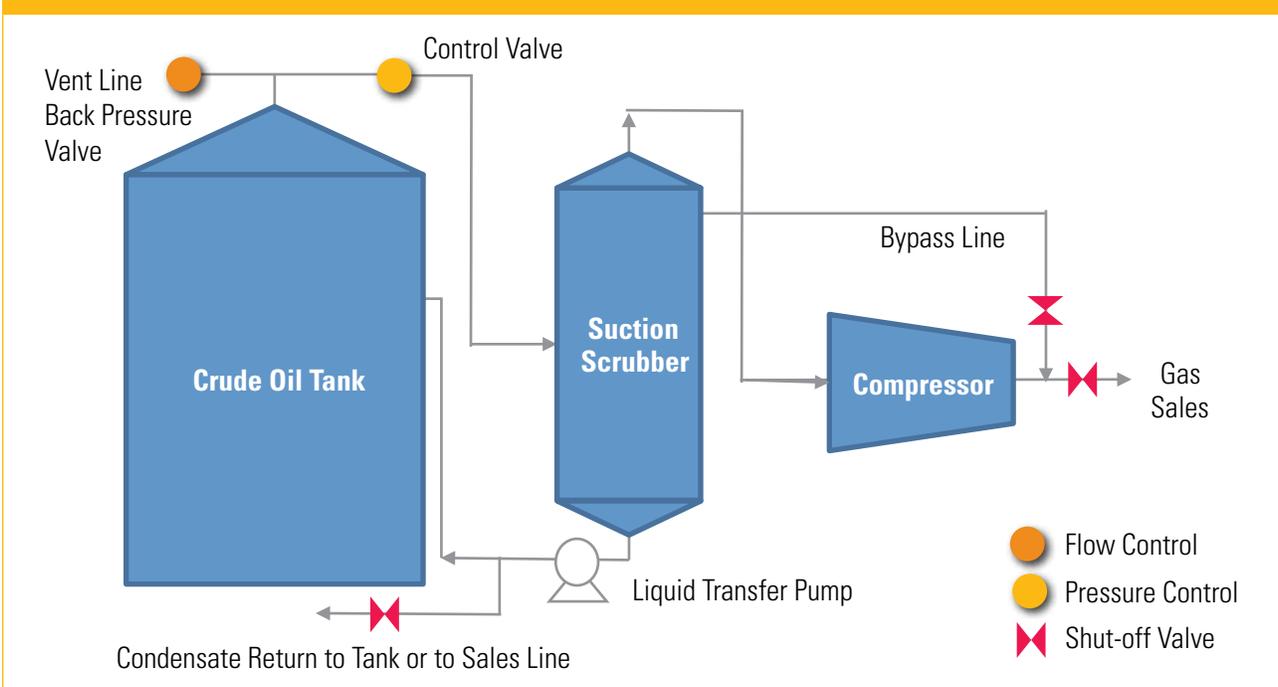
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Once crude oil and condensate are in the tank, they will continue to release methane gas when tank contents are agitated (working losses), which typically occurs during filling and removal of oil or condensate from the tank, and through standing losses during seasonal and daily temperature and pressure changes.

Vapor recovery units can typically capture up to 95 percent of the methane that would ordinarily be vented to atmosphere. Figure 31 shows vapor recovery equipment. Captured methane gas can be sold or used as fuel. Figure 32 is a schematic showing the typical equipment configuration needed for a vapor recovery system.

For sites where electric power is available, the EPA recommends conventional rotary or screw type compressor vapor recovery units. For sites without electric power, an

Figure 32: Vapor Recovery Unit Schematic



© M.A. Goodyear, A.L. Graham et al. Vapor Recovery of Natural Gas Using Non-mechanical Technology

ejector vapor recovery unit can be used if there is a high-pressure compressor with spare capacity.<sup>148</sup>

TotalFinaElf E&P USA, Inc. reports that it recovered \$334,000 in gas per year from its El Ebanito O&G facility tanks in Starr County, Texas using the Venturi Jet Ejector System (patented by COMM Engineering).<sup>149</sup> Patented by Hy-Bon Engineering, the Vapor Jet System is another option if there is produced water available at the site to operate the system. A small centrifugal pump forces water into a Venturi jet, creating a vacuum effect to move low-pressure gas to a gas sales line or fuel use intake point.

If gas is collected in the vapor recovery units, it must be at sufficient pressure to enter the intended gas pipeline or fuel system. If this is not the case, additional compression is required at an additional cost.

## 4.9.2 Opportunity

### Reduction Target: 21 Bcf/year

The 2011 *Greenhouse Gas Inventory* estimates that storage tanks vent approximately 21 Bcf/year of methane to the atmosphere.<sup>150</sup> Some crude oil tanks are required—by EPA and state regulation—to install vapor recovery units, however many smaller tanks do not have vapor recovery units installed.

## 4.9.3 Proposed EPA Regulations

The EPA's proposed NSPS for storage vessels would require at least 95 percent of VOC reductions for new and modified storage vessels.<sup>151</sup> These requirements would apply to vessels with a throughput equal to or greater than one barrel of

condensate per day or 20 barrels of crude oil per day, which are equivalent to VOC emissions of about 6 tons per year.<sup>151</sup> Controls would include either the installation of a VRU or the use of a combustion device. At the same time, the EPA is proposing revised air toxics standards for storage vessels. The standards would apply to new and modified sources as well as existing sources. The EPA is proposing a 95 percent HAP reduction requirement, which would also reduce VOC emissions at these sources by 95 percent. In order to avoid duplication in compliance requirements (monitoring, recordkeeping, and reporting), the EPA is proposing that sources which are subject to the NESHAPs requirements would not be subject to NSPS requirements.

The EPA estimates that the proposed NSPS and NESHAPs regulations would reduce methane emissions from storage tanks by about 0.52 Bcf/year, or just under 3 percent of the emissions from this source, because the proposed rules would not apply to most of the uncontrolled tanks currently in operation.

NRDC recommends that the EPA's proposed regulations be strengthened by reducing the threshold for emission control on smaller tanks (e.g., by aggregating small tanks into a battery of tanks and considering emissions of the entire battery). The EPA should also require emissions reductions from produced water tanks, and require 98 percent control efficiency for VRUs (up from 95 percent).

## 4.9.4 Profit

The amount of profit from vapor recovery units will vary widely, based on site-specific parameters. The EPA's Methane to Markets program found that tank vapor recovery projects can be profitable (Table 6). Depending on size of the systems,

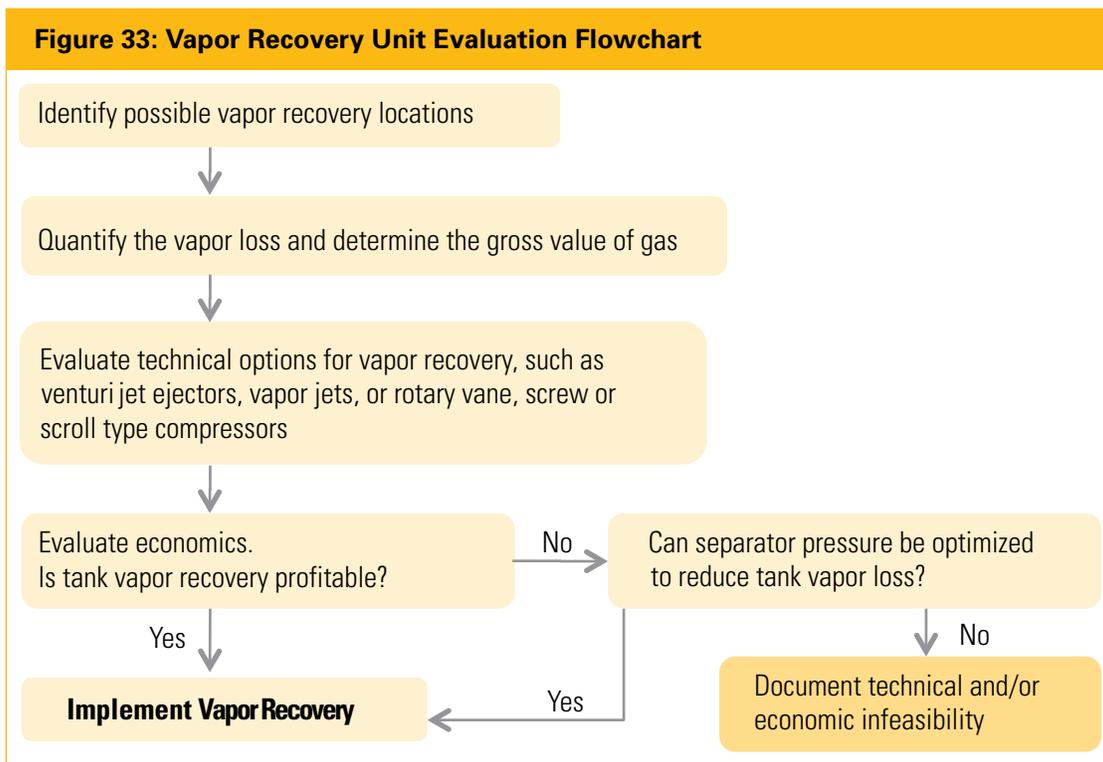
**Table 6: Crude Oil Tank Vapor Recovery Unit (VRU) Economics**

Financial Analysis for a Conventional VRU Project						
Peak Capacity (Mcf/day)	Installation & Capital* Costs	O&M Costs (year)	Value of Gas** (year)	Annual Savings	Simple Payback (months)	Internal Rate of Return %
25	\$35,738	\$7,367	\$18,262	\$10,895	39	28%
50	\$46,073	\$8,419	\$36,524	\$28,105	20	60%
100	\$55,524	\$10,103	\$73,048	\$62,945	11	113%
200	\$74,425	\$11,787	\$146,097	\$134,310	7	180%
300	\$103,959	\$16,839	\$365,242	\$348,403	4	335%

Adapted from: EPA Natural Gas STAR, Reducing Methane Emissions with Vapor Recovery on Storage Tanks, Lessons learned from the Natural Gas STAR Program, Newfield Exploration Company, Anadarko Petroleum Corporation, Utah Petroleum Association, Interstate O&G Compact Commission, Independent Petroleum Association of Mountain States, March 23, 2010.

\*Unit cost plus estimated installation of 75 percent of unit cost

\*\* \$4.00 per Mcf x 1/2 peak capacity x 365 (original price as per report was \$6.22)



capital and installation costs range from \$36,000 to \$104,000, methane capture at between 5,000 and 91,000 Mcf/year, and profits are between \$4,000 and \$348,000. Additional detail is provided in Appendix A, Table A9. Payback periods range from a few months to about three years, depending on flow rate and scale of the unit.<sup>152,153</sup>

Additional examples of tank vapor recovery profitability include:

- Anadarko reported netting \$7 million to \$8 million between 1993 and 1999 by installing more than 300 vapor recovery units.<sup>154</sup>
- ConocoPhillips installed vapor recovery on nine tank batteries at a total cost of \$712,500. The company's investment paid out within less than four months, earning \$189,000 per month thereafter.<sup>155</sup>
- Chevron installed eight vapor recovery units on crude oil stock tanks in 1996. This investment paid out in less than one year.<sup>156</sup>

If vapor recovery is not economic, an operator can consider minimizing the operating pressure of its low-pressure separators to reduce flashing losses, or the amount of methane vapors that are flashed off. For example, Devon Energy reported a savings of \$7,000 per year after optimizing operating pressures in its low-pressure separators, reducing the amount of methane vapors that are flashed off. The company reported that the "primary goal of the optimization

was to increase profits for the facility by putting more gas into the sales pipeline and to reduce emissions of methane with minimal costs to the facility."<sup>157</sup>

#### 4.9.5 Additional Benefits

Vapor recovery units are commonly required in ozone non-attainment areas as lowest achievable emission rate (LAER), or in attainment areas as best available control technology (BACT). Therefore, VRU use to control methane will also have ozone mitigation benefits. Control of tank vent gases can also reduce emissions of HAPs, such as benzene, toluene, ethylbenzene, and xylenes, VOCs, and hydrogen sulfide.

The collection of methane and other gas vapors creates a safer working environment by reducing potentially combustible vapors at the work site.

#### 4.9.6 Limitations and Evaluation

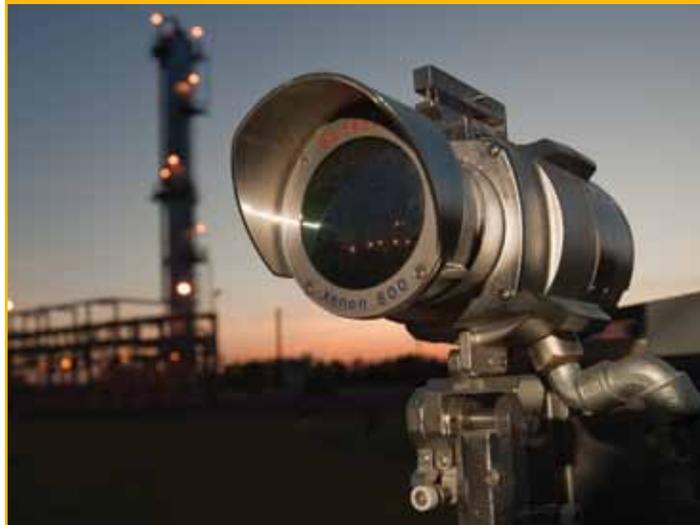
Care must be taken in VRU system design to avoid oxygen entrainment, because oxygen in the system can pose a corrosion and explosion hazard.<sup>158</sup>

VRUs are appropriate for locations that have access to a gas pipeline or an opportunity to use the recovered methane for fuel gas. If this infrastructure does not exist, the technical and economic feasibility may be limited.

Figure 33 illustrates the basic steps for evaluating tank vapor recovery options.

**Figure 34: Hand Held Infrared Camera**

© Mine Safety Appliances Co.

**Figure 35: Remote Methane Leak Detector**

© Mine Safety Appliances Co.

#### 4.10 LEAK MONITORING AND REPAIR

Methane gas leaks can occur from numerous locations at oil and gas facilities—valves, drains, pumps, threaded and flanged connections, pressure relief devices, open-ended valves and lines, and sample points—as gas moves through equipment under pressure. These leaks are called fugitive emissions.

Fugitive emissions from equipment leaks are unintentional losses of methane gas that may occur due to normal wear and tear, improper or incomplete assembly of components, inadequate material specifications, manufacturing defects, damage during installation or use, corrosion, or fouling.<sup>159</sup>

Because methane is a colorless, odorless gas, leaks often go unnoticed. Historically, checks were typically performed on equipment components when they were first installed, using a soap bubble test or hand held sensor, to ensure the installation was leak tight. After installation, leaks were not typically monitored or repaired unless they became a significant safety hazard. For example, a significant gas leak would be repaired if area, building, or employee monitors set off alarms or if olfactory, audible, or visual indicators observed by facility employees identified the leak. Under these circumstances, the leaks had usually become an obvious safety concern. As a result, methane leaks at outdoor facilities and unmanned facilities often went undetected for long periods of time.

Today, an increasing number of operators are monitoring and repairing leaks at their facilities. Sometimes these programs are instituted voluntarily, other times they are required by the EPA, or state and local air quality control agencies. For instance, the EPA has leak detection and repair regulations for VOCs where facilities meeting certain specifications are required to survey for leaks and repair all detected leaks. A voluntary program, also undertaken by the EPA Natural Gas STAR program, is called Directed Inspection and Maintenance. In this program facilities identify leaks, and then prioritize and repair them based on cost-effectiveness.

**Figure 36: Leaking Valve as shown by Infrared Gas Detector**

© FLIR Systems, Inc.

##### 4.10.1 Technology Description

Fugitive emission control is a two-part process that includes both a monitoring program to identify leaks and a repair program to fix the leak. Monitoring program type and frequency is a function of the type of component, and how the component is put to use. In most cases, monitoring programs can be intermittently scheduled at a certain frequency (e.g. monthly or quarterly) to identify leaking equipment. However, permanent leak sensors may be required to detect chronic leakers.<sup>160</sup>

There are many different monitoring tools that can be used to identify leaks, including electronic gas detectors, acoustic leak detection systems, ultrasound detectors, flame ionization detectors, calibrated bagging, high volume sampler, end-of-pipe flow measurement, toxic vapor analyzers, and infrared optical gas detectors. A few of these methods are described in more detail to familiarize the reader with the availability of these tools and the ease of measurement capability. Once leaks are identified, the operator can evaluate what is causing the leak and develop a replacement or repair program to mitigate the problem. For example, a hand held infrared camera can be used as a

screening tool to detect emissions that are not visible to the naked eye. An infrared camera produces images of gas leaks in real-time. It is capable of identifying methane leaks, but cannot quantify the amount of the leak (Figure 34).

Remote methane leak detectors can detect methane leaks from as far away as 100 feet (Figure 35).

Infrared cameras produce photos that show methane gas leaks, like the leaking valve shown in Figure 36. Once a leak is identified, a more quantitative leak flow rate is needed, and other measurement devices such as high-flow samplers, vent-bag methods, and anemometers may be used.<sup>161</sup> High-flow samplers capture the entire leak, measuring the leak rate directly for leaks up to 10 cubic feet per minute, providing leak flow rate and concentration data.

In 2007, TransCanada reported significant reductions in fugitive emissions by implementing an effective leak monitoring and repair program that included measurement of fugitive emissions using high flow samplers to identify the largest and most effective repairs.<sup>162</sup>

Canadian experience with control of fugitive emissions at oil and gas facilities shows that:<sup>163</sup>

- Most methane leaks are from components in gas service
- Older facilities have the highest leak rates
- About 75 to 85 percent of leaks are economic to repair
- The top 10 leaks at a facility generally contribute more than 80 percent of the emissions

The EPA has found that components in sweet gas service tend to leak more often than those in sour gas service, and a high frequency of leaks occurs from components in vibration, cryogenic, or thermal cycling service.<sup>164</sup>

## 4.10.2 Opportunity

### **Reduction Target: 143 Bcf/year**

The 2011 *Greenhouse Gas Inventory* estimates that the O&G industry's fugitive emissions are 143 Bcf/year.<sup>165</sup> Elimination or reduction of gas leaks retains more gas in the piping system for sale.

Most large gas processing plants are already subject to the existing NSPS regulations (40 CFR Part 60, Subpart KKK) and required to implement an LDAR program. However, most of the 457,000 miles of production gathering pipelines, and 302,000 miles of transmission pipelines in the United States and 384,000 meters have not been required to implement LDAR programs.<sup>166</sup>

The 143 Bcf/year of fugitive emissions is largely uncontrolled today. Fugitive emissions management is an ongoing commitment, not a one-time initiative. The potential for fugitive equipment leaks will increase as facilities age. Successful fugitive emission control plans require trained personnel, emissions testing equipment, performance tracking systems, and corporate commitment.

## 4.10.3 Proposed EPA Regulations

The EPA's proposed NSPS regulations would lower leak detection thresholds at gas processing plants.<sup>167</sup> The EPA's proposed NSPS regulations would reduce methane emissions through leak detection and repair by about 0.1 Bcf/year, less than 0.1 percent of the methane emissions from equipment leaks.

Based on the EPA's reported leak monitoring and repair profitability, NRDC recommends that more LDAR programs can and should be required by the EPA. Facilities in all sectors, including the production, transmission and distribution sectors should undertake LDAR programs. Best management practices such as optimizing processes should be used in tandem with LDAR programs. Not all devices that detect VOCs can detect methane, so facilities should specifically employ equipment and processes that can detect methane, such as infrared laser detectors.

## 4.10.4 Profit

In 2009, the EPA examined the profitability of repairing equipment leaks at oil and gas facilities through a Directed Inspection & Maintenance program.<sup>168</sup>

EPA *Lessons Learned* documents for both gas processing plants and compressor stations show the average cost of repair was between \$26,000 and \$59,000 per year per facility.<sup>169,170</sup> Methane captured through these programs averaged 30,000 and 87,000 Mcf/year. For gas processing plants, leak screening and monitoring cost about \$32,000 annually per plant. At both gas processing plants and compressor stations, the investments are profitable generating as much as \$314,000 in profit per facility, with payback periods of just a few months. Additional detail is shown in Appendix A, Table A10.

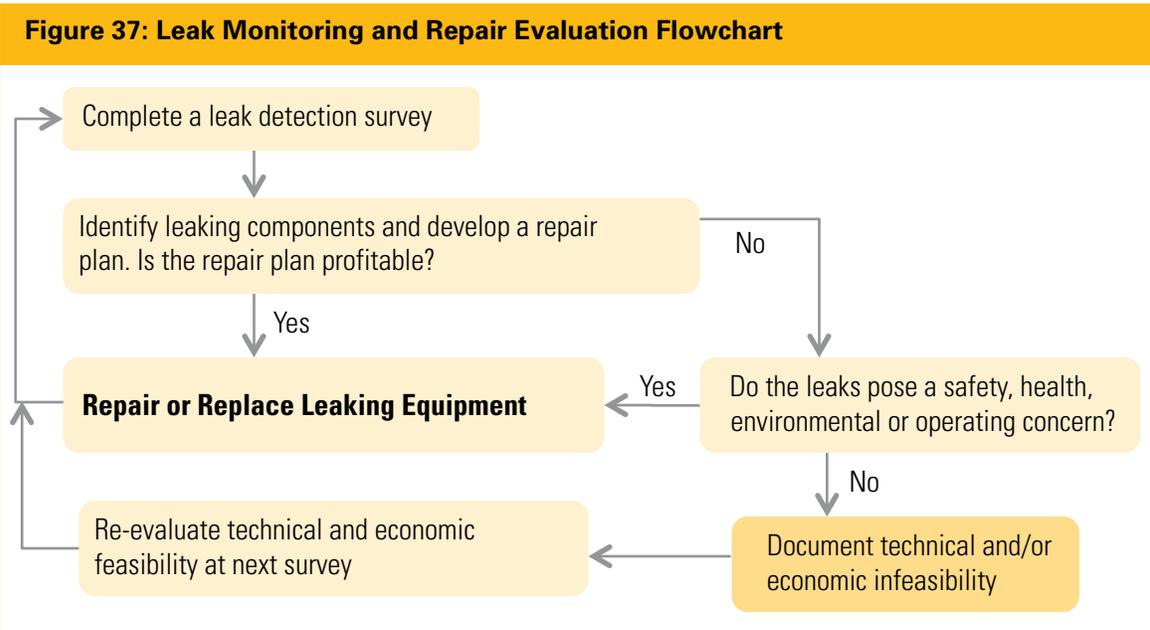
## 4.10.5 Additional Benefits

The EPA has found that fugitive emission control provides numerous benefits including: reduced maintenance costs and downtime, improved process efficiency, a safer work environment, a cleaner environment, and resource conservation.<sup>171</sup> Leaking gases may also include toxic air pollutants known to harm human health.

## 4.10.6 Limitations and Evaluation

There are no major limitations or barriers to implementation of a leak monitoring and repair program.

A simplified evaluation flowchart (Figure 37) is provided to show the basic steps for evaluating leak monitoring and repair.



## 5. CONCLUSION AND POLICY RECOMMENDATIONS

The technologies discussed in this report can be used to reduce significant amounts of methane emissions from the oil and gas production, processing, and transmission sector, while generating significant profits for the O&G Industry. NRDC recognizes that some companies have voluntarily implemented methane controls. Mandatory methane control regulations will be needed for companies that have not updated business-as-usual practices, embraced a culture of environmental responsibility, or chosen to voluntarily invest even in profitable methane control technologies. Through these steps methane can be kept out of the atmosphere and the health and safety of Americans can be improved.

NRDC supports establishing a fully effective system of safeguards to ensure that natural gas is produced, processed, stored, and distributed in a way that ensures protection of our water, air, land, climate, human health, and sensitive ecosystems (For more information on NRDC's position on natural gas and fracking, go to <http://www.nrdc.org/energy/gasdrilling/>). The use of natural gas in our homes, power plants, and industry also must be as efficient as possible. Americans do not have to trade clean water and clean air for increased natural gas supplies. The O&G industry can and should adopt the methane capture technologies discussed in this report, which are technically proven, commercially available, and profitable.

Given our country's growing reliance on natural gas and methane's strong link to global warming, methane emissions should be controlled to the maximum extent possible. It is fortunate that more than 80 percent of methane emissions can be captured with the technologies highlighted in this report and yield billions of dollars in revenues through sale of the captured methane. Under these circumstances, there is a compelling case for companies to be required to adopt the best methane capture practices as soon as possible, and for government at all levels to take a far more active role in addressing market failures and requiring producers to adopt best practices.

Taking these considerations into account, several policy options can reduce methane emissions across the natural gas industry nationwide. NRDC recommends adoption of the policies outlined below:

- The EPA's proposed NSPS and air toxics standards provide an important starting point for the reduction of air pollutants from O&G operations, with substantial methane co-benefits. Still, there are key ways in which

these regulations can be improved, with robust mandates needed, as voluntary programs have proven insufficient. Federal regulations to control methane emissions would need to be adopted by states through their State Implementation Plans. The EPA should:

- Regulate methane directly
- Expand its proposal to include emission reduction requirements for existing sources that are the main contributors to VOC and methane emissions from the oil and natural gas industry. States would then be required to adopt methane leakage control measures for existing sources through their State Implementation Plans
- Ensure coverage of all major methane emission sources for which controls are feasible, including coalbed methane wells and oil wells
- Strengthen standards where possible. For example, the EPA should raise standards for tank and dehydrator emissions reductions
- Strengthen required procedures where possible. For example, the EPA should complement its Leak Detection & Repair program by requiring that best management practices be implemented, including process optimization and conducting more frequent leak surveys
- The EPA should continue to improve its mandatory greenhouse gas emissions reporting program for the O&G industry so that methane emission sources can be better identified, and opportunities for reductions can be better targeted. Also, the EPA should provide a more detailed breakdown by source of methane emissions reductions achieved through the Natural Gas STAR program.

- The EPA's Natural Gas STAR program's voluntary framework has encouraged companies to reduce methane emissions and document their reduction activities. Through Natural Gas STAR, techniques to reduce methane emissions have been tried and tested by some companies. Still, many effective reduction technologies have not been widely adopted by industry. To achieve significant industry-wide reductions, the most successful practices documented by the Natural Gas STAR program need to become mandatory. through EPA's regulatory programs such as NSPS and NESHAPs. However, Natural Gas STAR should still play an important role in driving continued improvements that in turn can inform future revisions of EPA standards.
- Federal land management agencies, such as the Bureau of Land Management, should exercise their authority and responsibility to control methane waste from oil and gas lease operations on federal lands. Land management agencies should:
  - Modernize agency policies to prevent waste of methane resources through deployment of all technically and economically viable methane emission reduction technologies and practices, and to establish acceptable performance levels (i.e., levels of emissions beyond which production of mineral resources should be prohibited)
  - Evaluate methane emission risks and reduction opportunities as both a climate and waste problem
- through planning and environmental reviews before committing resources to development
- Not commit resources to development where methane emissions cannot technically or economically be abated within acceptable performance levels
- Where lands are committed to development, mandate specific methane reduction technologies and practices appropriate to the particular production field or geologic formation under consideration
- Shift the burden to oil and gas lessees and operators to demonstrate, before drilling permits are approved, that all reasonable and prudent methane emission prevention technologies and practices will be used, with land management agencies retaining full authority to mandate specific methane reduction technologies and practices or levels of performance
- States should require the use of methane control technologies. Several gas-producing states have already required methane pollution reduction measures to protect air quality and public health, mostly for large emission sources or in areas of concentrated development. These states, including Colorado, Wyoming, and Montana, provide a good start and model for action by other states and by federal agencies. Exceptions to these rules should be as narrow as possible.

## APPENDIX A

The tables in Appendix A provide a detailed economic summary of the 10 methane control technologies. A brief economic summary was also provided in Table 4. The economic analysis in this appendix is presented in a manner that facilitates a ready comparison among reports from various sources. Blank cells indicate insufficient data to compute values.

Where applicable, the economics of the technologies are also compared with the EPA's estimates from its proposed NSPS rulemaking. However, NRDC and other environmental organizations are concerned about potential deficiencies in the EPA's cost-benefit estimates of methane control technologies.<sup>172</sup> Therefore, NRDC has not utilized the EPA's NSPS estimates to inform the range of costs and benefits in this report, and instead has relied heavily on industry data and the EPA's Natural Gas STAR and Methane to Markets data.

Each line in the tables below represents a different data source or a different treatment within a source. Each line includes the source and year of the data (corresponding to the sources cited in the body of this report). The "Type" column describes any feature of the data, such as whether it was an upper bound or an average or based on a particular kind of technology. The next column specifies, if available, the number of devices (or wells or installations) from which an average was obtained. The remaining columns discuss the economics of the technologies.

The terms used in the tables are consistent with common industry and accounting practices:

- Total investment: Total costs of implementing a technology; typically up-front costs, excluding ongoing operating and maintenance expense.
- Annual investment expense: Effective investment cost spread out over the useful life of the investment. In a few tables, for simplicity this is just depreciation expense, using simple depreciation with no salvage value. In other tables where more information is available, this includes joint depreciation and interest expenses using a capital recovery factor.
- O&M expense: Operating and maintenance expense for technology deployment.
- Total annual expense: Annual investment expense plus O&M expenses.
- Revenue from NG: Revenue from the sale of natural gas, obtained by multiplying gas sales volume and price.
- Other revenue: Revenues other than from the sale of natural gas.
- O&M savings: Operating and maintenance savings from technology deployment.
- Total revenue plus savings: Sum of revenue and any O&M savings.
- Payout: Period (in years) in which initial investment is paid back (i.e., total investment divided by total revenues, plus O&M savings, less O&M costs per year).
- Operating profit excluding depreciation: Total revenues, plus O&M savings, less O&M costs, excluding depreciation; akin to EBITDA (earnings before interest, taxes, depreciation and amortization). This is sometimes referred to as "profit" in the text.
- Operating profit: Total revenues, plus O&M savings, less O&M costs, less depreciation (approximated to annual investment expense, as above); akin to EBIT (earnings before interest and taxes).

**Table A1: Cost-effectiveness of green completions**

Source	Year	Type	# wells	Total investment per well	O&M expense per well	Total expense per well	\$	Mcf / well	\$/Mcf	\$/ well	\$/ well	\$/ well	\$/ well	Years	Operating profit (ex depr) per well	\$/ well	Operating profit per well
EPA Lessons Learned <sup>173</sup>	2011	Purchased equip.	125	4,000 <sup>a</sup>	4,850 <sup>b</sup>	8,850		10,800 <sup>c</sup>	4.00	43,200	7,000 <sup>c</sup>	50,200	0.50 <sup>d</sup>	45,350	41,350		
EPA Lessons Learned <sup>173</sup>	2011	Rented equip.		33,000 <sup>e</sup>		33,000		10,800	4.00	43,200	6,930 <sup>f</sup>	50,130	immediate	50,130	17,130		
EPA <sup>174</sup>	2005	Avg.		14,000		14,000		7,000	4.00	28,000		28,000	immediate	28,000	14,000		
Devon Energy <sup>175,176,177</sup>	2004, '05, '07	Avg.	~400 <sup>g</sup>	8,700		8,700				50,000		50,000	0.17	50,000	41,300		
BP <sup>178,179</sup>	2005, '07	Avg.	106	12,264		12,264		7,500	4.00	30,000	6,321	36,321	0.70	36,321	24,057		
Williams <sup>180</sup>	2006	Avg.	1,177	14,444		14,444		22,515	4.00	90,059 <sup>h</sup>		90,059	0.16	90,059	75,616		
EnCana <sup>181</sup>		Avg.	Many wells										< 1.00		190 M +		
Anadarko <sup>182</sup>	2009	Avg.	613						5.00						16,803		
ICF <sup>183</sup>	2009	Avg.											0.25				
(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)																	
EPA - NSPS TSD <sup>184</sup>	2008	Min		2,418		2,418											
EPA - NSPS TSD <sup>184</sup>	2008	Max		74,860		74,860											
EPA - NSPS TSD <sup>184</sup>	2008	Avg.		33,237		33,237		8,258 <sup>i</sup>	4.00	33,032	2,380	35,412	0.94	35,412	2,175		

<sup>a</sup> Based on an investment cost of \$500,000, that is spread out over 5 years and 25 well completions per year (does not take into account time value of money).

<sup>b</sup> Based on annual costs of \$121,250 spread out over 25 well completions per year.

<sup>c</sup> Volume of saved NG based on 270,000 Mcf saved per year, and condensate revenue based on \$175,000 per year, spread out over 25 well completions per year.

<sup>d</sup> Initial investment of \$500,000 paid back by operating profit (ex depr) of \$45,350 per well x 25 wells per year.

<sup>e</sup> Based on 9 days per well completion and daily costs for contracted services of \$3,600 per well per day, plus \$600 for initial set-up costs.

<sup>f</sup> Based on 9 days per well completion, 11 barrels of condensates saved per day, valued at \$70 per barrel of condensate.

<sup>g</sup> Calculated from estimated average emissions per well, given that total emissions reductions was ~4.8 Bcf in 2005.

<sup>h</sup> Scaled down from revenues based on a historically higher natural gas price, assumed to be \$6/Mcf.

<sup>i</sup> 8,258 Mcf of methane; 142.7 tons of methane; production quality natural gas is approx. 83% methane (EPA NSPS TSD page 5-16); 0.0208 tons per Mcf. This is consistent with API's estimate of 8,400 Mcf of methane based on 1.2 Mcf/day for 7 days (API comments to EPA, EPA-HQ-OAR-2010-0505-4266).

**Table A2: Cost-effectiveness of plunger lift systems**

Source	Year	Type	# installations	Total investment	\$	#	\$ / yr	Annual investment expense	Mcf / yr	\$ / yr	Revenue from NG	Price of NG	Mcf	\$ / yr	O&M savings per year <sup>a</sup>	Total revenue plus savings per year	Payout	Years	\$ / yr	Operating profit (ex depr) per year	\$ / yr	Operating profit per year
EPA Lessons Learned <sup>185</sup>	2010	Min		2,600			520 <sup>b</sup>	4,700	4.00	18,800	10,900	29,700	0.09	29,700	29,700	29,700	0.09	29,700	29,700	29,700	29,700	29,180
EPA Lessons Learned <sup>185</sup>	2010	Max		10,400			2,080	18,250	4.00	73,000	10,900	83,900	0.12	83,900	83,900	83,900	0.12	83,900	83,900	83,900	83,900	81,820
EPA Lessons Learned <sup>185</sup>	2010	Simple Avg.		6,500			1,300	11,475	4.00	45,900	10,900	56,800	0.11	56,800	56,800	56,800	0.11	56,800	56,800	56,800	56,800	55,500
Mobil Oil <sup>186</sup>	1997	Avg.	19					640	4.00	2,561		2,561		2,561		2,561			2,561	2,561	2,561	
BP <sup>186,187</sup>	2007	Avg.	2,200					1,424	4.00	5,696		5,696		5,696		5,696			5,696	5,696	5,696	7,045
Amoco <sup>188</sup>	2006	Avg.	1,177	13,000			2,600	13,167	6.00	79,000	24,000 <sup>c</sup>	103,000	0.13	103,000	103,000	103,000	0.13	103,000	103,000	103,000	103,000	100,400

<sup>a</sup> Operational savings here includes maintenance costs less savings such as chemical treatments.

<sup>b</sup> Assumes lifetime of five years for all examples, uses simple depreciation.

<sup>c</sup> Includes savings from avoided electricity, well workovers and chemical treatments.

**Table A3: Cost-effectiveness of TEG dehydrator controls**

Source	Year	Type	# devices	Total investment	\$	#	\$ / yr	Annual investment expense	Mcf / yr	\$ / yr	Volume of saved NG	Price of NG	Mcf	\$ / yr	Revenue from NG	Total revenue plus savings per year	Payout	Years	\$ / yr	Operating profit (ex depr) per year	\$ / yr	Operating profit per year
EPA NG STAR <sup>189,190</sup>	2005	Flash tank separator		5,000			1,000 <sup>b</sup>	1,000	3,650	4	14,600	14,600	0.34	14,600	14,600	14,600	0.34	14,600	14,600	14,600	14,600	13,600
EPA NG STAR <sup>189,190</sup>	2005	Optimizing glycol circ. Rate							18,250	4	73,000	73,000		73,000	73,000	73,000			73,000	73,000	73,000	73,000
EPA NG STAR <sup>191</sup>	2007	Rerouting glycol skimmer gas		1,000			200	300	7,665	4	30,660	30,660	0.03	30,660	30,660	30,660	0.03	30,660	30,660	30,660	30,660	30,360
EPA NG STAR <sup>192</sup>	2007	Installing electric pump		7,000 <sup>b</sup>			1,400	1,400	5,000 <sup>c</sup>	4	20,000	20,000	0.35	20,000	20,000	20,000	0.35	20,000	20,000	20,000	20,000	18,600
EPA NG STAR <sup>193</sup>	2005 - 07	All four above	4	13,000			2,600	2,700	34,565	4	138,260	138,260	0.09	138,260	138,260	138,260	0.09	138,260	138,260	138,260	138,260	135,560

<sup>a</sup> Assumes lifetime of five years for all examples, uses simple depreciation.

<sup>b</sup> Approximate average of a range of costs from \$1,400 to \$13,000.

<sup>c</sup> Conservative estimate based on the EPA range (360 Mcf/year to 36,000 Mcf/year).

**Table A4: Cost-effectiveness of desiccant dehydrators**

Source	Year	Type	#	\$	\$ / yr	Mcf	\$ / Mcf	\$ / yr	\$ / yr	O&M savings per year	Total revenue plus savings per year	Years	\$ / yr	Operating profit (ex depr) per year	Operating profit per year
EPA NG STAR <sup>194</sup>	2009	Avg.		16,000	3,200 <sup>a</sup>	1,000	4	4,000	2,000	6,000	6,000	2.67	6,000	6,000	2,800
BP <sup>195</sup>	2007	Avg.	858									"immediate"			3,147 <sup>b</sup>

<sup>a</sup> Assumes lifetime of five years, uses simple depreciation.

<sup>b</sup> Based on reported profit of \$27 million. Assumes a lifetime of 10 years. \$3,147 is the operating profit per device per year (including annual investment expense) over the period of 10 years.

**Table A5: Cost-effectiveness of replacing wet seals in centrifugal compressors with dry seals**

Source	Year	Type	#	\$	\$ / yr	Mcf	\$ / Mcf	\$ / yr	Revenue from NG	O&M savings per year	Total revenue plus savings per year	Years	\$ / yr	Operating profit (ex depr) per year	Operating profit per year
EPA Lessons Learned <sup>196</sup>	2006	Avg.		324,000	46,129 <sup>a</sup>	45,120	4	180,480	102,400	282,880	282,880	1.15	282,880	282,880	236,751
EPA NG STAR <sup>197,198</sup>	2006	Max (savings)		324,000	46,129	100,000	4	400,000 <sup>b</sup>	120,000 <sup>c</sup>	520,000	520,000	0.62	520,000	520,000	473,871
Petroleos Mexicanos <sup>199</sup>	2008	Avg.				35,000	4	140,000		140,000 <sup>d</sup>	140,000 <sup>d</sup>			140,000 <sup>d</sup>	
Targa <sup>200</sup>	2006	Avg.		90,000	12,814					300,000	300,000	0.38 <sup>e</sup>	300,000	300,000	287,186

(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)

EPA – NSPS TSD <sup>201</sup>	2008	Processing		75,000 <sup>e</sup>	10,678 <sup>f</sup>	11,527 <sup>g</sup>	4	46,108	88,300	134,408	134,408	0.56	134,408	134,408	123,730
EPA – NSPS TSD <sup>201</sup>	2008	Trans./Storage		75,000	10,678	6,372 <sup>g</sup>			88,300	88,300	88,300	0.85	88,300	88,300	77,622
EPA – NSPS TSD <sup>201</sup>	2008	Simple avg.		75,000	10,678	8,949		23,054	88,300	111,354	111,354	0.67	111,354	111,354	100,676

<sup>a</sup> For annual investment expense including joint depreciation and interest expenses, assumes similar lifetimes and discount rate as in the EPA's NSPS estimates.

<sup>b</sup> Illustrative high-end estimate of natural gas savings based on the range of savings from \$75,000 - \$400,000.

<sup>c</sup> Average maintenance and operational savings of \$120,000 based on the range of savings of \$100,000 - \$140,000.

<sup>d</sup> Average of 2 – 7 months.

<sup>e</sup> The EPA reports this to be 1-3% of the total pipeline cost. This is the incremental cost of a compressor with a dry seal instead of one with a wet seal (EPA NSPS TSD, page 6-19).

<sup>f</sup> The EPA assumes a 10-year lifetime and a 7% discount rate; here annual investment expense includes joint depreciation and interest expenses.

<sup>g</sup> EPA NSPS TSD, page 6-20, Table 6-8; based on individual compressor emissions reductions in tons per year.

**Table A6: Cost-effectiveness of replacing rod packing in reciprocating compressors**

Source	Year	Type	#	\$	\$ / yr	Mcf	\$ / Mcf	Years	\$ / yr	Operating profit (ex depr) per year	\$ / yr	
EPA Lessons Learned <sup>202</sup>	2006	Avg.		6,480 <sup>a</sup>	2,493 <sup>b</sup>	3,460	4	4	13,840	13,840	11,347	
JPT <sup>203</sup>	2008	Avg.		4,800 <sup>c</sup>	1,847 <sup>b</sup>	3,504 <sup>d</sup>	4	4	14,016	14,016	12,169	
(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)												
EPA – NSPS TSD <sup>204</sup>	2008	Production		6,480	2,493 <sup>e</sup>	9 <sup>f</sup>	4	36	36	180.00	36	(2,457)
EPA – NSPS TSD <sup>204</sup>	2008	Gathering, Boosting		5,346	1,669 <sup>e</sup>	396 <sup>f</sup>	4	1,584	1,584	3.38	1,584	(85)
EPA – NSPS TSD <sup>204</sup>	2008	Processing		4,050	1,413 <sup>e</sup>	1,077 <sup>f</sup>	4	4,308	4,308	0.94	4,308	2,895
EPA – NSPS TSD <sup>204</sup>	2008	Transmission		5,346	1,669 <sup>e</sup>	1,257 <sup>f</sup>				NA	0	(1,669)
EPA – NSPS TSD <sup>204</sup>	2008	Storage		7,290	2,276 <sup>e</sup>	1,263 <sup>f</sup>				NA	0	(2,276)
EPA – NSPS TSD <sup>204</sup>	2008	Simple avg.		5,702	1,904	296	4	1,186	1,186	4.81	1,186	(718)

<sup>a</sup> Cost of replacing rod packing for four cylinders (as per EPA TSD estimate of average number of reciprocating compressor cylinders in the production sector, Table 6-2), at \$1,620 per cylinder.  
<sup>b</sup> For annual investment expense including joint depreciation and interest expenses, assumes similar lifetimes and discount rate as in the EPA's NSPS estimate for reciprocating compressors in the production sector, i.e., same capital recovery factor (EPA NSPS TSD Table 6-7 and page 6-16).  
<sup>c</sup> Cost of replacing rod packing for four cylinders (as per EPA TSD estimate of average number of reciprocating compressor cylinders in the production sector, Table 6-2), at \$1,200 per cylinder.  
<sup>d</sup> Multiplying estimated emissions savings as reported by sources by four, to account for savings from four cylinders.  
<sup>e</sup> The EPA annual investment expense estimates include joint depreciation and interest expenses, but uses slightly different capital recovery factors for different kinds of devices (EPA NSPS TSD Table 6-7 and page 6-16).  
<sup>f</sup> EPA NSPS TSD, page 6-15, Table 6-6; based on individual compressor emissions reductions in tons per year.

**Table A7: Cost-effectiveness of replacing high-bleed pneumatic controllers with low-bleed pneumatic controllers**

Source	Year	Type	#	\$	\$ / yr	Mcf	\$ / Mcf	\$ / yr	O&M savings per year	Total revenue plus savings per year	Years	\$ / yr	Operating profit (ex depr) per year	\$ / yr	Operating profit per year
			# devices	Total investment cost	Annual investment expense	Volume of saved NG	Price of NG	Revenue from NG			Payout				
EPA <sup>205, 206, 207</sup>	2005	Avg.		350 <sup>a</sup>	50 <sup>b</sup>	180 <sup>c</sup>	4	720	1,100	1,820	0.19	1,820	1,820	1,784	
EPA Lessons Learned <sup>208</sup>	2006	Avg.		275 <sup>d</sup>	39 <sup>b</sup>	125 <sup>e</sup>	4	500	50	550	0.50	550	550	511	
BP <sup>209</sup>	2005	Avg.	11,500	174 <sup>f</sup>	25 <sup>b</sup>	296 <sup>g</sup>	4	1,183	726	1,909	0.09	1,909	1,909	1,884	
(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)															
EPA - NSPS TSD <sup>210</sup>	2008	Min		158	23 <sup>b</sup>										
EPA - NSPS TSD <sup>210</sup>	2008	Max		1,852	264										
EPA - NSPS TSD <sup>210</sup>	2008	Avg.		165	24	375 <sup>i</sup>	4	1,500		1,500	0.11	1,500	1,500	1,477	

<sup>a</sup> Based on incremental cost of fitting low-bleed devices instead of high-bleed devices, for all lines.

<sup>b</sup> For annual investment expense including joint depreciation and interest expenses, assumes similar lifetimes and discount rate as in the EPA's NSPS estimates.

<sup>c</sup> Based on average natural gas savings of 0.3 Mcf/day (as reported in sources).

<sup>d</sup> Average of \$210 and \$340 per device.

<sup>e</sup> Average of 50 and 200 Mcf/year.

<sup>f</sup> Assumes half of replacement cost.

<sup>g</sup> 11,500 wells saved 3.4 Bcf/year.

<sup>h</sup> The EPA assumes a lifetime of 10 years and a discount rate of 7% (NSPS TSD page 5-16, 5-17); here annual investment expense includes joint depreciation and interest expenses.

<sup>i</sup> Using the average value of dollar savings (NSPS TSD page 5-16); calculated natural gas volume is consistent with TSD value quoted.

**Table A8: Cost-effectiveness of replacing high-bleed pneumatic controllers with instrument- air pneumatic controllers**

Source	Year	Type	#	\$	\$ / yr	\$ / yr	\$ / yr	\$ / yr	Mcf	\$ / Mcf	\$ / yr	Years	\$ / yr	\$ / yr	
			# devices	Total investment	Annual investment expense	O&M expense per year	Total expense per year	Total revenue plus savings per year	Volume of saved NG	Price of NG	Revenue from NG	Payout	Operating profit (ex depr) per year	Operating profit per year	
EPA NG STAR <sup>211,212</sup>	2005	Avg.		10,000	1,400 <sup>a</sup>	7,500 <sup>b</sup>	8,900	21,600	5,400	4	21,600	0.70 - 2.00 <sup>c</sup>	14,100	12,700	
EPA Lessons Learned <sup>213</sup>	2006	Avg.		60,000	8,500 <sup>a</sup>	17,700 <sup>b</sup>	26,200	80,000	20,000	4	80,000	0.96	62,300	53,800	
(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)															
EPA - NSPS TSD <sup>214</sup>	2008	Small		16,972	2,416 <sup>d</sup>	1,334	11,090 <sup>e</sup>	3,484	871	4	3,484	NA	(5,190)	(7,606)	
EPA - NSPS TSD <sup>214</sup>	2008	Med.		73,531	10,469	4,333	36,877	14,632	3,658	4	14,632	NA	(11,776)	(22,245)	
EPA - NSPS TSD <sup>214</sup>	2008	Large		135,750	19,328	5,999	80,515	40,644	10,161	4	40,644	NA	(20,543)	(39,871)	
EPA - NSPS TSD <sup>214</sup>	2008	Simple avg.		75,418	10,738	3,889	42,827	19,587	4,897	4	19,587	NA	(12,503)	(23,241)	

<sup>a</sup> For annual investment expense including joint depreciation and interest expenses, assumes similar lifetimes and discount rate as in the EPA's NSPS estimates.

<sup>b</sup> Includes both labor and operational costs such as electrical power (unlike EPA costs in same column).

<sup>c</sup> Range between calculated value and reported value.

<sup>d</sup> EPA assumes a 10-year life, and a 7% discount rate; here annual investment expense includes joint depreciation and interest expenses.

<sup>e</sup> The total expense includes capital, labor and electrical power.

**Table A9: Cost-effectiveness of installing vapor recovery units**

Source	Year	Type	#	\$	\$ / yr	\$ / yr	\$ / yr	Mcf	\$ / Mcf	\$ / yr	Years	\$ / yr	\$ / yr	
			# devices	Total investment	Annual investment expense	O&M expense per year	Total expense per year	Volume of saved NG	Price of NG	Revenue from NG	Total revenue plus savings per year	Payout	Operating profit (ex depr) per year	Operating profit per year
EPA NG STAR <sup>215</sup>	2010	Small		35,738 <sup>a</sup>	3,924 <sup>b</sup>	7,367	11,291	4,566	4	18,262 <sup>c</sup>	18,262	3.28	10,895	6,972
EPA NG STAR <sup>215</sup>	2010	Med.		55,524	6,096 <sup>b</sup>	10,103	16,199	18,262	4	73,048	73,048	0.88	62,945	56,849
EPA NG STAR <sup>215</sup>	2010	Large		103,959	11,414 <sup>b</sup>	16,839	28,253	91,311	4	365,242	365,242	0.30	348,403	336,990
EPA NG STAR <sup>215</sup>	2010	Simple avg.		65,074	7,145 <sup>b</sup>	11,436	18,581	38,046	4	152,184	152,184	0.46	140,748	133,603
Anadarko <sup>216</sup>	1999	Avg.	300										4,167	
ConocoPhillips <sup>217</sup>		Avg.	9	79,167	8,692 <sup>b</sup>							0.33	252,000	243,308
Chevron <sup>218</sup>	1996	Avg.	8									<1		
(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)														
EPA – NSPS TSD <sup>219</sup>	2008	Avg.		98,186	10,780 <sup>d</sup>	9,367	20,147	291	4	1,164	1,164	NA	(8,203)	(18,983)

<sup>a</sup> This includes capital cost and installation cost equal to 75% of the capital cost.

<sup>b</sup> For annual investment expense including joint depreciation and interest expenses, assumes similar lifetimes and discount rate as in the EPA's NSPS estimates.

<sup>c</sup> Scaled down from savings based on a historically higher natural gas price of \$6.22/Mcf.

<sup>d</sup> EPA assumes a 15-year life and a 7% discount rate; here annual investment expense includes joint depreciation and interest expenses.

**Table A10: Cost-effectiveness of leak monitoring and repair systems**

Source	Year	Type	#	\$/yr	Total investment per year	O&M expense per year	\$/yr	Total expense per year	Mcf	Volume of saved NG	Price of NG	\$/Mcf	Revenue from NG	Total revenue plus savings per year	Payout	Years	Operating profit (ex depr) per year	\$/yr	Operating profit per year	\$/yr
EPA Lessons Learned <sup>220</sup>	2003	Gas processing plants			59,000 <sup>a</sup>	32,000 <sup>b</sup>		91,000	86,500 <sup>c</sup>	4	4	346,000	0.19	314,000	255,000					
EPA Lessons Learned <sup>221</sup>	2003	Compressor stations			26,200		26,200	29,400	4	4	117,600	0.22	117,600	117,600	91,400					
Methane to Markets <sup>222</sup>	2009	Valves			130			2,895	4	4	11,580	likely small	11,580	11,580	likely positive					
Methane to Markets <sup>222</sup>	2009	Connectors			10			3,482	4	4	13,928	likely small	13,928	13,928	likely positive					
Methane to Markets <sup>222</sup>	2009	Open ended lines			60			2,320	4	4	9,280	likely small	9,280	9,280	likely positive					
Methane to Markets <sup>222</sup>	2009	Simple avg.			67			2,899	4	4	11,596	likely small	11,596	11,596	likely positive					
Canadian experience <sup>223</sup>	2005	Avg.										small			positive					

(EPA NSPS TSD estimates below not utilized to inform the range of costs and benefits in this report; only provided for completeness)

EPA - NSPS TSD <sup>224</sup>	2008	Valves			18,529 <sup>d</sup>	incl. in total	34,608	1,060 <sup>d</sup>	4	4	4,241	4,241	4,241	4,241	negative	NA	negative	negative	(30,366)
EPA - NSPS TSD <sup>224</sup>	2008	Connectors			9,991	incl. in total	25,622	515	4	4	2,061	2,061	2,061	2,061	negative	NA	negative	negative	(23,561)
EPA - NSPS TSD <sup>224</sup>	2008	Pressure Relief Devices			101,820	incl. in total	40,372	160	4	4	639	639	639	639	negative	NA	negative	negative	(39,734)
EPA - NSPS TSD <sup>224</sup>	2008	Open ended lines			12,280	incl. in total	26,200	693	4	4	2,772	2,772	2,772	2,772	negative	NA	negative	negative	(23,428)
EPA - NSPS TSD <sup>224</sup>	2008	Simple avg.			35,655	incl. in total	31,700	607	4	4	2,428	2,428	2,428	2,428	negative	NA	negative	negative	(29,272)

<sup>a</sup> Average of \$39,000 and \$78,000 for repairs annually.

<sup>b</sup> Average of \$14,000 and \$50,000 for leak screening and measurement annually.

<sup>c</sup> Average of 45,000 and 128,000 Mcf/year per gas plant.

<sup>d</sup> Average of values from Tables 8-14, 8-15 and 8-17. Table 8-16 data was not included as that was only incremental cost data.

## APPENDIX B: LIST OF ACRONYMS

API	American Petroleum Institute	MMtCO <sub>2</sub> e	Million Metric tons of Carbon Dioxide equivalent
AQ	Air Quality	Mcf	Thousand standard cubic feet
BACT	Best Available Control Technology	MMcfd	Million standard cubic feet per day
BAT	Best Available Technology	NAAQS	National Air Ambient Air Quality Standards
bbl	Barrels (equivalent to 42 gallons)	NESHAPs	National Emission Standards for Hazardous Air Pollutants
Bcf	Billion standard cubic feet	NO <sub>x</sub>	Nitrogen Oxides
Bcf/year	Billion standard cubic feet per year	NPV	Net Present Value
BMP	Best Management Practices	NRDC	Natural Resources Defense Council
bopd	Barrels of oil per day	NSPS	New Source Performance Standards
BTU	British Thermal Unit	O&G	Oil & Gas
CDA	Concentrated Development Area	O&M	Operations & Maintenance
CO <sub>2</sub>	Carbon Dioxide	P&A	Plug & Abandonment
CO <sub>2</sub> e	Carbon Dioxide equivalent	PM	Particulate Matter
DEG	Diethylene Glycol	PROs	Partnership Reduction Opportunities
DOE	U.S. Department of Energy	PRV	Pressure Relief Valve
E&P	Exploration & Production	psi	Pounds per square inch
EIA	U.S. Energy Information Administration	REC	Reduced Emission Completion
EPA	U.S. Environmental Protection Agency	scf	Standard cubic feet
GRI	Gas Research Institute	scfm	Standard cubic feet per minute
GWP	Global Warming Potential	TEG	Triethylene Glycol
HAPs	Hazardous Air Pollutants	tpy	Tons per year
HFCs	Hydrofluorocarbons	TREG	Tetraethylene Glycol
IPCC	Intergovernmental Panel on Climate Change	TSD	Technical Support Document
JPAD	Jonah-Pinedale Anticline Development Area	TWG	Technical Work Group
KWh	Kilowatt-hour	U.S.	United States
LAER	Lowest Achievable Emission Rate	VOCs	Volatile Organic Compounds
LDAR	Leak Detection & Repair	VRU	Vapor Recovery Unit
MEG	Ethylene Glycol	WCI	Western Climate Initiative
Mt	Metric ton (equivalent to 1.102 short tons)	WGA	Western Governors Association
MMt	Million Metric tons	WRAP	Western Regional Air Partnership

# APPENDIX C : METHANE EMISSION SOURCE DETAIL

**Table C1: Natural Gas System Methane Emission Sources**

2009 NATURAL GAS SYSTEMS METHANE EMISSIONS			TECHNOLOGY OPTIONS COVERED IN PAPER	PERCENT OF OVERALL EMISSIONS
	Bcf	Bcf		%
<b>PRODUCTION</b>	<b>464</b>			
Well Completion, Workovers		68.26	No. 1 Green Completions	10%
Well Clean Ups (Low pressure gas wells)		236.47	No. 1 & 2 Green Completions and Plunger Lifts	33%
Dehydrator Vents		5.81	No. 3 & 4 Dehydrator Controls	1%
Reciprocating Compressors		4.33	No. 6 Improved Compressor Maintenance	1%
Pneumatic Controllers		62.92	No. 7 Low -Bleed or No-Bleed Controllers	9%
Pipeline Emissions		0.15	No. 8 Pipeline Maintenance and Repair	0%
Tank Venting		7.04	No. 9 Vapor Recovery Units	1%
Controlled Tank Vents		1.41		0%
Heaters		1.83		0%
Separators		5.85		1%
Vessel & Compressor Blowdown & Mishaps		0.29		0%
Compressor Starts		0.31		0%
Coal Bed Methane		3.59		1%
Engine & Turbine Exhaust		14.35		2%
Pump Emissions		17.18		2%
Offshore		15.67		2%
Fugitive Emissions		18.28	No. 10 Leak Monitoring and Repair	3%
<b>Subtotal</b>		<b>463.73</b>		
<b>Subtotal of Emissions Controllable by the 10 Technologies</b>		<b>403.26</b>		
<b>PROCESSING</b>	<b>48</b>			
Dehydrator Vents		1.39	No. 3 & 4 Dehydrator Controls	0%
Centrifugal Compressors Wet Seals		12.12	No. 5 Dry Seal Systems	2%
Centrifugal Compressors Dry Seals		1.28		0%
Reciprocating Compressors		19.93	No. 6 Improved Compressor Maintenance	3%
Pneumatic Controllers		0.10	No. 7 Low -Bleed or No-Bleed Controllers	0%
Pipeline Emissions		1.17	No. 8 Pipeline Maintenance and Repair	0%
Tank Venting		1.17	No. 9 Vapor Recovery Units	0%
Engine & Turbine Exhaust		8.64		1%
Acid Gas Removal Vents		0.65		0%
Pump Emissions		0.23		0%
Fugitive Emissions		1.67	No. 10 Leak Monitoring and Repair	0%
<b>Subtotal</b>		<b>48.35</b>		
<b>Subtotal of Emissions Controllable by the 10 Technologies</b>		<b>37.54</b>		

**Table C1: Natural Gas System Methane Emission Sources (Continued)**

<b>TRANSMISSION</b>				
	<b>129</b>			
Dehydrator Vents		0.34	No. 3 & 4 Dehydrator Controls	0%
Centrifugal Compressors Wet Seals		14.42	No. 5 Dry Seal Systems	2%
Centrifugal Compressors Dry Seals		0.98		0%
Reciprocating Compressors		51.25	No. 6 Improved Compressor Maintenance	7%
Pneumatic Controllers		13.93	No. 7 Low -Bleed or No-Bleed Controllers	2%
Pipeline Emissions		17.35	No. 8 Pipeline Maintenance and Repair	2%
Tank Venting		1.71	No. 9 Vapor Recovery Units	0%
Engine & Turbine Exhaust		13.71		2%
Fugitive Emissions		15.18	No. 10 Leak Monitoring and Repair	2%
<b>Subtotal</b>		<b>128.87</b>		
<b>Subtotal of Emissions Controllable by the 10 Technologies</b>		<b>114.17</b>		
<b>DISTRIBUTION</b>				
	<b>74</b>			
Pipeline Emissions		0.13	No. 8 Pipeline Maintenance and Repair	0%
Fugitive Emissions (Pipeline and Meter Leaks)		71.55	No. 10 Leak Monitoring and Repair	10%
Pressure Relief Valves & Mishaps (Dig-ins)		2.15		0%
<b>Subtotal</b>		<b>73.84</b>		
<b>Subtotal of Emissions Controllable by the 10 Technologies</b>		<b>71.69</b>		
<b>TOTAL</b>				
	<b>715</b>			
<b>Total of Emissions Controllable by the 10 Technologies</b>		<b>627</b>		88%
<b>Other Emissions</b>		<b>88</b>		12%

Source: EPA Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009 Conversion: Gg/19.26=Bcf

**Table C2: Petroleum System Methane Emission Sources**

<b>2009 PETROLEUM SYSTEM METHANE EMISSIONS</b>			<b>TECHNOLOGY OPTIONS COVERED IN PAPER</b>	<b>PERCENT OF TOTAL EMISSIONS</b>
	Bcf	Bcf		%
<b>PRODUCTION</b>	<b>75</b>			
Pneumatic Controller		21.75	No. 7 Low -Bleed or No-Bleed Controllers	29%
Tank Venting		11.01	No. 9 Vapor Recovery Units	14%
Fugitive Emissions		37.33	No. 10 Leak Monitoring and Repair	49%
Combustion and Process Upsets		4.88		6%
<b>Subtotal</b>		<b>74.97</b>		
<b>Subtotal of Emissions Controllable by the 10 Technologies</b>		<b>70.09</b>		
<b>TRANSMISSION</b>	<b>0</b>			<b>0%</b>
<b>REFINING</b>	<b>1</b>			<b>2%</b>
<b>TOTAL</b>	<b>76</b>			
<b>Total of Emissions Controllable by the 10 Technologies</b>				92%
<b>Other emissions</b>				8%

Source: U.S. EPA 2011 Greenhouse Gas Inventory Conversion: Gg/19.26=Bcf

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To: Lisa M. Burianek </o=lawnet/ou=first administrative group/cn=recipients/cn=lisaburianek>; Lemuel Srolovic </o=lawnet/ou=first administrative group/cn=recipients/cn=lsrolovi>; Mauricio Roma </o=lawnet/ou=first administrative group/cn=recipients/cn=mauricioroma>; Philip Bein </o=lawnet/ou=first administrative group/cn=recipients/cn=philipbein>; Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>; Andrew G. Frank </o=lawnet/ou=first administrative group/cn=recipients/cn=andrewfrank>  
Cc:  
Bcc:  
Subject: Shale gas aint all bad  
Date: Mon Apr 16 2012 14:57:00 EDT  
Attachments:

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Monday, April 16, 2012

Gas Bridged to 168 Coal Plant Cancellations Since 2005

Back in 2005, when America was bracing to import natural gas in large quantities, and natural gas prices were ever escalating, the power industry was rushing to build as many as 250 new coal plants. <http://www.sierraclub.org/environmentallaw/coal/plantlist.aspx>. Yet, the coal rush is now dead.

Just since 2005, an incredible 168 proposed, new coal plants have been cancelled. Unlike old coal plants that often have no modern pollution controls, the proposed 168 new power plants would have been built to meet all environmental requirements, but they were cancelled anyway. Why?

Power plant economics, not environmental regulation, was the decisive factor. Low, low natural gas prices produced by shale gas, steadily rising prices for coal over 10 years, and lower increases in electricity demand than had been forecast made each of the 168 power plants too expensive to build.

And how much carbon dioxide has been avoided by the cancellation of 168 proposed coal plants?

The Sierra Club calculates 610 million tons per year, making natural gas already a big bridge to a lower carbon economy. Moreover, the 610 million tons number does not appear to account for the retirement of 106 coal plants or for the reduction in operating time for many coal plants, as natural gas plants run more and coal plants less.

Two more proposed coal plants-- the 850 megawatt Ben Hill in Georgia and Big Cajun 1--were cancelled last week. The Big Cajun cancellation is particularly telling about how shale gas has changed the power world and avoided huge amounts of carbon pollution, as well as soot, mercury, and other pollutants.

Prior to the shale gas boom, new coal plants were even being suggested to replace expensive natural gas power plants, such as at Big Cajun 1, that made then and still makes electricity from combusting gas.

It sounds crazy, does it not? But in 2007, when natural gas prices were heading toward \$13 for a

thousand cubic feet by July 2008, Louisiana Generating actually proposed an economically sensible thing to do just 5 years ago: switching Big Cajun 1 from expensive gas to cheaper coal.

But here we are in April 2012 and 168 proposed coal plants, including Big Cajun 1, have been cancelled, and nobody is anymore suggesting to close gas plants and replace them with coal plants.

It is climate folly to not recognize these facts about the substantial carbon pollution already avoided just from coal plant cancellations by the natural gas bridge built by low gas prices from shale gas production.

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Andrea Sanchez  
<andrea.sanchez@sierraclub.org>  
Cc:  
Bcc:  
Subject: Accepted: Invitation: CONF Call: EGU NSPS @ Fri May 4 10:30am - 11:30am (morgan.  
costello@ag.ny.gov)  
Date: Fri May 04 2012 09:30:16 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Pre-call for Refinery NSPS: Redline of Settlement  
Date: Tue Jun 26 2012 08:53:29 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: RE: Are you joining refinery call now?  
Date: Wed Jun 27 2012 13:05:55 EDT  
Attachments:

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Yes.

Morgan A. Costello  
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From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, June 27, 2012 1:05 PM  
To: 'Joanne.Spalding@sierraclub.org'; Morgan Costello  
Subject: Are you joining refinery call now?

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Document ID: 0.7.691.429914

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Megan Ceronsky <mceronsky@edf.org>  
Cc:  
Bcc:  
Subject: Accepted: NSPS litigants check-in -- hold  
Date: Fri Jun 29 2012 11:54:45 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Megan Ceronsky <mceronsky@edf.org>;  
Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: NSPS litigants call  
Date: Fri Jul 13 2012 10:12:43 EDT  
Attachments:

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I will be out of the office next week. Mike, are you free then?

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From: Megan Ceronsky [mailto:mceronsky@edf.org]  
Sent: Friday, July 13, 2012 10:12 AM  
To: Michael J. Myers; Morgan Costello  
Subject: NSPS litigants call

Hi Mike and Morgan—

I hope you both are well and had lovely 4th of July holidays. Would you be able to join an NSPS litigants call on Monday at 1 ET? Alternatively, 2 ET?

Thanks much--Megan

Megan Ceronsky  
Attorney

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From: Morgan Costello </o=lawnet/ou=first  
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To:  
Cc:  
Bcc:  
Subject: T/c NRDC re Methane Leaks  
Date: Mon Jul 23 2012 14:24:25 EDT  
Attachments:

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StartTime: 07/24/2012 11:00:00 AM GMT  
EndTime: 07/24/2012 11:30:00 AM GMT  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Accepted: Call with NRDC on NSPS for natural gas drilling  
Date: Tue Jul 24 2012 10:03:38 EDT  
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Cc: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 15:18:25 EDT  
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Dear Counsel:

New York requests an 8-day extension, until August 10, 2012, of the deadline to file an amicus brief in American Public Gas Association v. United States Department of Energy, Case No. 11-1485, D.C. Cir. New York would be filing jointly with the Commonwealth of Massachusetts and the California Energy Commission, both of which have already requested an 8-day extension. Since no party to this proceeding has opposed those extension requests, we ask that consent be provided by the parties to our request as well.

Please do not hesitate to contact me at 518-473-5843, if you have any questions.

Thank you,

Morgan A. Costello  
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Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 17:18:01 EDT  
Attachments: image001.jpg  
image002.jpg  
image003.jpg

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AHRI consents to this request.

David B. Calabrese

General Counsel and Senior Vice President, Policy

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From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Tuesday, July 31, 2012 3:18 PM  
To: 'relliott@mbolaw.com'; 'jjanicke@mbolaw.com'; 'wmiller@mbolaw.com'; 'H.Thomas.Byron@usdoj.gov'; 'michael.raab@usdoj.gov'; 'mdgibson@venable.com'; 'dhgreen@venable.com'; Calabrese, David; Mattingly, Joseph; 'amber.abbasi@causeofaction.org'; 'daniel.epstein@causeofaction.org'; 'blongstreth@nrdc.org'; 'kkennedy@nrdc.org'; 'cking@law.nyc.gov'; 'Holmes, Caryn@Energy'; 'Driskell, Kristen@Energy'; 'Augenstern, Fred (AGO)'  
Cc: Michael J. Myers  
Subject: AGPA v. DOE: New York Request for Extension of Filing Deadline

Dear Counsel:

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Please do not hesitate to contact me at 518-473-5843, if you have any questions.

Thank you,

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224

(518) 473-5843

morgan.costello@ag.ny.gov

Document ID: 0.7.691.125532-000001

Owner: Calabrese, David <dcalabrese@ahrinet.org>

Filename: image001.jpg

Last Modified: Tue Jul 31 17:18:01 EDT 2012

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Document ID: 0.7.691.125532-000001

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Reason: It is an unsupported file type

Document ID: 0.7.691.125532-000002

Owner: Calabrese, David <dcalabrese@ahrinet.org>

Filename: image002.jpg

Last Modified: Tue Jul 31 17:18:01 EDT 2012

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Document ID: 0.7.691.125532-000002

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Reason: It is an unsupported file type

Document ID: 0.7.691.125532-000003

Owner: Calabrese, David <dcalabrese@ahrinet.org>

Filename: image003.jpg

Last Modified: Tue Jul 31 17:18:01 EDT 2012

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Document ID: 0.7.691.125532-000003

Attachment Name: image003.jpg

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Reason: It is an unsupported file type

From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Calabrese, David  
<dcalabrese@ahrinet.org>; Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>;  
relliott@mbolaw.com <relliott@mbolaw.com>; jjanicke@mbolaw.com  
<jjanicke@mbolaw.com>; wmiller@mbolaw.com <wmiller@mbolaw.com>;  
H.Thomas.Byron@usdoj.gov <h.thomas.byron@usdoj.gov>;  
michael.raab@usdoj.gov <michael.raab@usdoj.gov>;  
mdgibson@venable.com <mdgibson@venable.com>;  
dhgreen@venable.com <dhgreen@venable.com>; Mattingly, Joseph  
<jmattingly@ahrinet.org>; amber.abbasi@causeofaction.org  
<amber.abbasi@causeofaction.org>;  
daniel.epstein@causeofaction.org  
<daniel.epstein@causeofaction.org>; Kennedy, Kit  
<kkennedy@nrdc.org>; cking@law.nyc.gov <cking@law.nyc.gov>;  
Holmes, Caryn@Energy <caryn.holmes@energy.ca.gov>; Driskell,  
Kristen@Energy <kristen.driskell@energy.ca.gov>; Augenstern,  
Fred (AGO) <fred.augenstern@state.ma.us>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 17:21:38 EDT  
Attachments: image001.jpg  
image002.jpg  
image003.jpg

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As does NRDC, Alliance to Save Energy, ACEEE, MUPHT, and Consumer Federation of America. –  
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com'; Mattingly, Joseph; 'amber.abbasi@causeofaction.org'; 'daniel.epstein@causeofaction.org';  
Longstreth, Ben; Kennedy, Kit; 'cking@law.nyc.gov'; 'Holmes, Caryn@Energy'; 'Driskell,  
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Cc: Michael J. Myers  
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dcalabrese@ahrinet.org

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Environmental Protection Bureau

The Capitol

Albany, NY 12224

(518) 473-5843

[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)

Document ID: 0.7.691.125487-000001

Owner: Longstreth, Ben <blongstreth@nrdc.org>

Filename: image001.jpg

Last Modified: Tue Jul 31 17:21:38 EDT 2012

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Document ID: 0.7.691.125487-000001

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Reason: It is an unsupported file type

Document ID: 0.7.691.125487-000002

Owner: Longstreth, Ben <blongstreth@nrdc.org>

Filename: image002.jpg

Last Modified: Tue Jul 31 17:21:38 EDT 2012

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Document ID: 0.7.691.125487-000003

Owner: Longstreth, Ben <blongstreth@nrdc.org>

Filename: image003.jpg

Last Modified: Tue Jul 31 17:21:38 EDT 2012

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:07003f14574399e0ae54479bc9883fc91d478c2d26dd2547ce50f7945789845a91e1

Reason: It is an unsupported file type

From: King, Christopher <cking@law.nyc.gov>  
To: Longstreth, Ben <blongstreth@nrdc.org>;  
Calabrese, David <dcalabrese@ahrinet.org>; Morgan Costello  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=morgancostello>; relliott@mbolaw.com  
<relliott@mbolaw.com>; jjanicke@mbolaw.com  
<jjanicke@mbolaw.com>; wmill@mbolaw.com <wmiller@mbolaw.com>;  
H.Thomas.Byron@usdoj.gov <h.thomas.byron@usdoj.gov>;  
michael.raab@usdoj.gov <michael.raab@usdoj.gov>;  
mdgibson@venable.com <mdgibson@venable.com>;  
dhgreen@venable.com <dhgreen@venable.com>; Mattingly, Joseph  
<jmattingly@ahrinet.org>; amber.abbasi@causeofaction.org  
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<kristen.driskell@energy.ca.gov>; Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 17:22:23 EDT  
Attachments: image001.jpg  
image002.jpg  
image003.jpg

---

As does the City of NY.

CK

Christopher Gene King  
Senior Counsel, Environmental Law Division  
New York City Law Department  
100 Church Street, Room 6-143  
New York, New York 10007  
Phone: 212-788-1235  
Fax: 212-788-1619  
Email: cking@law.nyc.gov

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From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Tuesday, July 31, 2012 5:22 PM  
To: Calabrese, David; Morgan Costello; 'relliott@mbolaw.com'; 'jjanicke@mbolaw.com'; 'wmiller@mbolaw.com'; 'H.Thomas.Byron@usdoj.gov'; 'michael.raab@usdoj.gov'; 'mdgibson@venable.com'; 'dhgreen@venable.com'; Mattingly, Joseph; 'amber.abbasi@causeofaction.org'; 'daniel.epstein@causeofaction.org'; Kennedy, Kit; King, Christopher; 'Holmes, Caryn@Energy'; 'Driskell, Kristen@Energy'; 'Augenstern, Fred (AGO)'  
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General Counsel and Senior Vice President, Policy

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New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224

(518) 473-5843

morgan.costello@ag.ny.gov

Document ID: 0.7.691.125490-000001

Owner: King, Christopher <cking@law.nyc.gov>

Filename: image001.jpg

Last Modified: Tue Jul 31 17:22:23 EDT 2012

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Document ID: 0.7.691.125490-000001

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Reason: It is an unsupported file type

Document ID: 0.7.691.125490-000002

Owner: King, Christopher <cking@law.nyc.gov>

Filename: image002.jpg

Last Modified: Tue Jul 31 17:22:23 EDT 2012

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Document ID: 0.7.691.125490-000003

Owner: King, Christopher <cking@law.nyc.gov>

Filename: image003.jpg

Last Modified: Tue Jul 31 17:22:23 EDT 2012

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Reason: It is an unsupported file type

From: Amber Abbasi  
<amber.abbasi@causeofaction.org>  
To: King, Christopher <cking@law.nyc.gov>;  
Longstreth, Ben <blongstreth@nrdc.org>; Calabrese, David  
<dcalabrese@ahrinet.org>; Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>;  
relliott@mbolaw.com <relliott@mbolaw.com>; jjanicke@mbolaw.com  
<jjanicke@mbolaw.com>; wmill@mbolaw.com <wmiller@mbolaw.com>;  
H.Thomas.Byron@usdoj.gov <h.thomas.byron@usdoj.gov>;  
michael.raab@usdoj.gov <michael.raab@usdoj.gov>;  
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<kristen.driskell@energy.ca.gov>; Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 17:35:48 EDT  
Attachments: image001.jpg  
image002.png  
image003.png  
image004.jpg  
image005.jpg  
image006.jpg

---

HARDI consents to this request.

Amber D. Abbasi | Chief Counsel for Regulatory Affairs | Cause of Action

2100 M Street NW | Suite 170-247 | Washington, D.C. 20037

Amber.Abbasi@causeofaction.org  
O: 202.507.5880 | C: 202.670.0717

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Subject: AGPA v. DOE: New York Request for Extension of Filing Deadline

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New York requests an 8-day extension, until August 10, 2012, of the deadline to file an amicus brief in American Public Gas Association v. United States Department of Energy, Case No. 11-1485, D.C. Cir. New York would be filing jointly with the Commonwealth of Massachusetts and the California Energy Commission, both of which have already requested an 8-day extension. Since no party to this proceeding has opposed those extension requests, we ask that consent be provided by the parties to our request as well.

Please do not hesitate to contact me at 518-473-5843, if you have any questions.

Thank you,

Morgan A. Costello

Assistant Attorney General

New York State Office of the Attorney General

Environmental Protection Bureau

The Capitol

Albany, NY 12224

(518) 473-5843

morgan.costello@ag.ny.gov



Document ID: 0.7.691.125491-000001

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image001.jpg

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000001

Attachment Name: image001.jpg

Locator: esa:pst/\*:\vm-alf-med2\med2\_E\CW-Data\foi\140072-Custodian\_em-edid-edid9296  
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Reason: It is an unsupported file type

Document ID: 0.7.691.125491-000002

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image002.png

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000002

Attachment Name: image002.png

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\mcostell\MCostell\_Live\_02242014.pst:00000000ade98bbd4bc9284c9c2a3574d05b2d64442b2000:  
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Reason: It is an unsupported file type

Document ID: 0.7.691.125491-000003

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image003.png

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000003

Attachment Name: image003.png

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Reason: It is an unsupported file type

Document ID: 0.7.691.125491-000004

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image004.jpg

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000004

Attachment Name: image004.jpg

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Reason: It is an unsupported file type

Document ID: 0.7.691.125491-000005

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image005.jpg

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000005

Attachment Name: image005.jpg

Locator: esa\pst\\*\vm-afb-med2\med2\_E\CW-Data\foi\140072-Custodian\_em-edid-edid9296  
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:0700fcb5a43b3b0595163a03ed3e74c28cc289486e3f1de0faa3b8730bb4f0598aa5

Reason: It is an unsupported file type

Document ID: 0.7.691.125491-000006

Owner: Amber Abbasi <amber.abbasi@causeofaction.org>

Filename: image006.jpg

Last Modified: Tue Jul 31 17:35:48 EDT 2012

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Could not print file content for:

Document ID: 0.7.691.125491-000006

Attachment Name: image006.jpg

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:0700fcb5a43b3b0595163a03ed3e74c28cc289486e3f1de0faa3b8730bb4f0598aa5

Reason: It is an unsupported file type

From: William T. Miller <wmiller@mbolaw.com>  
To: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>; Randolph Lee Elliott <relliott@mbolaw.com>; Jeffrey K. Janicke <jjanicke@mbolaw.com>; H.Thomas.Byron@usdoj.gov <h.thomas.byron@usdoj.gov>; michael.raab@usdoj.gov <michael.raab@usdoj.gov>; mdgibson@venable.com <mdgibson@venable.com>; dhgreen@venable.com <dhgreen@venable.com>; dcalabrese@ahrinet.org <dcalabrese@ahrinet.org>; jmattingly@ahrinet.org <jmattingly@ahrinet.org>; amber.abbasi@causeofaction.org <amber.abbasi@causeofaction.org>; daniel.epstein@causeofaction.org <daniel.epstein@causeofaction.org>; blongstreth@nrdc.org <blongstreth@nrdc.org>; kkennedy@nrdc.org <kkennedy@nrdc.org>; cking@law.nyc.gov <cking@law.nyc.gov>; Holmes, Caryn@Energy <caryn.holmes@energy.ca.gov>; Driskell, Kristen@Energy <kristen.driskell@energy.ca.gov>; Augenstern, Fred (AGO) <fred.augenstern@state.ma.us>  
Cc: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Tue Jul 31 2012 18:57:36 EDT  
Attachments:

---

APGA has no objection.

---

From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Tue 7/31/2012 3:18 PM  
To: Randolph Lee Elliott; Jeffrey K. Janicke; William T. Miller; 'H.Thomas.Byron@usdoj.gov'; 'michael.raab@usdoj.gov'; 'mdgibson@venable.com'; 'dhgreen@venable.com'; 'dcalabrese@ahrinet.org'; 'jmattingly@ahrinet.org'; 'amber.abbasi@causeofaction.org'; 'daniel.epstein@causeofaction.org'; 'blongstreth@nrdc.org'; 'kkennedy@nrdc.org'; 'cking@law.nyc.gov'; 'Holmes, Caryn@Energy'; 'Driskell, Kristen@Energy'; 'Augenstern, Fred (AGO)'  
Cc: Michael J. Myers  
Subject: AGPA v. DOE: New York Request for Extension of Filing Deadline

Dear Counsel:

New York requests an 8-day extension, until August 10, 2012, of the deadline to file an amicus brief in American Public Gas Association v. United States Department of Energy, Case No. 11-1485, D.C. Cir. New York would be filing jointly with the Commonwealth of Massachusetts and the California Energy Commission, both of which have already requested an 8-day extension. Since no party to this proceeding has opposed those extension requests, we ask that consent be provided by the parties to our request as well.

Please do not hesitate to contact me at 518-473-5843, if you have any questions.

Thank you,

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Gibson, Monica D. <mdgibson@venable.com>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>;  
relliott@mbolaw.com <relliott@mbolaw.com>; jjanicke@mbolaw.com  
<jjanicke@mbolaw.com>; wmiller@mbolaw.com <wmiller@mbolaw.com>;  
H.Thomas.Byron@usdoj.gov <h.thomas.byron@usdoj.gov>;  
michael.raab@usdoj.gov <michael.raab@usdoj.gov>; Green, Douglas  
H. <dhgreen@venable.com>; dcalabrese@ahrinet.org  
<dcalabrese@ahrinet.org>; jmattingly@ahrinet.org  
<jmattingly@ahrinet.org>; amber.abbasi@causeofaction.org  
<amber.abbasi@causeofaction.org>;  
daniel.epstein@causeofaction.org  
<daniel.epstein@causeofaction.org>; blongstreth@nrdc.org  
<blongstreth@nrdc.org>; kkennedy@nrdc.org <kkennedy@nrdc.org>;  
cking@law.nyc.gov <cking@law.nyc.gov>; Holmes, Caryn@Energy  
<caryn.holmes@energy.ca.gov>; Driskell, Kristen@Energy  
<kristen.driskell@energy.ca.gov>; Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: AGPA v. DOE: New York Request for Extension of Filing Deadline  
Date: Thu Aug 02 2012 13:07:28 EDT  
Attachments:

---

ACCA does not object.

Regards,

Monica Gibson

Monica Derbes Gibson, Esq. | Venable LLP  
t 202.344.4526 | f 202.344.8300  
575 7th Street, NW, Washington , DC 20004

MDGibson@Venable.com | www.Venable.com

From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Tuesday, July 31, 2012 3:18 PM  
To: 'relliott@mbolaw.com'; 'jjanicke@mbolaw.com'; 'wmiller@mbolaw.com'; 'H.Thomas.Byron@usdoj.'

gov'; 'michael.raab@usdoj.gov'; Gibson, Monica D.; Green, Douglas H.; 'dcalabrese@ahrinet.org';  
'jmattingly@ahrinet.org'; 'amber.abbasi@causeofaction.org'; 'daniel.epstein@causeofaction.org';  
'blongstreth@nrdc.org'; 'kkennedy@nrdc.org'; 'cking@law.nyc.gov'; 'Holmes, Caryn@Energy'; 'Driskell,  
Kristen@Energy'; 'Augenstern, Fred (AGO)'  
Cc: Michael J. Myers  
Subject: AGPA v. DOE: New York Request for Extension of Filing Deadline

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Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

\*\*\*\*\*  
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(including any attachments) was not intended or written to be used,  
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\*\*\*\*\*  
\*\*\*\*\*

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Alan Belenz </o=lawnet/ou=first  
administrative group/cn=recipients/cn=abelenz>  
Cc:  
Bcc:  
Subject: RE: Did you see this CERES report?  
Date: Thu Sep 27 2012 14:56:01 EDT  
Attachments:

---

No. Thanks for sharing.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

---

From: Alan Belenz  
Sent: Thursday, September 27, 2012 2:00 PM  
To: Morgan Costello  
Subject: Did you see this CERES report?

<< File: ceres\_SustainableExtraction\_2012[1].pdf >>

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Alan Belenz </o=lawnet/ou=first  
administrative group/cn=recipients/cn=abelenz>  
Cc:  
Bcc:  
Subject: FW: SEC Investor Prep Call: Wednesday, October 17 [1:00-2:00pmET]  
Date: Thu Oct 11 2012 15:22:32 EDT  
Attachments:

---

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Siobhan Collins [mailto:collins@ceres.org]  
Sent: Wednesday, October 10, 2012 9:56 AM  
To: Morgan Costello  
Subject: SEC Investor Prep Call: Wednesday, October 17 [1:00-2:00pmET]

Good Morning Morgan,

Thank you for getting back to me about your availability for an "Investor Prep Call" for the October 23rd meetings at the Securities and Exchange Commission (SEC). It appears that most participants are free to touch base on Wednesday, October 17th from 1:00-2:00pmET. Please hold this time on your calendars and use the call-in information below.

#### Call-In Information

Toll-Free Access: 877-326-0011

Meeting #: \*8457128\*

For those of you who have not booked your travel, all meetings with SEC Commissioners and Corp.

Finance staff are in the afternoon - with lunch and refreshments provided. I will circulate background materials and draft agendas prior to the call.

If you should have any questions or conflicts, please contact me via. email or phone (617) 247-0700 ex. 162.

Best Regards,

Siobhan

Siobhan Collins

Coordinator, Investor Programs | Ceres

99 Chauncy Street, 6th Floor | Boston, MA 02111

T: (617) 247-0700 X 162

[collins@ceres.org](mailto:collins@ceres.org) | [www.ceres.org](http://www.ceres.org) | [www.incr.com](http://www.incr.com)

Ceres is an advocate for sustainability leadership. Our mission is to mobilize investor and business leadership to build a thriving, sustainable global economy.

Siobhan Collins

Coordinator, Investor Programs | Ceres

99 Chauncy Street, 6th Floor | Boston, MA 02111

T: (617) 247-0700 X 162

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Isaac Cheng </o=lawnet/ou=first  
administrative group/cn=recipients/cn=isaaccheng>  
Cc:  
Bcc:  
Subject: FW: SEC Investor Prep Call: Wednesday, October 17 [1:00-2:00pmET]  
Date: Mon Oct 15 2012 11:07:44 EDT  
Attachments:

---

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Siobhan Collins [mailto:collins@ceres.org]  
Sent: Wednesday, October 10, 2012 9:56 AM  
To: Morgan Costello  
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Siobhan

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Coordinator, Investor Programs | Ceres

99 Chauncy Street, 6th Floor | Boston, MA 02111

T: (617) 247-0700 X 162

[collins@ceres.org](mailto:collins@ceres.org) | [www.ceres.org](http://www.ceres.org) | [www.incr.com](http://www.incr.com)

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From: Robert Emmet Hernan  
<rehjms@earthlink.net>  
To: William E Dornbos <wdornbos@gmail.com>;  
Judith Enck <enckj@aol.com>; Peter Lehner <plehner@nrdc.org>;  
Lemuel Srolovic </o=lawnet/ou=first administrative  
group/cn=recipients/cn=lsrolovi>; Gordon Johnson  
<gojohnso@mtahq.org>; Carter H. Strickland, Jr.  
<carter.strickland@dep.nyc.gov>; Simon Wynn  
<swynn@empire.state.ny.us>; Eugene Leff  
<elgene10@earthlink.net>; Thomas Congdon  
<tomcookcurtis@gmail.com>; Dave Munro <dam@nyserda.org>  
Cc:  
Bcc:  
Subject: EnviroSalon  
Date: Mon Oct 15 2012 14:51:09 EDT  
Attachments:

---

Cheers: Time for another EnviroSalon for former EPBers (including Lem who has returned to the EPB fold). What evenings are you available for the weeks of November 26th - 30th, December 3rd -7th, December 10th - 12th. Gordon has offered to host the EnviroSalon at his place which is 14 Douglass St. (between Court and Smith Streets), nearest to the F and G trains stop at Bergen Street, and a pleasant 12-15 minute stroll down Court Street from the Borough Hall/Court St. station 2, 3, 4, 5, and R trains. Let me know your availability at your earliest convenience.

Hope you're all well.

Bob

Robert Emmet Hernan  
Apt. 3B  
41 East 28th Street  
New York, NY 10016  
212.725.0848  
rehjms@earthlink.net

From: Wynn, Simon <swynn@esd.ny.gov>  
To: Robert Emmet Hernan  
<rehjms@earthlink.net>; William E Dornbos <wdornbos@gmail.com>;  
Judith Enck <enckj@aol.com>; Peter Lehner <plehner@nrdc.org>;  
Lemuel Srolovic </o=lawnet/ou=first administrative  
group/cn=recipients/cn=lsrolovi>; Gordon Johnson  
<gojohnso@mtahq.org>; Carter H. Strickland, Jr.  
<carter.strickland@dep.nyc.gov>; Eugene Leff  
<elgene10@earthlink.net>; Thomas Congdon  
<tomcookcurtis@gmail.com>; Dave Munro <dam@nyserda.org>  
Cc:  
Bcc:  
Subject: RE: EnviroSalon  
Date: Mon Oct 15 2012 15:10:01 EDT  
Attachments:

---

I will be in Vietnam from Thanksgiving till Dec 10th, so have fun without me.

From: Robert Emmet Hernan [mailto:rehjms@earthlink.net]  
Sent: Monday, October 15, 2012 2:51 PM  
To: William E Dornbos; Judith Enck; Peter Lehner; Lem Srolovic; Gordon Johnson; Carter H. Strickland, Jr.; Wynn, Simon; Eugene Leff; Thomas Congdon; Dave Munro  
Subject: EnviroSalon

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Bob

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Apt. 3B

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New York, NY 10016

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rehjms@earthlink.net

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Thank you.

From: Lehner, Peter <plehner@nrdc.org>  
To: Robert Emmet Hernan  
<rehjms@earthlink.net>; William E Dornbos <wdornbos@gmail.com>;  
Judith Enck <enckj@aol.com>; Lemuel Srolovic  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=lsrolovi>; Gordon Johnson  
<gojohnso@mtahq.org>; Carter H. Strickland, Jr.  
<carter.strickland@dep.nyc.gov>; Simon Wynn  
<swynn@empire.state.ny.us>; Eugene Leff  
<elgene10@earthlink.net>; Thomas Congdon  
<tomcookcurtis@gmail.com>; Dave Munro <dam@nyserda.org>  
Cc:  
Bcc:  
Subject: RE: EnviroSalon  
Date: Mon Oct 15 2012 15:24:05 EDT  
Attachments:

---

Wonderful idea! Dec 3-7 week is out for me as it is our board meeting that week. The week before is thus also suboptimal. The 10-12 period looks good.

From: Robert Emmet Hernan [mailto:rehjms@earthlink.net]  
Sent: Monday, October 15, 2012 2:51 PM  
To: William E Dornbos; Judith Enck; Lehner, Peter; Lem Srolovic; Gordon Johnson; Carter H. Strickland, Jr.; Simon Wynn; Eugene Leff; Thomas Congdon; Dave Munro  
Subject: EnviroSalon

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Apt. 3B

41 East 28th Street

New York, NY 10016

212.725.0848

rehjms@earthlink.net

From: Strickland Jr., Carter H.  
<cstrickland@dep.nyc.gov>  
To: Lehner, Peter <plehner@nrdc.org>;  
Robert Emmet Hernan <rehjms@earthlink.net>; William E Dornbos  
<wdornbos@gmail.com>; Judith Enck <enckj@aol.com>; Lemuel  
Srolovic </o=lawnet/ou=first administrative  
group/cn=recipients/cn=lsrolovi>; Gordon Johnson  
<gojohnso@mtahq.org>; Simon Wynn <swynn@empire.state.ny.us>;  
Eugene Leff <elgene10@earthlink.net>; Thomas Congdon  
<tomcookcurtis@gmail.com>; Dave Munro <dam@nyserda.org>  
Cc:  
Bcc:  
Subject: RE: EnviroSalon  
Date: Mon Oct 15 2012 22:54:02 EDT  
Attachments:

---

Just saw this - it looks like the week of December 10-12 is best for all, and I am free all that week for now.

---

Carter H. Strickland, Jr. | Commissioner | NYC Environmental Protection

(O) 718 595 6565 | (M) 347 844 2544 | cstrickland@dep.nyc.gov

From: Lehner, Peter [mailto:plehner@nrdc.org]  
Sent: Monday, October 15, 2012 3:24 PM  
To: Robert Emmet Hernan; William E Dornbos; Judith Enck; Lem Srolovic; Gordon Johnson; Strickland Jr., Carter H.; Simon Wynn; Eugene Leff; Thomas Congdon; Dave Munro  
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Subject: EnviroSalon

Cheers: Time for another EnviroSalon for former EPBers (including Lem who has returned to the EPB

fold). What evenings are you available for the weeks of November 26th - 30th, December 3rd -7th, December 10th - 12th. Gordon has offered to host the EnviroSalon at his place which is 14 Douglass St. (between Court and Smith Streets), nearest to the F and G trains stop at Bergen Street, and a pleasant 12-15 minute stroll down Court Street from the Borough Hall/Court St. station 2, 3, 4, 5, and R trains. Let me know your availability at your earliest convenience.

Hope you're all well.

Bob

Robert Emmet Hernan

Apt. 3B

41 East 28th Street

New York, NY 10016

212.725.0848

rehjms@earthlink.net

From: Tom Congdon <tomcookcurtis@gmail.com>  
To: Strickland Jr., Carter H.  
<cstrickland@dep.nyc.gov>  
Cc: Lehner, Peter <plehner@nrdc.org>;  
Robert Emmet Hernan <rehjms@earthlink.net>; William E Dornbos  
<wdornbos@gmail.com>; Judith Enck <enckj@aol.com>; Lemuel  
Srolovic </o=lawnet/ou=first administrative  
group/cn=recipients/cn=lsrolovi>; Gordon Johnson  
<gojohnso@mtahq.org>; Simon Wynn <swynn@empire.state.ny.us>;  
Eugene Leff <elgene10@earthlink.net>; Dave Munro  
<dam@nyserda.org>  
Bcc:  
Subject: Re: EnviroSalon  
Date: Tue Oct 16 2012 19:29:25 EDT  
Attachments:

---

I'm free dec 10-12 as well. Thank you!

Sent from my iPhone

On Oct 15, 2012, at 10:54 PM, "Strickland Jr., Carter H." <CStrickland@dep.nyc.gov> wrote:

Just saw this - it looks like the week of December 10-12 is best for all, and I am free all that week for now.

---

Carter H. Strickland, Jr. | Commissioner | NYC Environmental Protection

(O) 718 595 6565 | (M) 347 844 2544 | cstrickland@dep.nyc.gov

From: Lehner, Peter [mailto:plehner@nrdc.org]  
Sent: Monday, October 15, 2012 3:24 PM  
To: Robert Emmet Hernan; William E Dornbos; Judith Enck; Lem Srolovic; Gordon Johnson; Strickland Jr., Carter H.; Simon Wynn; Eugene Leff; Thomas Congdon; Dave Munro  
Subject: RE: EnviroSalon

Wonderful idea! Dec 3-7 week is out for me as it is our board meeting that week. The week before is thus also suboptimal. The 10-12 period looks good.

From: Robert Emmet Hernan [mailto:rehjms@earthlink.net]

Sent: Monday, October 15, 2012 2:51 PM

To: William E Dornbos; Judith Enck; Lehner, Peter; Lem Srolovic; Gordon Johnson; Carter H. Strickland, Jr.; Simon Wynn; Eugene Leff; Thomas Congdon; Dave Munro  
Subject: EnviroSalon

Cheers: Time for another EnviroSalon for former EPBers (including Lem who has returned to the EPB fold). What evenings are you available for the weeks of November 26th - 30th, December 3rd -7th, December 10th - 12th. Gordon has offered to host the EnviroSalon at his place which is 14 Douglass St. (between Court and Smith Streets), nearest to the F and G trains stop at Bergen Street, and a pleasant 12-15 minute stroll down Court Street from the Borough Hall/Court St. station 2, 3, 4, 5, and R trains. Let me know your availability at your earliest convenience.

Hope you're all well.

Bob

Robert Emmet Hernan

Apt. 3B

41 East 28th Street

New York, NY 10016

212.725.0848

rehjms@earthlink.net

From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Daniel Sangeap </o=lawnet/ou=first administrative group/cn=recipients/cn=danielsangeap>  
Cc:  
Bcc:  
Subject: FW: SEC Investor Prep Call: Wednesday, October 17 [1:00-2:00pmET]  
Date: Wed Oct 17 2012 08:33:30 EDT  
Attachments:

---

Info for call today.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Siobhan Collins [mailto:collins@ceres.org]  
Sent: Wednesday, October 10, 2012 9:56 AM  
To: Morgan Costello  
Subject: SEC Investor Prep Call: Wednesday, October 17 [1:00-2:00pmET]

Good Morning Morgan,

Thank you for getting back to me about your availability for an "Investor Prep Call" for the October 23rd meetings at the Securities and Exchange Commission (SEC). It appears that most participants are free to touch base on Wednesday, October 17th from 1:00-2:00pmET. Please hold this time on your calendars and use the call-in information below.

#### Call-In Information

Toll-Free Access: 877-326-0011

Meeting #: \*8457128\*

For those of you who have not booked your travel, all meetings with SEC Commissioners and Corp.

Finance staff are in the afternoon - with lunch and refreshments provided. I will circulate background materials and draft agendas prior to the call.

If you should have any questions or conflicts, please contact me via. email or phone (617) 247-0700 ex. 162.

Best Regards,

Siobhan

Siobhan Collins

Coordinator, Investor Programs | Ceres

99 Chauncy Street, 6th Floor | Boston, MA 02111

T: (617) 247-0700 X 162

[collins@ceres.org](mailto:collins@ceres.org) | [www.ceres.org](http://www.ceres.org) | [www.incr.com](http://www.incr.com)

Ceres is an advocate for sustainability leadership. Our mission is to mobilize investor and business leadership to build a thriving, sustainable global economy.

Siobhan Collins

Coordinator, Investor Programs | Ceres

99 Chauncy Street, 6th Floor | Boston, MA 02111

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[collins@ceres.org](mailto:collins@ceres.org) | [www.ceres.org](http://www.ceres.org) | [www.incr.com](http://www.incr.com)

Ceres is an advocate for sustainability leadership. Our mission is to mobilize investor and business leadership to build a thriving, sustainable global economy.

Document ID: 0.7.691.437393

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To:  
Cc:  
Bcc:  
Subject: Call with Ceres  
Date: Wed Oct 31 2012 10:27:36 EDT  
Attachments:

---

StartTime: 11/01/2012 09:00:00 AM GMT  
EndTime: 11/01/2012 10:00:00 AM GMT  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

Document ID: 0.7.691.437420

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To:  
Cc:  
Bcc:  
Subject: Ceres Call  
Date: Thu Nov 01 2012 14:41:30 EDT  
Attachments:

---

StartTime: 11/13/2012 01:00:00 PM GMT  
EndTime: 11/13/2012 02:00:00 PM GMT  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

From: Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>  
To: Lisa M. Burianek </o=lawnet/ou=first administrative group/cn=recipients/cn=lisaburianek>; Peter Washburn </o=lawnet/ou=first administrative group/cn=recipients/cn=peterwashburn>; Lemuel Srolovic </o=lawnet/ou=first administrative group/cn=recipients/cn=lsrolovi>; Monica Wagner </o=lawnet/ou=first administrative group/cn=recipients/cn=monicawagner>  
Cc: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Bcc:  
Subject: Sandy Committee Members  
Date: Thu Nov 29 2012 15:52:42 EST  
Attachments:

---

FYI:

Listed below are the Cuomo appointees on each of the three post-Sandy committees:, who include Fred Krupp, Kit Kennedy, and other friends/notables

NYS2100:

- Judith Rodin, President, The Rockefeller Foundation (Co-Chair)
- Felix Rohatyn, Senior Advisor to Chairman and CEO, Lazard (Co-Chair)
- Richard T. Anderson, President, New York Building Congress
- Dan Arvizu, Director and CEO, U.S. Department of Energy's National Renewable Energy Laboratory
- Walter Bell, Former Chair, Swiss Re America Holding Company
- Jo-Ellen Darcy, Assistant Secretary of the Army (Advisory Member)
- Isabel Deding, Deputy Mayor for Transport, London, England
- Lloyd Dixon, Senior Economist, RAND Corporation
- Mortimer L. Downey, Vice Chair, Washington Metropolitan Area Transit Authority
- Clark W. Gellings, Fellow, Electric Power Research Institute
- Patricia Hoffman, Assistant Secretary for the Office of Electricity Delivery and Energy Reliability (Advisory Member)
- J. Robert Hunter, Insurance Director, Consumer Federation of America
- Sudhakar Kesavan, Chair and CEO, ICF International
- Roy Kienitz, Former Under Secretary for Policy, U.S. Department of Transportation
- Timothy Killeen, President, SUNY Research Foundation and SUNY Vice-Chancellor for Research
- Fred Krupp, President, Environmental Defense Fund
- Sylvia Lee, Water Manager, Skoll Global Threats
- Joe Lhota, Chair and CEO of the Metropolitan Transit Authority
- Miho Mazereeuw, Lecturer, Massachusetts Institute of Technology
- Guy J.P. Nordenson, Partner, Guy Nordenson and Associates
- John Porcari, Deputy Secretary, U.S. Department of Transportation (Advisory Member)
- Robert Puentes, Senior Fellow Brookings Institute
- Gil Quiniones, President and CEO, New York Power Authority
- Jack Quinn, President, Erie Community College
- Scott Rechler, Vice-Chair, Port Authority of New York and New Jersey
- Jonathan F.P. Rose, President, Jonathan Rose Companies
- Lisa Rosenblum, Executive Vice-President for Government and Public Affairs, Cablevision
- John Shinn, USW District 4 Director, United Steelworkers
- Mark Tercek, President and CEO, The Nature Conservancy
- Robert D. Yaro, President, Regional Plan Association (also member of the NY Works Task Force)

NYS Respond:

- Thad Allen, Senior Vice President, Booz Allen; Admiral (US Coast Guard) - Retired (Co-Chair)
- K. Bradley Penuel, Director, Center for Catastrophe Preparedness and Response at New York University (Co-Chair)
- Doug Barton, Director of Planning & Economic Development, Tioga County
- Patricia Bashaw, EMS Coordinator, Essex County
- Bradford Berk, Senior Vice President for Health Sciences & CEO of the University of Rochester Medical Center
- LaRay Brown, Senior Vice President, Corporate Planning, Community Health and Intergovernmental Relations, NYC Health & Hospitals Corporation
- Major General Doug Burnett, Florida National Guard (Ret.)
- James Burns, President, Firemen's Association of the State of New York
- The Reverend Frederick Davie, Executive Vice President, Union Theological Seminary in New York City
- Peter J. Davoren, President and Chief Executive Officer, Turner Construction
- Grant Dillon, President, Global Preparedness and Mitigation
- Eli Feldman, President & CEO, MJHS and Elderplan
- Peter Gudaitis, President, National Disaster Interfaiths Network
- Tony Hannigan, Executive Director, Center for Urban Community Services (CUCS)
- Jerome Hauer, Commissioner, New York State Division of Homeland Security and Emergency Services (Advisory Member)
- Scott Heller, Director of Emergency Management, Albany Medical Center
- Tino Hernandez, President & Chief Executive Officer, Samaritan Village, Inc.
- Bart Johnson, Executive Director, International Association of Chiefs of Police
- Timothy Manning, Deputy Administrator for Protection and National Preparedness, FEMA (Advisory Member)
- Mike McManus, President, New York State Professional Fire Fighters Association
- Thomas Mungeer, President, New York State Troopers Police Benevolent Association
- Chris Renschler, Associate Professor of Geography, University of Buffalo
- Marilyn Saviola, Vice President, Advocacy and the Women's Health Access Program, Independence Care System
- Jennifer Schneider, Professor & Russell C. McCarthy Endowed Chair, Civil Engineering Technology, Environmental Management & Safety Department, Rochester Institute of Technology
- Mark J. Solazzo, Executive Vice President & Chief Operating Officer, North Shore-LIJ Health System
- Harry L. Weed, II, Superintendent of Public Works, Village of Rockville Centre
- Sheena Wright, President, United Way of New York City

NYS Ready:

- Ira Millstein, Senior Partner, Weil, Gotshal & Manges LLP (Co-Chair)
- Irwin Redlener, Director, National Center for Disaster Preparedness at Columbia University (Co-Chair)
- William Acker, Executive Director, NY-BEST
- Scott Amrhein, President, Continuing Care Leadership Coalition
- Robert Atkinson, Director of Policy Research, Columbia Institute for Tele-Information at Columbia University
- Guruduth Banavar, Vice President and Chief Technology Officer, Global Public Sector, IBM
- Donald Capoccia, Managing Principal & Founder, BFC Partners
- Mae Carpenter, Commissioner, Westchester County Department of Senior Programs & Services
- Gerry Cauley, President & CEO, North American Electric Reliability Corporation
- Mary Ann Christopher, President & CEO, Visiting Nurse Service of New York
- Arthur V. Gorman, Jr., Lieutenant Colonel, US Marine Corps (Ret.)
- Patricia A. Hoffman, Assistant Secretary of Electricity Delivery and Energy Reliability, U.S. Department of Energy (Advisory Member)
- William Hooke, Senior Policy Fellow and Director, American Meteorological Society
- John Kemp, President & CEO, The Viscardi Center
- Kit Kennedy, Counsel to the Air & Energy Program, Natural Resources Defense Council
- Steven Levy, Managing Director, Sprague Energy
- Robert Mayer, Vice President - Industry and State Affairs, US Telecom

- Daniel McCartan, Emergency Preparedness Coordinator, Western New York Regional Resource Center & Erie County Medical Center
- John Merklinger, 9-1-1 Coordinator, Monroe County, and President, New York State 9-1-1 Coordinators Association
- Cynthia Morrow, Commissioner of Health, Onondaga County
- Major General Patrick A. Murphy, Adjutant General of New York State (Advisory Member)
- Kyle Olson, Founder, The Olson Group
- Walter Parkes, Chairman, O'Connell Electric Company, Inc.
- Cynthia Rosenzweig, Senior Research Scientist, NASA Goddard Institute for Space Studies at Columbia University
- Howard Schmidt, Former Special Assistant to the President and Cybersecurity Coordinator
- Denise Scott, Managing Director, LISC
- D. Gregory Scott, Senior Vice President, Terminal Operations & Petroleum Distribution, Gulf Oil
- S. Shyam Sunder, Director, Engineering Laboratory, National Institute of Standards and Technology (NIST)
- Major General (Retired) Joseph J. Taluto, Former Adjutant General, New York State
- Anthony Townsend, Associate Research Scientist, Rudin Center for Transportation Policy and Management, New York University
- Russell Unger, Executive Director, Urban Green Building Council
- Susan C. Waltman, Executive Vice President and General Counsel, Greater New York Hospital Association (GNYHA)
- William "Bill" Wilson, President & CEO, Pepsi-Cola Bottling Company of New York
- John E. Zuccotti, Co-Chairman, Brookfield Office Properties

-----  
Jeremy E. Magliaro  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224-0341  
Phone: (518) 402-4957  
Fax: (518) 473-6818

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Connecting  
Date: Wed Dec 12 2012 11:34:50 EST  
Attachments:

---

It can wait until tomorrow. What time can you talk? Thanks.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

---

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Tuesday, December 11, 2012 11:55 PM  
To: Morgan Costello  
Subject: Connecting

Hi Morgan, I would welcome the opportunity to connect. Am on the road all day Wednesday and back in the office on Thursday. If this is time sensitive, I will try to reach you tomorrow and, if not, will call Thursday am. And please don't hesitate to call my mobile at any time - 720-837-6239. Best wishes, Vickie

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Connecting  
Date: Wed Dec 12 2012 12:53:15 EST  
Attachments:

---

10:30 ET works better. Why don't you call me -- I don't think I have your direct number. Thanks.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Wednesday, December 12, 2012 12:03 PM  
To: Morgan Costello  
Subject: RE: Connecting

1030 or 230 ET?

From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Wednesday, December 12, 2012 9:35 AM  
To: Vickie Patton  
Subject: RE: Connecting

It can wait until tomorrow. What time can you talk? Thanks.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224

(518) 473-5843  
morgan.costello@ag.ny.gov

---

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Tuesday, December 11, 2012 11:55 PM  
To: Morgan Costello  
Subject: Connecting

Hi Morgan, I would welcome the opportunity to connect. Am on the road all day Wednesday and back in the office on Thursday. If this is time sensitive, I will try to reach you tomorrow and, if not, will call Thursday am. And please don't hesitate to call my mobile at any time – 720-837-6239. Best wishes, Vickie

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Document ID: 0.7.691.439210

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: NSPS for Power Plants Scheduling  
Date: Fri Jan 11 2013 09:02:02 EST  
Attachments:

---

Document ID: 0.7.691.439219

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To:  
Cc:  
Bcc:  
Subject: T/c w/ EDF  
Date: Mon Jan 14 2013 07:57:37 EST  
Attachments:

---

StartTime: 01/17/2013 12:00:00 PM GMT  
EndTime: 01/17/2013 12:30:00 PM GMT  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Geertsma, Meleah <mgeertsma@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: O&G complaint call  
Date: Thu Jan 17 2013 10:29:28 EST  
Attachments:

---

Document ID: 0.7.691.439493

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Megan Ceronsky <mceronsky@edf.org>  
Cc:  
Bcc:  
Subject: Accepted: NSPS check in  
Date: Thu Feb 07 2013 07:55:03 EST  
Attachments:

---

From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Lisa M. Burianek </o=lawnet/ou=first administrative group/cn=recipients/cn=lisaburianek>; Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>  
Cc: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Bcc:  
Subject: HVHF  
Date: Tue Feb 12 2013 08:43:43 EST  
Attachments:

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### 3. NEW YORK:

Fracking draft deadline could force Cuomo's hand this week

Colin Sullivan, E&E reporter

Published: Tuesday, February 12, 2013

NEW YORK -- Interests for and against hydraulic fracturing have all their attention trained on Albany, where a regulatory deadline of tomorrow may force Gov. Andrew Cuomo (D) to signal which way he's going to go on permitting the controversial drilling technique.

To drill or not to drill for natural gas through the process commonly known as high-volume, horizontal "fracking" is still the question facing the Democrat as his administration approaches a bureaucratic deadline that may force his hand on a review process that has lasted four years and counting.

Tomorrow, the Department of Environmental Conservation under Cuomo has to finish draft regulations if it is to pursue final regulations by the end of the month or restart the process. Many are expecting news anytime, though few were prepared to predict Cuomo's next move with certainty.

Tom Shepstone, of the pro-fracking Northeast Marcellus Initiative, said it could go either way, but he suspects the governor will support development. He cited the poor state of the economy in the upstate swath called the Southern Tier where drilling would take place, as well as the tone of the opposition, describing it as hindered by "hysterical ... attention-seeking celebrities and environmental special interests."

"The facts just aren't with them, and I don't think the governor will, in the end, sell out the Southern Tier for those kinds of arguments," he said.

Shepstone added: "The overall signs are that it's going to be approved. If I had to pick one sign that is most encouraging, it's that the people on the other side are acting depressed."

Thomas West, an attorney representing the industry side in state fracking cases, called the decision "one of the best-kept secrets in Albany." He said anyone's guess is as good as his.

"We will know when the Environmental Notice Bulletin is published on Wednesday," he said, adding that he has "no predictions on what will happen" and noting that the administration could still wiggle free, allow the draft regulations to lapse and start over.

"The DEC can issue the final [draft environmental impact statement] at any time and start issuing permits after it issues formal findings, which require a minimum of 10 days following the issuance of the final [draft] before the findings may be issued," he said.

Investigation adds new wrinkle

If Cuomo goes that direction and invokes another delay, he may leave himself open to charges of regulatory confusion and excess bureaucracy. Still, environmental groups all along have maintained that the process should return to square one, for an independent health review, and a few of the more aggressive organizations have added another wrinkle to the action by calling for an investigation of two top Cuomo administration aides.

The groups Public Citizen, Food and Water Watch, Frack Action, United for Action, Catskill Citizens for Safe Energy, and Capital District Against Fracking held a news conference yesterday to demand Albany County District Attorney David Soares investigate the aides.

The groups charged that Lawrence Schwartz, Cuomo's right-hand man, and Robert Hallman, deputy secretary for energy and the environment, have a conflict of interest in favor of industry. The gist of their case is that the DEC at the urging of the Cuomo aides worked closely with industry in a bid to ultimately end the state's moratorium against fracking (EnergyWire, Sept. 20, 2012).

Karen Moreau, executive director of the New York State Petroleum Council, sees the news conference as a sign of desperation.

"Their protests have gone from 'regulate fracking' to 'ban fracking,'" Moreau wrote in an email. "They are now calling for the Albany County District Attorney to investigate two of the governor's key advisers. This latest personal attack leads me to believe they are getting desperate."

Kate Sinding, an attorney at the Natural Resources Defense Council, wouldn't touch the question of desperation or the call for an investigation. She characterized her own view as "cautiously optimistic that the governor and DEC have heard the calls of New Yorkers not to finalize a fracking program while there are still so many outstanding questions about the health risks and while the health review remains shrouded in secrecy."

"We hope that this week will provide us with a restatement of the governor's long-standing commitment to conduct a fully deliberative and transparent process," she said.

Ready for the next round

Off the record, many sources were expressing confusion at what one called a "convoluted" process that could make for a surprise in either direction. Others said environmental groups have long since been cut out of the political process in Albany.

Katherine Nadeau, director of water and natural resources programs at Environmental Advocates of New York, said the governor and his agencies "have remained tight-lipped about how they want to proceed on fracking."

"What we know is that Gov. Cuomo will have a huge problem on his hands if he intends to permit fracking in New York," Nadeau said. "Any attempt to rush through the 204,000 comments recently submitted on draft regulations or to steamroll a public health impacts review will put the administration's credibility at risk, to say nothing of the risks to our New Yorkers, our air and our water if the governor moves before the science is in."

If the governor approves permits, Nadeau, Sinding and others have made no bones about threatening an all-out legal assault.

The office of the Albany County district attorney did not return a call seeking a comment on the investigation request.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
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Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Strategy on next litigation moves re: power plants and oil/gas  
Date: Tue Mar 19 2013 12:31:56 EDT  
Attachments:

---

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Megan Ceronsky <mceronsky@edf.org>  
Cc:  
Bcc:  
Subject: RE: mail code  
Date: Tue Mar 26 2013 14:52:54 EDT  
Attachments:

---

Thanks.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
morgan.costello@ag.ny.gov

From: Megan Ceronsky [mailto:mceronsky@edf.org]  
Sent: Tuesday, March 26, 2013 2:52 PM  
To: Morgan Costello  
Subject: mail code

USEPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W.  
Mail Code: 1101A  
Washington, DC 20460

Megan Ceronsky

Attorney

Environmental Defense Fund

(303) 447-7224 (P)

(303) 440-8052 (F)

1875 Connecticut Avenue NW

Suite 600

Washington, D.C. 20009

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Robert Schuwerk </o=lawnet/ou=exchange  
administrative group  
(fydibohf23spdl)/cn=recipients/cn=rschuwer>  
Cc:  
Bcc:  
Subject: Ceres  
Date: Thu Mar 28 2013 08:06:41 EDT  
Attachments:

---

Rob: Got your message. Our primary contact person at Ceres is Jim Coburn. Here is a link to their website with info about him: <http://www.ceres.org/about-us/who-we-are/ceres-staff/jim-coburn-jd>. I'm happy to participate in a call with him and make introductions. Let me know.

Morgan A. Costello  
Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 473-5843  
[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)

Document ID: 0.7.691.441920

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: T/C w/ Ceres  
Date: Fri Mar 29 2013 08:34:57 EDT  
Attachments:

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StartTime: Mon Apr 01 12:00:00 Eastern Daylight Time 2013  
EndTime: Mon Apr 01 13:00:00 Eastern Daylight Time 2013  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Power plant notice letter call  
Date: Wed Apr 10 2013 08:06:25 EDT  
Attachments:

---

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Accepted: Methane emissions strategy call with Environmental Defense Fund  
Date: Thu Apr 18 2013 10:49:22 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Isaac Cheng </o=lawnet/ou=first administrative group/cn=recipients/cn=isaaccheng>; Robert Schuwerk </o=lawnet/ou=exchange administrative group (fydibohf23spdl)/cn=recipients/cn=rschuwer>; Monica Wagner </o=lawnet/ou=first administrative group/cn=recipients/cn=monicawagner>  
Cc: Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>  
Bcc:  
Subject: Disclosures re Fracking & Water Usage  
Date: Thu May 02 2013 08:54:12 EDT  
Attachments:

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#### HYDRAULIC FRACTURING:

Water-stressed areas home to nearly half of fracked wells -- investors' report

Debra Kahn, E&E reporter

Published: Thursday, May 2, 2013

SAN FRANCISCO -- Nearly half of "fracked" shale gas and oil wells in the United States are in areas where water is already in short supply, according to a group advocating for sustainable business practices.

In a report released today aimed at oil and gas investors, Ceres urges companies to disclose their strategies for obtaining water as they continue to access shale gas and oil through hydraulic fracturing, which uses millions of gallons of water per well.

Researchers from Ceres overlaid a map of the country's water-stressed areas with data from 25,450 wells compiled by industry website FracFocus.org. They found about 47 percent of the wells are in areas classified by the World Resources Institute as having "high" or "extremely high" water stress, meaning more than 80 percent of the annual available water is already being withdrawn by municipal, industrial and agricultural users.

In some states, the concentration of fracking activity in severely water-stressed areas is even higher, the report says. In Colorado, for example, 97 percent of wells are being developed under those conditions.

Overall, Ceres found that 65.8 billion gallons of water was used for fracking between January 2011 and September 2012 -- the equivalent of a year's water supply for 2.5 million Americans.

"Although water use for hydraulic fracturing is often less than 1 or 2 percent of a state's overall use, it can be much higher at the local level, increasing competition for scarce supplies," the report says, noting that fracking accounted for 29 percent of total water use in Johnson County, Texas, in 2011.

"Given projected sharp increases in production in the coming years and the intense nature of local water demands, competition and conflicts over water should be a growing concern for companies, policymakers and investors," it says.

Report co-author Monika Freyman, manager of Ceres' water program, said that companies should disclose to investors exactly how they obtain their water and how they plan to in the future, in order to avoid hurting local municipalities or farmers. "Companies can mitigate a lot of water-sourcing problems, but they have to be more proactive," she said. "Are they engaging with these communities, or are they just outbidding" them for water rights?

Another recent report on fracking and water use criticized FracFocus and its water data for being voluntary and industry-run. That study, by the Western Organization of Resource Councils, said the

amount of water being used was unclear and encouraged states to do their own research and analysis (EnergyWire, April 26).

Freyman conceded the database was imperfect. While yet another study estimated that oil and gas development in Texas used 26 billion gallons of water in 2011, the Ceres study found similar numbers over a longer period of time, supporting the idea that FracFocus underreports water use.

"However, the fact that it does indeed capture tens of thousands of data points on fracking activity across the U.S. is pretty compelling and certainly makes the data set worthy of analysis," she said.

An industry group dismissed the report, citing Ceres' vested interested in the stakeholders.

"Ceres, as a coalition of environmental groups, unions and 'sustainable' investors groups, has an obvious bias, as does their report," said Kathleen Sgamma, vice president of government and public affairs for the Denver-based Western Energy Alliance, which represents more than 400 oil and gas developers.

Further, the study should have compared oil and gas's water use to that of other energy sources, as well as other users of water, she said, citing a Colorado state government analysis that shows fracking uses 0.08 percent of the state's water.

"Compare that to 85.5 percent for agriculture and 7.4 percent for municipal and industrial uses," she said. "From that low water use, the oil and natural gas industry generates \$31 billion in economic impact to the state. That's a fantastic balance between wise resource use and economics."

The industry is also working on reducing its water use, she said.

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Geertsma, Meleah <mgeertsma@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Debrief on O&G meeting  
Date: Tue May 07 2013 08:02:57 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Cc:  
Bcc:  
Subject: CA  
Date: Wed May 08 2013 09:47:07 EDT  
Attachments:

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Not sure if you saw this:

States want to meet with EPA on existing power plant rules -- Calif. air chief  
Debra Kahn and Jean Chemnick, E&E reporters  
Published: Wednesday, May 8, 2013

The chairwoman of the California Air Resources Board said yesterday that air agency employees from a group of like-minded states intend to meet this summer with U.S. EPA personnel to explore ways to craft and implement greenhouse gas rules for existing power plants.

"We have to wait until EPA has an administrator, and then try to formulate some common views about how this 111(d) process might work, but we're not there yet," said Mary Nichols, referring to the section of the Clean Air Act that provides for performance standards for existing sources.

Nichols' comments, in an interview with E&E Daily following a climate conference in San Francisco, come as EPA officials continue to hold that they have no plans to regulate greenhouse gases from today's power fleet. The agency committed to do so under a settlement with state and environmental litigants in late 2010, but officials have refused to discuss existing source standards ever since. EPA has proposed a rule for future power plants but has missed a deadline to finalize that rule.

In a written statement to Sen. David Vitter (R-La.) released this week, EPA administrator nominee Gina McCarthy modified the "no plans" line somewhat (E&ENews PM, May 6).

The current assistant administrator for air and radiation said EPA "is not currently developing any existing source [greenhouse gas] regulations."

"In the event that EPA does undertake action to address [greenhouse gas] emissions from existing power plants, the agency would ensure, as it always seeks to do, ample opportunity for States, the public and stakeholders to offer meaningful input on potential approaches," she added.

Despite EPA's statements, environmentalists say they are not overly worried that the agency might renege on its commitment to promulgate an existing power plant rule.

"I don't think at this point that that is our primary concern," said John Coequet of the Sierra Club in a recent interview. "Our primary concern is getting Gina confirmed and then working with EPA on the agenda once she is confirmed."

Reached late yesterday by email about Nichols' comments, Coequet noted that California has had its own concerns about how 111(d) might interact with its state climate change policies.

A California official said that a date for the talks hadn't been set yet but that they would probably take place in Washington, D.C., and include states that are members of the North America 2050 group, a coalition of 16 states and four Canadian provinces committed to low-carbon policies.

In addition to California, the meeting could include states that are members of the Northeast's Regional Greenhouse Gas Initiative and a handful of Western and Midwestern states that have supported similar policies.

The official said the goal of the meeting would be to demonstrate ways that states could comply with a federal rule for stationary sources.

"We've got a window in which to be constructive and show that EPA can put forth a proposal respecting states' existing policies, resources and politics," said the California Air Resources Board's assistant executive officer, Brian Turner.

Turner said the states might commission a report setting out ways that EPA could tailor its standards to allow for a range of policies to show compliance, from California's A.B. 32 to policies like Xcel Energy Inc.'s "integrated resource plan" in Colorado and Minnesota, which covers the utility's entire fleet rather than individual facilities. States with aggressive efficiency and renewables programs could also meet the standard, he said.

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Longstreth, Ben <blongstreth@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Call on 111(b) suit  
Date: Thu May 30 2013 08:16:16 EDT  
Attachments:

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From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Mauricio Roma </o=lawnet/ou=first administrative group/cn=recipients/cn=mauricioroma>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>; Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>; Rob Sliwinski <rgsliwin@gw.dec.state.ny.us>; Isaac Cheng </o=lawnet/ou=first administrative group/cn=recipients/cn=isaaccheng>  
Cc:  
Bcc:  
Subject: Methane from Pipelines  
Date: Wed Jun 05 2013 09:51:01 EDT  
Attachments:

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IG to assess EPA's efforts on methane from pipelines

Ellen M. Gilmer, E&E reporter

Published: Wednesday, June 5, 2013

Story Tools sponsored by America's Natural Gas Alliance

U.S. EPA's inspector general is launching a probe into whether the agency is doing enough to manage methane leaks from natural gas pipelines.

The IG's office will look at what steps EPA has taken to reduce the levels of methane emitted from gas pipelines that sprawl across the country. Over the next several months, the IG team will collect documents and data from the agency and interview EPA officials, along with researchers, industry representatives and environmental groups, said Assistant Inspector General Carolyn Copper.

Details for the evaluation, which was announced in the office's fiscal 2013 annual plan, were outlined in a memo this week to air chief Gina McCarthy and acting Assistant Administrator Lek Kadeli of the Office of Research and Development.

A spokesman for the IG's office said a timeline has not been set, and it will depend on the review's "scope and complexity." Asked what prompted the evaluation, he said only that it was "self-initiated" during the office's annual planning process.

The evaluation comes as climate hawks remain ever wary of the natural gas system's effect on global warming. Though natural gas burns cleaner than coal, its main component, methane, leaks from pipelines and other infrastructure to become a short-lived but powerful greenhouse gas.

Some estimates put methane leakage so high that it would cancel out the environmental benefits of natural gas use, but EPA's most recent rough estimate is a more manageable 1.54 percent. A recent study from the World Resources Institute suggests that leakage must be below 1 percent to improve on coal's climate impact (EnergyWire, April 5).

New York-based Environmental Defense Fund and the University of Texas, Austin, are working with several natural gas companies to take measurements and develop a better understanding of actual leakage rates.

EPA indirectly addressed methane leakage last year when it set new rules for emissions of volatile organic compounds, which are released alongside methane. But those requirements apply to the production phase of the natural gas life cycle. Pipeline venting, meanwhile, accounts for about 8 percent of the onshore oil and gas industry's methane emissions, EPA says.

The IG's office is planning a separate evaluation of the agency's efforts on controlling emissions from natural gas flaring from well sites and refineries.

Morgan A. Costello

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(518) 473-5843  
morgan.costello@ag.ny.gov

From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Rob Sliwinski  
<rgsliwin@gw.dec.state.ny.us>  
Cc:  
Bcc:  
Subject: FW: Methane from Pipelines  
Date: Wed Jun 05 2013 09:52:44 EDT  
Attachments:

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Sent this to the wrong Rob;)

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From: Morgan Costello  
Sent: Wednesday, June 05, 2013 9:51 AM  
To: Mauricio Roma; Michael J. Myers; Alan Belenz; Jeremy Magliaro; 'Rob Sliwinski'; Isaac Cheng  
Subject: Methane from Pipelines

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Ellen M. Gilmer, E&E reporter

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[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)

From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Robert Schuwerk </o=lawnet/ou=exchange administrative group (fydibohf23spdl)/cn=recipients/cn=rschuwer>  
Cc:  
Bcc:  
Subject: FW: Methane from Pipelines  
Date: Wed Jun 05 2013 09:53:41 EDT  
Attachments:

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Sent this to the wrong Rob;)

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New York State Office of the Attorney General  
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The Capitol  
Albany, NY 12224  
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morgan.costello@ag.ny.gov

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From: Morgan Costello  
Sent: Wednesday, June 05, 2013 9:51 AM  
To: Mauricio Roma; Michael J. Myers; Alan Belenzs; Jeremy Magliaro; 'Rob Sliwinski'; Isaac Cheng  
Subject: Methane from Pipelines

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From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: mojocostello@gmail.com  
<mojocostello@gmail.com>  
Cc:  
Bcc:  
Subject: FW: 111d Lawsuit Call Tomorrow at 1:30pm EST  
Date: Thu Jun 06 2013 15:14:46 EDT  
Attachments:

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From: Henderson, Kelly [mailto:khenderson@nrdc.org]  
Sent: Thursday, June 06, 2013 10:50 AM  
To: Michael J. Myers; Morgan Costello; 'Joanne.Spalding@sierraclub.org'; 'Megan Ceronsky  
(mceronsky@edf.org)'; Vickie Patton; Longstreth, Ben  
Cc: Doniger, David  
Subject: 111d Lawsuit Call Tomorrow at 1:30pm EST

Good Morning All,

I just sent around an invite for a 111d lawsuit call tomorrow (Friday) at 1:30pm EST. The call in is: 212-727-4600, code: 0193688#.

Best,

Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program

Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005

202. 289. 2401 | khenderson@nrdc.org | www.nrdc.org

Blog: <http://switchboard.nrdc.org/blogs/khenderson/>

Document ID: 0.7.691.446097

From: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
To: Henderson, Kelly <khenderson@nrdc.org>  
Cc:  
Bcc:  
Subject: Accepted: Power Plant Complaint Discussion  
Date: Thu Jun 13 2013 08:44:20 EDT  
Attachments:

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Document ID: 0.7.691.153108

From: Mordick, Briana <bmordick@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Oil and Gas NSPS/Meeting Reschedule  
Date: Fri Jul 19 2013 12:45:07 EDT  
Attachments:

---

I will be out of the office on Friday, July 19 and will respond to email when I return.

From: Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>  
To: safe.emissions@gmail.com  
<safe.emissions@gmail.com>; jatrav@yahoo.com  
<jatrav@yahoo.com>; SFALZON@mac.com <sfalzon@mac.com>;  
roger.downs@sierraclub.org <roger.downs@sierraclub.org>  
Cc:  
Bcc:  
Subject: 12 pm Conf Call Instructions  
Date: Mon Jul 22 2013 17:46:58 EDT  
Attachments:

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Elyse, Susan, Jim, Roger -

Thanks for making time available tomorrow, July 23 at 12 pm (noon), for a brief conference call. The dial-in is listed below.

Also, please confirm that you've received this.

Thanks,  
Jeremy

July 23, 2013 Conference Call @ 12 noon  
Dial-in Number: (866) 394-2346  
Conference Access code: 1551310317

---

Jeremy E. Magliaro | Environmental Policy Analyst  
New York State Office of Attorney General  
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Jeremy.Magliaro@ag.ny.gov / www.ag.ny.gov

From: leslie.couvillion.yale@gmail.com  
<leslie.couvillion.yale@gmail.com> on behalf of Leslie  
Couvillion <leslie.couvillion@yale.edu>  
To: Robert Schuwerk </o=lawnet/ou=exchange  
administrative group  
(fydibohf23spdl)/cn=recipients/cn=rschuwer>  
Cc: Eisenson, Matthew  
<matthew.eisenson@yale.edu>  
Bcc:  
Subject: Yale Environmental Protection Clinic - CALL FOR PROJECT PROPOSALS (Fall 2013)  
Date: Fri Jul 26 2013 13:00:50 EDT  
Attachments: Yale EPC Fall 2013 Project Submissions Memo and Instructions.pdf  
Yale EPC Project Proposal Template Fall 2013.pdf

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Dear Robert:

I am writing to let you that the Yale Environmental Protection Clinic is soliciting project proposals for the Fall 2013 semester. Matt Eisenson (cc'd) and I are the teaching assistants for this clinic, and we are coordinating project submissions this semester.

If you or any of your colleagues at the NY Attorney General, Environmental Protection Bureau, is interested in submitting a project for students at Yale Law School or the Yale School of Forestry & Environmental Studies to work on, please see the memo I am attaching and pasting below from clinical teaching team: Allison Clements and Lisa Suatoni, of NRDC, and Josh Galperin, Associate Director of the Yale Center for Environmental Law and Policy. The memo provides information on the clinic, as well as instructions on submitting a project proposal.

To submit a proposal, please fill out the attached Project Proposal Template Form and email it to me (leslie.couvillion@yale.edu) and Matt (matthew.eisenson@yale.edu) by August 23rd, 2013. Essentially, we are seeking a 1-2 page write-up of the project with a proposed work plan and expected deliverables. If you're submitting multiple projects, you can put them together in one document. Please feel free to contact me with any questions about the clinic. I look forward to hearing from you!

Best,

Leslie Couvillion

Teaching Fellow, Environmental Protection Clinic

J.D./M.E.M. Candidate, 2015  
leslie.couvillion@yale.edu  
504-410-5505

#### MEMORANDUM

To: Potential Project Sponsors for the Yale Environmental Protection Clinic  
From: Allison Clements(NRDC Senior Attorney, Energy & Transportation Program), Lisa Suatoni (NRDC Senior Scientist, Oceans Program) and Joshua Galperin (Associate Director, Yale Center for Environmental Law and Policy)

Date: July 2013

Re: Project Proposals for the Yale Environmental Protection Clinic, Fall 2013 Semester

The Yale Environmental Protection Clinic is a collaboration between Yale Law School and the Yale School of Forestry & Environmental Studies. The clinic is taught by practitioners from the field in coordination with Yale faculty and staff. This year, Josh Galperin, the Associate Director of the Yale Center for Environmental Law and Policy will continue to co-teach the clinic alongside Allison Clements and Lisa Suatoni of the Natural Resource Defense Council. Allison and Lisa are taking the reins from NRDC colleague Kit Kennedy, who directed the clinic for the last few years. Leslie Couvillion and Matt Eisenson are joining the team this year as teaching assistants.

The Fall 2013 Semester for the Yale Environmental Protection Clinic begins in September and we are now soliciting project proposals. This memo provides a description of the clinic, as well as instructions on submitting proposals. We are also attaching a template form to use for project submissions. If you are interested in having the students work on a project please let us know as soon as possible! The due date for project proposals is Friday, August 23rd.

These proposals should be approximately 1-2 pages, and should include background information, a tentative work plan, and a description of the expected deliverables. Please use the template form that is attached. (We know it's the summer vacation season, so if you have a project idea but need a little more time to put it together, let us know, and we can work it out).

#### I. Background on the Environmental Protection Clinic

Clinic students come from Yale Law School and the Yale School of Forestry & Environmental Studies, with occasional students from other Yale graduate schools. We teach a weekly seminar on environmental advocacy and skills, and the Clinic's students also work in interdisciplinary teams on major environmental and clean energy projects for environmental groups, the private sector, or government agencies. Generally, 2-3 students will work on each project, each spending roughly 10-12 hours per week on the project over the semester (which is about 12 weeks). Clinic students can work on a wide array of projects, including but not limited to: researching and writing legal/policy/science reports on various topics; drafting appellate briefs or amicus briefs; developing policy recommendations and writing white papers; communications and outreach; or undertaking comparative international law projects and legislative drafting projects.

Recent projects have included:

- preparing a legal, technical and policy paper on fracking in China and how best to regulate it and participating in a workshop in Beijing to present the paper;
- drafting a white paper and providing recommendations to a state agency on how to move forward with regional renewable energy procurement;
- drafting several appellate briefs in environmental challenges under various statutes;
- assisting with the preparation a petition to a federal agency on state climate adaptation claims;
- preparing for and participating in the Conference of the Parties to the United Nations Framework Convention on Climate Change discussions in on behalf of a group representing the Pacific Island Nations;
- drafting a report for a Greek environmental organization with recommendations on EU and Greek provisions of law that might be used to require the raising of a recent shipwreck in the Aegean that is leaking oil and to pay for remediation of the damage caused by the wreck.
- drafting a petition to list the Arctic Ocean as a World Heritage Site
- researching and drafting public outreach material for a legislative campaign organized by a coalition of national environmental NGOs

– drafting a whitepaper on the science, economics, and legal issues surrounding a forthcoming administrative rulemaking.

Please note that all aspects of each project are kept entirely confidential both by the students and the teaching team unless the sponsoring organization wishes to make the fact of the project or the results of the project public.

## II. Requirements for Clinic Project Sponsors

Project sponsors are responsible for supervising and providing regular guidance and feedback to the clinic students working on their project. This usually entails the following steps. First, on Tuesday, September 17th from 12:00 – 2:00 pm ET, there will be an introductory call with each project team. These calls will be approximately 20 minutes and will include the sponsors (you), a member of teaching team, the students and teaching assistants Leslie Couvillion and Matt Eisenson. Please hold this time open on your calendar.

Second, project sponsors will typically have a brief call with the clinic student team every two weeks for the rest of the term. You may also want to organize an in-person meeting with your clinic students at the start of the term, if geography allows. The Clinic has a modest travel budget to assist with meetings.

Third, the project sponsors, teaching team, student team and teaching assistant will have another joint call mid-way through the term to check on the project's progress.

Finally, at the end of the term, the project sponsors, teaching team, student team and teaching assistant will have a final call to wrap up the project and review how the project went and its results. We also ask that you provide a 1-2 page memo to the students at the close of the term providing feedback to the students on their work and the project results.

The clinic has a small travel budget so that the students can travel to meet with you, do site visits or fieldwork, and attend outside meetings if needed to advance the project. Otherwise students will work remotely from New Haven.

## III. Follow-Up Projects

If a student team worked on a project for you last term we encourage you to propose a follow-up project. In some cases the same students may work on the next phase of the project, or it may be different students or a mix.

## IV. If Your Project Is Not Selected by a Clinic Team This Semester. . .

The clinic always has more proposed projects than we do student teams, so we cannot guarantee that your project will be selected. This is, unfortunately, a function of the small size of the clinic. If your project is not selected this term, we will try again next semester.

## V. For More Information

If you're interested, you can learn more about the Environmental Protection Clinic. Please contact any of us or visit the Clinic website at: <http://envirocenter.yale.edu/programs/environmental-protection-clinic>.

Please feel free to forward this memo to any other colleagues within or outside of your organization who may be interested in getting the Clinic's assistance on a project.

Best,

Allison Clements  
aclements@nrdc.org

Lisa Suatoni  
lsuatoni@nrdc.org

Joshua Galperin  
joshua.galperin@yale.edu  
203-432-3123

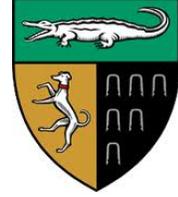
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Yale Law School  
Yale School of Forestry and Environmental Studies | J.D./M.E.M. Candidate, 2015  
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Owner: leslie.couvillion.yale@gmail.com <leslie.couvillion.yale@gmail.com> on behalf of  
Leslie Couvillion <leslie.couvillion@yale.edu>  
Filename: Yale EPC Fall 2013 Project Submissions Memo and Instructions.pdf  
Last Modified: Fri Jul 26 13:00:50 EDT 2013

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## MEMORANDUM

**To:** Potential Project Sponsors for the Yale Environmental Protection Clinic

**From:** Allison Clements (NRDC Senior Attorney, Energy & Transportation Program), Lisa Suatoni (NRDC Senior Scientist, Oceans Program) and Joshua Galperin (Associate Director, Yale Center for Environmental Law and Policy)

**Date:** July 2013

**Re:** Project Proposals for the Yale Environmental Protection Clinic, Fall 2013 Semester

The Yale Environmental Protection Clinic is a collaboration between Yale Law School and the Yale School of Forestry & Environmental Studies. The clinic is taught by practitioners from the field in coordination with Yale faculty and staff. This year, Josh Galperin, the Associate Director of the Yale Center for Environmental Law and Policy will continue to co-teach the clinic alongside Allison Clements and Lisa Suatoni of the Natural Resource Defense Council. Allison and Lisa are taking the reins from NRDC colleague Kit Kennedy, who directed the clinic for the last few years. Leslie Couvillion and Matt Eisenson are joining the team this year as teaching assistants.

The Fall 2013 Semester for the Yale Environmental Protection Clinic begins in September and we are now soliciting project proposals. This memo provides a description of the clinic, as well as instructions on submitting proposals. We are also attaching a template form to use for project submissions.

If you are interested in having the students work on a project please let us know as soon as possible! **The due date for project proposals is Friday, August 23<sup>rd</sup>.** These proposals should be approximately 1-2 pages, and should include background information, a tentative work plan, and a description of the expected deliverables. Please use the template form that is attached. (We know it's the summer vacation season, so if you have a project idea but need a little more time to put it together, let us know, and we can work it out).

### I. Background on the Environmental Protection Clinic

Clinic students come from Yale Law School and the Yale School of Forestry & Environmental Studies, with occasional students from other Yale graduate schools. We teach a weekly seminar on environmental advocacy and skills, and the Clinic's students

also work in interdisciplinary teams on major environmental and clean energy projects for environmental groups, the private sector, or government agencies. Generally, 2-3 students will work on each project, each spending roughly 10-12 hours per week on the project over the semester (which is about 12 weeks).

Clinic students can work on a wide array of projects, including but not limited to: researching and writing legal/policy/science reports on various topics; drafting appellate briefs or amicus briefs; developing policy recommendations and writing white papers; communications and outreach; or undertaking comparative international law projects and legislative drafting projects.

Recent projects have included:

- preparing a legal, technical and policy paper on fracking in China and how best to regulate it and participating in a workshop in Beijing to present the paper;
- drafting a white paper and providing recommendations to a state agency on how to move forward with regional renewable energy procurement;
- drafting several appellate briefs in environmental challenges under various statutes;
- assisting with the preparation a petition to a federal agency on state climate adaptation claims;
- preparing for and participating in the Conference of the Parties to the United Nations Framework Convention on Climate Change discussions in on behalf of a group representing the Pacific Island Nations;
- drafting a report for a Greek environmental organization with recommendations on EU and Greek provisions of law that might be used to require the raising of a recent shipwreck in the Aegean that is leaking oil and to pay for remediation of the damage caused by the wreck.
- drafting a petition to list the Arctic Ocean as a World Heritage Site
- researching and drafting public outreach material for a legislative campaign organized by a coalition of national environmental NGOs
- drafting a whitepaper on the science, economics, and legal issues surrounding a forthcoming administrative rulemaking.

Please note that all aspects of each project are kept entirely confidential both by the students and the teaching team unless the sponsoring organization wishes to make the fact of the project or the results of the project public.

## II. Requirements for Clinic Project Sponsors

Project sponsors are responsible for supervising and providing regular guidance and feedback to the clinic students working on their project. This usually entails the following steps.

First, on Tuesday, September 17th from 12:00 – 2:00 pm ET, there will be an introductory call with each project team. These calls will be approximately 20 minutes and will include the sponsors (you), a member of teaching team, the students and teaching assistants Leslie Couvillion and Matt Eisenson. Please hold this time open on your calendar.

Second, project sponsors will typically have a brief call with the clinic student team every two weeks for the rest of the term. You may also want to organize an in-person meeting with your clinic students at the start of the term, if geography allows. The Clinic has a modest travel budget to assist with meetings.

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<http://envirocenter.yale.edu/programs/environmental-protection-clinic>.

Please feel free to forward this memo to any other colleagues within or outside of your organization who may be interested in getting the Clinic's assistance on a project.

Best,

Allison Clements

[aclements@nrdc.org](mailto:aclements@nrdc.org)

Lisa Suatoni

[lsuatoni@nrdc.org](mailto:lsuatoni@nrdc.org)

Joshua Galperin

[joshua.galperin@yale.edu](mailto:joshua.galperin@yale.edu)

203-432-3123

Document ID: 0.7.691.440732-000002

Owner: leslie.couvillion.yale@gmail.com <leslie.couvillion.yale@gmail.com> on behalf of  
Leslie Couvillion <leslie.couvillion@yale.edu>  
Filename: Yale EPC Project Proposal Template Fall 2013.pdf  
Last Modified: Fri Jul 26 13:00:50 EDT 2013

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**Yale Environmental Protection Clinic Project Proposal Form  
for Fall Term 2013**

**Please fill out this form and return it to Leslie Couvillion ([leslie.couvillion@yale.edu](mailto:leslie.couvillion@yale.edu)) and Matt Eisenson ([matthew.eisenson@yale.edu](mailto:matthew.eisenson@yale.edu)) by Friday, August 23. Proposals are generally 1-2 pages in length.**

**Project Name:**

**Organization Name:**

**Supervisor Name(s) and Contact Information:**

[Provide the names, titles and contact info for the person who will supervise the project.]

**Brief Description of Organization:**

[This should be brief: no more than a paragraph. Also provide a link to your organization's website, if you have one.]

**Project Description:**

[Describe the specific tasks you seek the clinic's assistance with. Describe the end goals and objectives of the project, as well as why the project is important from an environmental/clean energy perspective and how it fits into your organizations' larger goals. This section should articulate the specific legal/policy/science questions that students will research. Please be as specific and concrete as possible.

Also describe any relevant background for the project, including its origins and/or the impetus for the project. Briefly describe any work already completed by the organization to advance the project.]

**Expected Work-Product and Deliverables:**

[Describe the type of work product (e.g., legal memo, legal brief, policy paper, database, etc.) that you expect students to produce. Please estimate the desired scope and length of the deliverables. The clinic's students work in teams, with 2-3 students working on each project 10-12hrs/week for the term (which is about 12 weeks), so the work product should be of a scope that can both absorb the energy and skills of a team of this size and can be feasibly completed in this amount of time.]

**Timetable and Deadlines:**

[If applicable, please propose a timetable for when any specific tasks should be completed. Make sure to include any known deadlines, as well as at least a tentative sense of when specific the

above-mentioned deliverables should be completed. This timeline may be tentative and provide a range of dates. Introductory projects calls will likely take place on Tuesday, September 17<sup>th</sup> at some point between 12:00 and 2:00 pm, so please hold that time and all final work-product will be completed by the end of December.]

**Useful Skills and Experience:**

[Describe any special skill sets or experience that you think would be an asset for the project team (e.g., expertise or prior experience in a particular area, fluency in another language, specialized IT skills etc.) Both Yale Law School students and Yale School of Forestry and Environmental Studies students enroll in the clinic, as well as occasional students from other Yale graduate schools, and students will thus come from a variety of backgrounds.]

**Skills/Experience Gained:**

[Describe what kinds of skills or experience students can expect to take away from the project. Please highlight why you feel this project is an interesting and valuable learning opportunity for students.]

From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Oil and Gas NSPS/Meeting Reschedule  
Date: Thu Aug 08 2013 07:25:24 EDT  
Attachments:

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Hi, I will be out of the office until July 1, 2013. I should have periodic access to email. - Ben

Document ID: 0.7.691.157839

From: Doniger, David <ddoniger@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Oil and Gas NSPS/Meeting Reschedule  
Date: Thu Aug 08 2013 07:25:25 EDT  
Attachments:

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I will be away from August 5 until August 19. I will be checking email about once a day. For urgent matters, you can call my cell, 202 321-3435.

From: Henderson, Kelly <khenderson@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Oil and Gas NSPS/Meeting Reschedule  
Date: Thu Aug 08 2013 07:25:26 EDT  
Attachments:

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I am out of the office Wednesday August 7 through Thursday August 15 and am not checking email. I will return your email on Friday August 16. If you need immediate assistance, please contact Mona Avalos (mavalos@nrdc.org).

From: Vickie Patton <vpatton@edf.org>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: Setting the Record Straight: EPA has Ample Authority to Protect Us from Carbon Pollution  
Date: Fri Sep 20 2013 11:13:41 EDT  
Attachments:

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## Setting the Record Straight: EPA has Ample Authority to Protect Us from Carbon Pollution

Even though they account for 40 percent of U.S. emissions of harmful carbon pollution, fossil fuel-fired power plants are currently subject to no national limits on the amount of such pollution they emit. Drawing on the same Clean Air Act tools it has previously used to regulate other pollutants, the U.S. Environmental Protection Agency (EPA) is working to put in place common-sense standards for carbon pollution from new and existing power plants.

Recently, a group of state attorneys general issued a White Paper challenging EPA's authority to establish minimum emission performance standards for carbon pollution from existing power plants under Section 111(d) of the Clean Air Act, and to issue rigorous standards for new power plants that are based on advanced technologies such as carbon capture and storage. This attack on EPA's well-established authority to administer the Clean Air Act is legally unfounded and a misguided attempt to obstruct urgently-needed and long-delayed limits on carbon pollution from our nation's largest source, as examined here: <http://www.edf.org/blog/2013/09/20/setting-record-straight-epa-has-ample-authority-protect-us-carbon-pollution>

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From: Megan Ceronsky <mceronsky@edf.org>  
To: Megan Ceronsky <mceronsky@edf.org>  
Cc:  
Bcc:  
Subject: The Legal Foundation for Strong, Flexible, & Cost-Effective Carbon Pollution Standards for Existing Power Plants  
Date: Mon Oct 07 2013 01:41:37 EDT  
Attachments: Section 111(d) of the Clean Air Act, The Legal Foundation for Strong, Flexible, & Cost-Effective Carbon Pollution Standards for Existing Power Plants (October 4, 2013).pdf

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<http://blogs.edf.org/climate411/2013/10/04/new-paper-outlines-the-legal-foundations-for-strong-carbon-pollution-standards-for-power-plants/>

New paper outlines the legal foundations for strong Carbon Pollution Standards for power plants

By Megan Ceronsky | Bio | Published: October 4, 2013

On June 25th, at Georgetown University, President Barack Obama issued a stirring call to action on climate change, saying:

“As a president, as a father and as an American, I am here to say we need to act. I refuse to condemn your generation and future generations to a planet that’s beyond fixing.”

In that speech, President Obama announced his Climate Action Plan — a suite of actions that his Administration will take to curb dangerous emissions of heat-trapping pollutants.

In that Climate Action Plan, the President directed the Environmental Protection Agency (EPA) to develop Carbon Pollution Standards for new and existing power plants.

Power plants are the largest source of greenhouse gases in America, and there are currently no federal limits on the amount of climate-destabilizing pollutants that these plants can put into the air.

Unfortunately, but not surprisingly, the attacks on the Carbon Pollution Standards had begun months earlier.

Those attacks included the usual sensational, defeatist, and wholly-unsupported claims designed to delay, deny, and obstruct progress.

Quieter but no less sensational are the attacks launched by the lawyers of obstructionist fossil fuel interests. Hunton & Williams, on behalf of the opaque Utility Air Regulatory Group, is leading the pack.

The legal attacks on the standards for existing power plants effectively boil down to this:

1. EPA does not have the authority under the Clean Air Act to establish any actual limits on carbon pollution.

2. If EPA does have that authority, there are no demonstrated measures to reduce carbon pollution from power plants, so any required emission reductions must at most be "minimal."

We disagree.

In this white paper, we lay out the legal foundation for EPA's authority to work with the states to ensure implementation of strong and cost-effective Carbon Pollution Standards for existing power plants.

These standards can support our nation's transition to a cleaner, safer, smarter power infrastructure and deliver the reductions in carbon pollution we so urgently need.

In the President's words:

"Our progress here will be measured differently, in crises averted, in a planet preserved. But can we imagine a more worthy goal? For while we may not live to see the full realization of our ambition, we will have the satisfaction of knowing that the world we leave to our children will be better off for what we did."

America is united by these hopes and dreams for a better world. Thanks to the ingenuity of our engineers and inventors, and the skill of our workers, the solutions are at hand to build a cleaner power sector and to use energy more efficiently.

The Clean Air Act provides a framework under which EPA and the states can work together to deploy these solutions. We need only work together — in red states, blue states and purple states alike — to meet this challenge.

Megan Ceronsky

Attorney

Environmental Defense Fund

(303) 447-7224 (P)

(303) 440-8052 (F)

1875 Connecticut Avenue NW

Suite 600

Washington, D.C. 20009

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Document ID: 0.7.691.163805-000001

Owner: Megan Ceronsky <mceronsky@edf.org>

Filename: Section 111(d) of the Clean Air Act, The Legal Foundation for Strong, Flexible, & Cost-Effective Carbon Pollution Standards for Existing Power Plants (October 4, 2013).pdf

Last Modified: Mon Oct 07 01:41:37 EDT 2013

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## Section 111(d) of the Clean Air Act

*The Legal Foundation for Strong, Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants*

October 2013

Megan Ceronsky & Tomás Carbonell

### *Acknowledgements*

The authors wish to express their sincere gratitude to all those who contributed to the development of this white paper, and welcome further comments and suggestions to inform the paper as it continues to evolve. To contact the authors, please write to Megan Ceronsky, Environmental Defense Fund, 1875 Connecticut Ave. NW, Washington, DC 20009, [mceronsky@edf.org](mailto:mceronsky@edf.org).

### *Environmental Defense Fund*

Environmental Defense Fund is a non-profit, non-partisan, non-governmental environmental organization that combines law, policy, science, and economics to find solutions to today's most pressing environmental problems.

## I. Introduction

The Intergovernmental Panel on Climate Change's recent report, "Climate Change 2013: The Physical Science Basis," includes several grim findings:

- Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased.<sup>1</sup>
- It is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century.<sup>2</sup>
- Continued emissions of greenhouse gases will cause further warming and changes in all components of the climate system. Limiting climate change will require substantial and sustained reductions of greenhouse gas emissions.<sup>3</sup>

Climate impacts are already affecting American communities—and the impacts are projected to intensify. The U.S. Global Change Research Program has determined that if greenhouse gas emissions are not reduced it is likely that American communities will experience:

- increased severity of dangerous smog in cities;<sup>4</sup>
- intensified precipitation events, hurricanes, and storm surges;<sup>5</sup>
- reduced precipitation and runoff in the arid West;<sup>6</sup>
- reduced crop yields and livestock productivity;<sup>7</sup>
- increases in fires, insect pests, and the prevalence of diseases transmitted by food, water, and insects;<sup>8</sup> and
- increased risk of illness and death due to extreme heat.<sup>9</sup>

Extreme weather imposes a high cost on our communities, our livelihoods, and our lives. The National Climatic Data Center reports that the United States experienced twelve climate disasters each causing more than a billion dollars of damage in 2012, including a yearlong drought and widespread crop failure in 22 states, western wildfires that burned over 9.2 million acres, and

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<sup>1</sup> Intergovernmental Panel on Climate Change Working Group I, Summary for Policymakers, at 3 (2013), available at [http://www.climatechange2013.org/images/uploads/WGIAR5-SPM\\_Approved27Sep2013.pdf](http://www.climatechange2013.org/images/uploads/WGIAR5-SPM_Approved27Sep2013.pdf).

<sup>2</sup> *Id.* at 12.

<sup>3</sup> *Id.* at 14.

<sup>4</sup> U.S. Global Change Research Program, Global Climate Change Impacts in the United States, at 92-93 (2009), available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>.

<sup>5</sup> *Id.* at 34-36.

<sup>6</sup> *Id.* at 45.

<sup>7</sup> *Id.* at 74-75, 78.

<sup>8</sup> *Id.* at 82-83.

<sup>9</sup> *Id.* at 90-91.

Hurricane Sandy, which devastated major population centers in the Northeast.<sup>10</sup> These are precisely the type of impacts projected to affect American communities with increasing frequency and severity as climate-destabilizing emissions continue to accumulate in the atmosphere.

Power plants are far and away the largest source of greenhouse gas emissions in the United States. In 2011, fossil fuel fired power plants emitted more than 2 billion metric tons of CO<sub>2</sub>e, equivalent to 41% of U.S. carbon pollution and nearly one-third of total U.S. greenhouse gas emissions.<sup>11</sup>

Section 111 of the Clean Air Act provides for the establishment of nationwide emission standards for major stationary sources of dangerous air pollution—including, since 1971, power plants. In response to the Supreme Court’s decision in *Massachusetts v. EPA*<sup>12</sup> that the Clean Air Act’s protections encompass greenhouse gas emissions and to EPA’s science-based determination that these climate-destabilizing emissions endanger public health and welfare,<sup>13</sup> EPA is now developing § 111 Carbon Pollution Standards for power plants.

EPA is developing separate carbon pollution-reduction frameworks for new and existing power plants under Clean Air Act § 111(b) and (d) respectively. Emission standards for existing pollution sources are developed and implemented through a dynamic federal-state collaboration, the legal underpinnings of which are described here. Through this collaboration, EPA and the states can put in place strong standards that will drive cost-effective reductions in carbon pollution and support our nation’s transition to a cleaner, safer, smarter power infrastructure.

## II. Background

Section 111(b) directs EPA to identify (“list”) categories of stationary sources that significantly contribute to dangerous air pollution, and to establish emission standards for air pollutants emitted by new sources in the listed categories.<sup>14</sup> Power plants were listed in 1971.<sup>15</sup> Section 111(d) directs the development of emission standards for pollutants emitted by existing sources

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<sup>10</sup> National Climatic Data Center, Billion-Dollar U.S. Weather/Climate Disasters (2013), *available at* [www.ncdc.noaa.gov/billions/events.pdf](http://www.ncdc.noaa.gov/billions/events.pdf).

<sup>11</sup> EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2011, at ES-5, ES-7 (Apr. 2013), *available at* <http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2013-Main-Text.pdf>. Of the heat-trapping pollutants emitted by sources in the United States, carbon dioxide is by far the most prevalent. Transportation emissions are the only greenhouse gas emission source that approaches the scale of power plants.

<sup>12</sup> 549 U.S. 497 (2007).

<sup>13</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

<sup>14</sup> 42 U.S.C. § 7411(b)(1).

<sup>15</sup> Air Pollution Prevention and Control: List of Categories of Stationary Sources, 36 Fed. Reg. 5931 (Mar. 31, 1971) (listing “Fossil fuel-fired steam generators of more than 250 million B.t.u. per hour heat input”).

in the listed categories. Emission standards are not established under § 111(d) if a source category's emissions of a specific pollutant are regulated under the provisions of the Clean Air Act addressing hazardous or criteria air pollutants.<sup>16</sup> Emission standards developed under § 111(d) must apply to "any existing source."<sup>17</sup>

The Clean Air Act provides that an emission standard (for new or existing sources) must reflect the emission reductions achievable through application of the "best system of emission reduction" that EPA finds has been adequately demonstrated, taking into account costs and any non-air quality health and environmental impacts and energy requirements.<sup>18</sup> For existing sources, once EPA guidance is issued identifying the best system of emission reduction and the emission reductions achievable under that system, the standards are implemented through state plans submitted to EPA for approval.<sup>19</sup> These plans must provide for the enforcement of the emission standards.<sup>20</sup>

### III. Understanding § 111(d)'s Dynamic Federal-State Collaboration

Section 111(d) provides for federal-state collaboration in securing emission reductions from existing sources, with state flexibility to identify the optimal systems of emission reduction for their state while achieving the necessary environmental performance. EPA's longstanding § 111(d) implementing regulations<sup>21</sup> provide for EPA to issue "emission guidelines" in which the

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<sup>16</sup> 42 U.S.C. § 7411(d). Congress enacted § 111 in the 1970 Clean Air Amendments. Emissions of criteria pollutants from all sources are addressed through the detailed State Implementation Plan process set forth in § 110, *id.* § 7410, and hazardous air pollutants are the subject of a detailed framework of protections set out in § 112, *id.* § 7412. In its 1975 implementing regulations and for the subsequent 15 years EPA treated § 111(d) as a means of 'filling the gap,' and addressing pollutants that were not otherwise covered by § 110 or 112. *See* 40 Fed. Reg. 53,340, 53,340 (Nov. 17, 1975). In 1990, the House and Senate passed conflicting amendments to § 111(d), both of which were included in the Clean Air Act Amendments of 1990. In a 2005 rulemaking, after conducting a thorough analysis of the language and legislative history of the two versions, EPA described one way to reconcile them in a manner that comported with the overall thrust of the Clean Air Act Amendments of 1990. EPA concluded that it has authority under § 111(d) to regulate any air pollutant not listed under § 112(b) (i.e., any non-hazardous air pollutant), even if the source category to be regulated under § 111 is also being regulated under § 112. *See* 70 Fed. Reg. 15,994, 60,030-32 (Mar. 29, 2005). Thus, the only pollutants EPA may *not* regulate under § 111(d) are hazardous air pollutants emitted from a source category that is actually being regulated under § 112.

<sup>17</sup> 42 U.S.C. § 7411(d).

<sup>18</sup> *Id.* § 7411(a)(1).

<sup>19</sup> *Id.* § 7411(d)(1)(A).

<sup>20</sup> *Id.* § 7411(d)(1)(B).

<sup>21</sup> 40 C.F.R. pt. 60, subpt. B. EPA's regulations for the general implementation of § 111(d) have not been challenged since they were promulgated in 1975. *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975); *see also* Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 18, 2005), vacated on other grounds by *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Any challenge would now be time-barred. 42 U.S.C. §

Agency fulfills its § 111 duty to identify the “best system of emission reduction” for a specific pollutant and listed source category.<sup>22</sup> EPA then identifies the emission reductions achievable using that system. States are given the flexibility to deploy different systems of emission reduction than the “best” system identified by EPA, so long as they achieve equivalent or better emission reductions.<sup>23</sup> The achievement of equivalent emission reductions enables state plans to be deemed “satisfactory” in the statutorily required review.<sup>24</sup> The statute provides that when states do not submit a satisfactory plan, EPA must develop and implement emission standards for the sources in that state.<sup>25</sup>

**A. The statute gives EPA ample authority to oversee state compliance with § 111(d).**

Although some industry attorneys have posited that the states have the sole authority to determine the stringency of emission standards under § 111(d), this disregards the plain language of § 111. Section 111(a)(1) elucidates that it is EPA—not the states—that identifies the best system of emission reduction considering the statutory factors:

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.<sup>26</sup>

That definition specifically refers to “the Administrator”<sup>27</sup> as the entity that “determines” what constitutes the best system of emission reduction based on the statutory factors such as optimal environmental performance (“best”) and cost. It is the Administrator who “tak[es] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” Significantly, that definition is explicitly made applicable to the entirety of § 111.<sup>28</sup>

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7607(b); *see also Am. Rd. & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 457-58 (D.C. Cir. 2013); *Am. Rd. & Transp. Builders Ass’n v. EPA*, 588 F.3d 1109, 1113 (D.C. Cir. 2009).

<sup>22</sup> 40 C.F.R. § 60.22(b)(5) (guidelines will “reflect[] 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”).

<sup>23</sup> *See* 40 C.F.R. § 60.24.

<sup>24</sup> *Id.*; 42 U.S.C. § 7411(a); *id.* § 7411(d)(2).

<sup>25</sup> *Id.* § 7411(d)(2).

<sup>26</sup> *Id.* § 7411(a)(1) (emphasis added).

<sup>27</sup> *Id.* § 7602(a) (defining “Administrator” to be “the Administrator of the Environmental Protection Agency”).

<sup>28</sup> *See id.* § 7411(a) (“For purposes of this section . . .”).

Under § 111(d)(1)(A), state plans must impose “standards of performance” on existing sources<sup>29</sup> according to the criteria provided in the “standard of performance” definition quoted above.<sup>30</sup> Section 111(d)(2) directs states to submit “satisfactory” plans, implementing such standards of performance, to EPA for review and approval.<sup>31</sup> EPA’s regulations and emission guidelines have long interpreted the Agency’s § 111(d) responsibility to determine whether state plans are “satisfactory” as governed by whether the plans implement emission standards that reflect the emission reductions achievable under the best system of emission reduction identified by the Administrator.<sup>32</sup>

EPA’s review of state plans is guided by the statutory parameters defining a “standard of performance”—do state plans establish emission standards that achieve emission reductions equivalent to or better than those achievable using the best system of emission reduction? This manifest interpretation of the statute flows inexorably from its plain language and structure, and EPA’s interpretation of its substantive role under § 111(d) carries the weight of nearly four decades of Agency statutory interpretation and practice under the 1975 § 111(d) implementing regulations.<sup>33</sup> It is implausible that Congress provided statutory criteria that state plans must meet and further provided for EPA review state plans, but did not intend for the statutory criteria to direct the review. Indeed, for EPA to approve state plans without regard to whether those plans satisfy the statutory criteria for standards of performance would be arbitrary.

Yet the language of § 111 requires substantive review of state plans by EPA even more directly. 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*” identified by the Administrator. An emission standard that fails on its face to secure the degree of emission reductions achievable under the best system of emission reduction is outside the statutory definition of standards of performance and does not meet the requirement that the “State establish[] standards of performance” for existing sources. State plans that fail to include a standard of performance cannot be approved as “satisfactory” by EPA under any reading of § 111.

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<sup>29</sup> *Id.* § 7411(d)(1)(A).

<sup>30</sup> *Id.* § 7411(a) (all definitions, including “standard of performance,” apply “[f]or purposes of this section” (emphasis added)).

<sup>31</sup> *Id.* § 7411(d)(2) (discussing results if “the State fails to submit a *satisfactory* plan” (emphasis added)).

<sup>32</sup> *See* State Plans for the Control of Existing Facilities, 39 Fed. Reg. 36,102 (Oct. 7, 1974); *see also* State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,342-44 (Nov. 17, 1975) (rejecting commenters’ argument that EPA does not have authority to require states to establish emissions standards that are at least as stringent as EPA’s emission guidelines); *id.* at 53,346 (defining “emission guideline” as “a guideline . . . 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.”).

<sup>33</sup> *Id.* EPA has issued § 111(d) emission guidelines for a number of source categories. *See* 42 Fed. Reg. 12,022 (Mar. 1, 1977) (phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977) (sulfuric acid plants); 44 Fed. Reg. 29,828 (May 22, 1979) (kraft pulp mills); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (primary aluminum plants); 61 Fed. Reg. 9,905 (Mar. 12, 1996) (municipal solid waste landfills).

In addition to being inconsistent with the language of § 111, exclusive state authority over the substance of existing source standards would be contrary to the purpose of the 1970 Clean Air Act—“to provide for a more effective program to improve the quality of the Nation’s air”<sup>34</sup>—because air quality could *worsen* if state plans were not subject to any enforceable substantive standards. Evidence of the central role for protective federal standard setting is found throughout the Clean Air Act, including in § 116, which prohibits the states from adopting or enforcing emission standards less stringent than those set by EPA.<sup>35</sup>

Preserving that basic role for EPA in protecting the nation’s air quality was a central theme of the regulations EPA adopted in 1975 to implement § 111(d). As EPA noted in the rulemaking:

[I]t would make no sense to interpret section 111(d) as requiring the Administrator to base approval or disapproval of State plans solely on procedural criteria. Under that interpretation, States could set extremely lenient standards—even standards permitting greatly increased emissions—so long as EPA’s procedural requirements were met. Given that the pollutants in question are (or may be) harmful to public health and welfare, and that section 111(d) is the only provision of the Act requiring their control, it is difficult to believe that Congress meant to leave such a gaping loophole in a statutory scheme otherwise designed to force meaningful action.<sup>36</sup>

In sum, both the language of § 111 and the overall purpose of the 1970 Clean Air Act amendments require a strong substantive role for EPA in ensuring that standards for existing sources meet the statutory requirements.

**B. EPA’s responsibility includes promulgation of binding emission guidelines for the states.**

Similarly, some stakeholders have questioned EPA’s authority to establish binding emission guidelines that identify the “best system of emission reduction” and the resulting emissions reductions that each state plan must achieve. That argument fails in light of the structure of § 111(d) and in light of congressional intent. It is also contrary to EPA’s reasonable interpretation of its statutory responsibility, laid out in the long-established regulations implementing § 111.

EPA’s interpretation of § 111(d) as authorizing it to adopt emission guidelines makes eminent sense in light of the statute’s overall structure. As EPA ultimately must approve state plans for existing sources under § 111(d), the states benefit from EPA giving them initial guidance on what the Agency will be expecting to see in their state plans. That guidance, in the form of emission guidelines, helps the states avoid wasting valuable time and resources as they develop their standards. The guidelines do so by providing states with the parameters a state plan must fit within in order to be found “satisfactory” by the Administrator.

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<sup>34</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1676 (1970).

<sup>35</sup> 42 U.S.C. § 7416.

<sup>36</sup> 40 Fed. Reg. at 53,343.

Moreover, while Congress did not detail the process by which EPA would evaluate and approve state plans, there is considerable evidence that Congress subsequently recognized and approved the guidelines process that EPA established in its 1975 regulations. In 1977, for example, when Congress modified the definition of “standard of performance,” the House committee explained that under § 111(d) “[t]he Administrator would establish *guidelines* as to what the best system for each . . . category of existing sources is.”<sup>37</sup> Then, in 1990, in § 129 of the Clean Air Act, Congress directed EPA to adopt standards for solid waste combustion that would mirror the § 111 process, expressly referring to the “*guidelines* (under section 7411(d) of this title . . .).”<sup>38</sup> Thus, Congress has both recognized and legislated in reliance upon EPA’s guidelines process under § 111(d).

Congress is not alone in affirming the place of emissions guidelines in the § 111(d) structure. The Supreme Court recently noted that states issue § 111(d) standards “in compliance with [EPA] guidelines and subject to federal oversight.”<sup>39</sup>

In the 1975 rulemaking to implement § 111(d), EPA received a number of comments questioning the Agency’s authority to set those substantive guidelines.<sup>40</sup> In response, EPA demonstrated its authority to do so with a detailed analysis of the language, purpose, and legislative history of § 111(d).<sup>41</sup> EPA’s authority to issue emission guidelines has long been settled.<sup>42</sup>

### **C. States can deploy locally designed solutions to meet EPA’s emission guidelines.**

Although EPA adopts emission guidelines identifying the best system of emission reduction, § 111(d) (and EPA’s implementing regulations) provide for state tailoring and flexibility in meeting those guidelines. The statute does not require states (or sources) to use the exact system of emission reduction identified by EPA. Instead, states simply must achieve the level of emission reductions that would be achieved under that best system, and can deploy the system or systems of emission reduction most appropriate for the emission sources in their state.<sup>43</sup>

With this state flexibility, § 111 is very similar to the process implemented under § 110, under which states put in place plans to achieve National Ambient Air Quality Standards for criteria pollutants. The safe level of ambient pollution is an expert, science-based determination made by EPA, but states have considerable discretion in determining how to reduce emissions to that level. EPA then reviews each state plan to ensure that “it meets all the applicable requirements”

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<sup>37</sup> H.R. Rep. No. 95-294, at 195 (1977) (emphasis added).

<sup>38</sup> 42 U.S.C. § 7429(a)(1)(A) (emphasis added).

<sup>39</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537-38 (2011).

<sup>40</sup> 40 Fed. Reg. at 53,342.

<sup>41</sup> *Id.* at 53,342-44.

<sup>42</sup> *See* 42 U.S.C. § 7607(b) (60-day review period for Clean Air Act rulemakings).

<sup>43</sup> *See id.* § 7411(a) (a “standard of performance” must “reflect[]” the emission reductions achievable through use of the best system, but need not actually use the best system).

of § 110.<sup>44</sup> This parallel structure for §§ 110 and 111—in which EPA uses its expertise to identify the emission reductions that must be achieved, states use their discretion to develop plans to achieve the emission reductions, and EPA reviews plans to ensure they are meeting the relevant statutory criteria—is reinforced by the statute explicitly, which provides that § 111(d) state plans be developed through “a procedure similar to that provided by” § 110.<sup>45</sup>

In sum, § 111(d) establishes a collaborative federal-state process for regulating existing sources in which EPA establishes quantitative emission guidelines and the states deploy locally tailored and potentially innovative solutions to achieve the required emission reductions.

#### **IV. A System of Emission Reduction That Achieves the Rigorous Cuts in Carbon Pollution Demanded by Science and Does so Cost-Effectively is Eminently Consistent with the § 111 Criteria and Is Plainly Authorized by § 111**

As EPA evaluates systems of emission reduction for existing power plants, it is instructive to look at what is taking place on the ground. Across the country, states and power companies are reducing emissions from fossil fuel fired power plants by making those plants more efficient, increasing the use of lower-carbon generation capacity and zero-emitting energy, and investing in demand-side energy efficiency. At their core, these approaches all have the same result—reducing emissions from existing high-emitting fossil fuel fired power plants and improving the emission performance of the power plant source category. The broad employment of this system across the country indicates that it is demonstrated in practice—and indeed, these approaches have been in use for decades.<sup>46</sup>

When seen through the lens of § 111, the system described above is fundamentally an emissions averaging system, achieving broadly based reductions from the power plant source category. Improving efficiency at plants, deploying zero-emitting energy on the grid, investing in demand-side energy efficiency to reduce demand, and shifting utilization towards lower-emitting generation all reduce emissions from fossil fuel fired units as a group. This system of emission reduction is conceptually more expansive than the typical pollution-control technology installed

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<sup>44</sup> *Id.* § 7410(k)(3). Section 110 requires, *inter alia*, state plans to provide for “implementation, maintenance, and enforcement of” National Ambient Air Quality Standards, *id.* § 7410(a)(1), the use of emissions monitoring equipment as prescribed by EPA, *id.* § 7410(a)(2)(F), and any air quality modeling requirements prescribed by EPA, *id.* § 7410(a)(2)(K).

<sup>45</sup> *Id.* § 7411(d)(1).

<sup>46</sup> *See, e.g.*, World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: Michigan (Sept. 2013), *available at* <http://www.wri.org/publication/power-sector-opportunities-for-reducing-carbon-dioxide-emissions-michigan>; World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: North Carolina (Sept. 2013), *available at* <http://www.wri.org/publication/power-sector-opportunities-for-reducing-carbon-dioxide-emissions-north-carolina>; World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: Ohio (Aug. 2013), *available at* <http://www.wri.org/publication/power-sector-opportunities-for-reducing-carbon-dioxide-emissions-ohio>. *See generally* World Resources Institute, GHG Mitigation in the United States: An Overview of the Current Policy Landscape, at 10-12 (2012), *available at* <http://www.wri.org/publication/ghg-mitigation-us-policy-landscape>; Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org/> (last visited Sept. 30, 2013).

at a plant but satisfies the statutory language and purpose of § 111(d) and is a reasonable interpretation of that provision. This system would employ emissions averaging across the regulated sources in order to recognize the pollution reductions achieved by changes in utilization at plants and among plants.

By incorporating an averaging framework, this system could create flexibility to identify the most cost effective emission reductions across the regulated sources. If sources are allowed to average emission reductions, the system will give sources flexibility to reduce emissions onsite or secure emission reductions from other sources that can achieve reductions beyond those necessary for their own compliance at lower cost. Each source would be required to comply with the emission standard established but could meet its compliance obligation by securing emission reductions at other units in the source category. By recognizing the emission reductions achieved by the deployment of low-carbon generation, shifts in utilization toward lower- or non-emitting generation, and improvements in demand-side energy efficiency, the system would create flexibility for states and regulated sources and enhance the cost-effectiveness and environmental co-benefits of the emission standards.

As discussed below, the language of § 111 is broad enough to encompass such an emission reduction system. Moreover, under § 111(d), where the goal is maximizing the reduction of carbon pollution from existing power plants considering cost and wider environmental and energy impacts, this emission reduction system facilitates optimization of the statutory factors.

**A. Section 111 gives EPA wide discretion to establish a system of emission reduction that achieves rigorous reductions in carbon pollution through locally tailored solutions.**

The language and structure of § 111 give EPA expansive authority to determine which system of emission reduction best serves the statutory goals. The marked breadth of the language indicates Congress' intention to provide EPA with ample flexibility in conceiving systems of emission reduction. Neither the term "best system of emission reduction" nor its components are given technical definitions in the Act. In common usage, a "system" is defined as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose."<sup>47</sup> Clearly the ordinary meaning of the term "system" does not limit EPA to choosing end-of-pipe control technologies or other mechanical interventions at the plant. Rather, EPA may choose any "complex unity . . . serving a common purpose" that meets the other statutory requirements. A system of emission reduction that reflects the unified nature of the electric grid and achieves cost-effective emission reductions from the source category by treating all fossil fuel fired power plants as an interconnected group, averaging emissions across plants and recognizing changes in plant use that reduce emissions, fits securely within this framework.

The history of § 111 demonstrates that Congress deliberately rejected terms that were more restrictive than "best system of emission reduction," and that it was especially important to Congress for EPA to have flexibility in identifying solutions to reduce emissions from existing sources. The original 1970 language provided a unitary definition of "standard of performance"

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<sup>47</sup> Webster's Third New International Dictionary 2322 (1967).

for both new and existing sources that is rather similar to the current definition: “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) the Administrator determines has been adequately demonstrated.”<sup>48</sup> Changes to the definition made in the 1977 Amendments to the Clean Air Act required § 111 standards for new sources to reflect “the best *technological* system of *continuous* emission reduction.”<sup>49</sup> In contrast, the § 111 standards for existing sources were to reflect the “best system of continuous emission reduction,”<sup>50</sup> which, as clarified by the Conference Report, need not be a technological system.<sup>51</sup> In 1990, Congress removed the requirements that standards for new sources be based on “technological” systems and that standards for both new and existing sources achieve “continuous” reductions, restoring use of broad “system” language for both new and existing source standards.<sup>52</sup> It is noteworthy that even during the period of time when Congress determined a more specific definition of “standard of performance” was advisable for new sources, it did not take this approach for existing sources. The current text of the Clean Air Act reflects both Congress’ more recent decision to allow EPA to select a non-technological system of emission reduction when promulgating standards for new sources under § 111 as well as Congress’ longstanding policy of allowing that approach for existing sources.

Courts have recognized that the identification of the best system of emission reduction is an expansive, flexible endeavor, in the service of securing the maximum emission reductions, finding that EPA may weigh “cost, energy, and environmental impacts in the broadest sense at the national and regional levels and over time as opposed to simply at the plant level in the immediate present.”<sup>53</sup> Further, courts have noted that EPA’s choice of the best system of emission reduction should encourage the development of systems that achieve greater emission reductions at lower costs and deliver energy and nonair health and environmental benefits.<sup>54</sup>

In short, § 111 gives EPA wide discretion to identify an emission reduction system that relies on solutions such as averaging to maximize environmental performance and enhance cost-effectiveness.

**B. The language of § 111 is sufficiently broad to authorize the selection of an averaging system as the best system of emission reduction.**

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<sup>48</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1683 (1970). The original definition lacks the language directing EPA to consider “any nonair quality health and environmental impact and energy requirements.” 42 U.S.C. § 7411(a)(1).

<sup>49</sup> Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 699-700 (1977) (emphases added).

<sup>50</sup> *Id.*

<sup>51</sup> The conference committee explained that the amendments “make[] clear that standards adopted for existing sources under section 111(d) of the act are to be based on available means of emission control (*not necessarily technological*).” H.R. Rep. No. 95-564, at 129 (1977) (Conf. Rep.) (emphasis added).

<sup>52</sup> Clean Air Act Amendments, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631 (1990).

<sup>53</sup> *Sierra Club v. Costle*, 657 F.2d 298, 321, 330 (D.C. Cir. 1981).

<sup>54</sup> *Id.* at 346-47.

Although the term “best system of emission reduction” is broad, it is not unbounded. Section 111 requires the “best” system to be the system adequately demonstrated to achieve the maximum emission reductions from the regulated sources, considering cost and impacts on non-air quality health or environmental impacts and energy requirements. The system must also provide the foundation for state standards of performance to apply a “standard for emissions” to “any existing source” in the listed category. EPA must seek out the system that best serves these clearly enunciated goals of § 111.

There are many available options for reducing carbon dioxide emissions from existing power plants through modifications or upgrades at these plants. In order to satisfy the statutory criteria described above, such an analysis of “onsite” measures would by necessity be expansive in scope—including not only significant improvements to the efficiency or “heat rate” of the plant, but also other emission reduction measures such as co-firing or re-powering with lower-carbon fuels;<sup>55</sup> utilizing renewable energy sources to provide supplemental steam heating;<sup>56</sup> using available waste heat to remove moisture from coal or switching to higher-rank coal;<sup>57</sup> and implementing combined heat and power (CHP) systems at plants near industrial facilities or district heating systems,<sup>58</sup> among other solutions. For example, engineering firms have estimated that with modest modifications, coal-fired power plants can derive as much as 50% of their heat input from natural gas.<sup>59</sup> Co-firing at this level could yield emission reductions of 20%, and could be combined with heat rate and other improvements to achieve even deeper reductions at a specific plant.

In some circumstances, however, averaging systems may distinctively further the statutory factors.<sup>60</sup> Flexible averaging programs implemented under the Clean Air Act and by states and

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<sup>55</sup> See F.J. Binkiewicz, Jr. et al., *Natural Gas Conversions of Existing Coal-Fired Boilers* (Babcock & Wilcox White Paper MS-14, 2010), available at <http://www.babcock.com/library/pdf/ms-14.pdf>; Brian Reinhart et al., *A Case Study on Coal to Natural Gas Fuel Switch* (Black & Veatch, 2012), available at <http://bv.com/Home/news/thought-leadership/energy-issues/paper-of-the-year-a-case-study-on-coal-to-natural-gas-fuel-switch..>

<sup>56</sup> See Craig Turchi et al., *Solar-Augment Potential of U.S. Fossil-Fired Power Plants* (National Renewable Energy Laboratory, 2011), available at <http://www.nrel.gov/docs/fy11osti/50597.pdf>. Several projects are currently under way to augment existing coal-fired power plants in Australia and the United States with concentrated solar thermal power systems. See *Hybrid Renewable Energy Systems Case Studies*, Clean Energy Action Project, [http://www.cleanenergyactionproject.com/CleanEnergyActionProject/Hybrid\\_Renewable\\_Energy\\_Systems\\_Case\\_Studies.html](http://www.cleanenergyactionproject.com/CleanEnergyActionProject/Hybrid_Renewable_Energy_Systems_Case_Studies.html) (last visited Oct. 4, 2013).

<sup>57</sup> See EPA, *Available and Emerging Technologies for Reducing Greenhouse Gas Emissions From Coal-Fired Electric Generating Units*, at 31-33 (Oct. 2010), available at <http://www.epa.gov/nsr/ghgdocs/electricgeneration.pdf> (describing a commercially-available on-site drying process that can reduce CO<sub>2</sub> emissions from a pulverized coal boiler by approximately 4%).

<sup>58</sup> See *id.* at 34-35.

<sup>59</sup> See Reinhart et al., *supra* note 55.

<sup>60</sup> EPA has allowed averaging or trading programs where they provide greater emissions reductions than source-specific technology standards. See, e.g., *Regional Haze Regulations*, 64 Fed. Reg. 35,714,

companies have demonstrated that they can significantly lower the cost of cutting pollution because they facilitate capture of the lowest-cost emission reduction opportunities.<sup>61</sup> In the context of the forthcoming Carbon Pollution Standards for existing power plants, a flexible averaging framework that rigorously quantifies the emission reductions achieved via increased utilization of lower and zero-emitting generation and investments in demand-side energy efficiency could achieve very substantial carbon pollution reductions cost-effectively while enabling proactive management of generation capacity and enhancement of grid reliability. Indeed, a flexible system would facilitate efficient compliance not only with the Carbon Pollution Standards but also with other applicable air quality and energy regulations, allowing states and companies to make sensible investments in multi-pollutant emission reductions and clean, safe, and reliable electricity infrastructure. Such a system would enable states to consider the “remaining useful life” of sources as the Clean Air Act provides<sup>62</sup> and optimize investments in existing and new generation to secure the necessary emission reductions. A flexible system that facilitates a variety of emission reduction pathways is also the system already being deployed by a number of states and companies, mobilizing innovative emission reduction measures and securing significant reductions in carbon pollution.<sup>63</sup>

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35,739 (July 1, 1999) (allowing state plans “to adopt alternative measures in lieu of BART where such measures would achieve even greater reasonable progress toward the national visibility goal”).

<sup>61</sup> For example, a recent survey of economic research found that the Clean Air Act’s flexible Acid Rain Program has achieved “a range of 15-90 percent savings, compared to counterfactual policies that specified the means of regulation in various ways and for various portions of the program’s regulatory period.” Gabriel Chan, Robert Stavins, Robert Stowe & Richard Sweeney, *The SO<sub>2</sub> Allowance Trading System and the Clean Air Act Amendments of 1990: Reflections on Twenty Years of Policy Innovation*, at 5 (2012), available at [http://belfercenter.ksg.harvard.edu/files/so2-brief\\_digital4\\_final.pdf](http://belfercenter.ksg.harvard.edu/files/so2-brief_digital4_final.pdf).

<sup>62</sup> 42 U.S.C. § 7411(d)(1).

<sup>63</sup> Some have suggested that the general Clean Air Act definition of “standard of performance” in § 302(l) also applies in the context of § 111, and precludes an averaging approach because it requires “continuous emission reduction.” *Id.* § 7602(l). It is unlikely that the § 302(l) definition applies given that Congress provided a specific and different definition of the term “[f]or purposes of” § 111, 42 U.S.C. § 7411(a). See *Reynolds v. United States*, 132 S. Ct. 975, 981 (2012) (specific statutory language supersedes general language); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (same). However, even if § 302(l) were found to apply, an averaging approach qualifies as “a requirement of continuous emission reduction” per the § 302(l) definition because covered sources must collectively achieve the emission limitations, which apply continuously. Even in a flexible program each source meets its obligations continuously. Under an averaging framework each source must secure the emission reductions needed, onsite or from other plants, to continuously be in compliance with the standard.

It is also worth noting that the generally applicable definition of “emission standard” in § 302(k) likely does inform the otherwise undefined phrase “standard for emissions” within the definition of “standard of performance” in § 111(a)(1). See 42 U.S.C. § 7416 (referring to an “emission standard or limitation . . . under section 7411”). A § 302(k) “emission standard” or “emission limitation” is defined as “a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*.” *Id.* § 7602(k) (emphasis added). An averaging approach qualifies as an “emission standard” or “emission limitation,” because covered sources must meet a limitation that applies

EPA has long interpreted the statute to authorize the Agency to determine when an averaging framework is an appropriate emission reduction system for a § 111(d) standard. In one of its first § 111(d) rulemakings after the Clean Air Act Amendments of 1990, EPA's 1995 emission guidelines for existing municipal waste combustors allowed states to establish averaging and trading programs through which these sources could meet standards for nitrogen oxides (“NO<sub>x</sub>”) emissions.<sup>64</sup>

In addition, the Clean Air Act provides that the procedure for establishing standards of performance for existing sources under § 111(d) is to be “similar” to that of § 110,<sup>65</sup> and § 110 expressly provides that emission limitations and control measures can include “fees, marketable permits, and auctions of emissions rights.”<sup>66</sup> The direct link to § 110 thus further reinforces the appropriateness of such flexible approaches under § 111(d).

In the context of § 111 and greenhouse gas emissions, a flexible system that enables a wide variety of available solutions to achieve rigorous and cost-effective carbon pollution reductions manifestly fulfills the statutory criteria for the “best” system.

**C. Both EPA and the states can consider broad systems of emission reduction under § 111.**

Some stakeholders have proposed that there are systems of emission reduction that states may include in § 111(d) implementation plans that EPA may not consider in identifying the best system of emission reduction. This hypothesis assumes that when EPA identifies the best system of emission reduction under § 111(a)(1) it must ignore certain flexible, cost-effective means of securing emission reductions from fossil fuel power plants, while a state may rely on these very mechanisms in developing a “plan which . . . provides for the implementation and enforcement of such standards of performance” under § 111(d)(1). This contention is directly contrary to the process set forth in § 111, under which EPA must consider cost, impacts on energy, and other factors in identifying the best system of emission reduction; if there are systems of emission reduction that can better optimize pollution reductions considering cost, impacts on energy, etc., EPA must consider such systems in order to identify the best system.

Section 111 requires EPA to determine the best system of emission reduction for existing stationary sources. States then implement the system of emission reduction they deem most appropriate for their sources—which could be more expensive, more stringent, or have different

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continuously. Indeed, Congress used the term “emission limitation” in 1990 to describe its Acid Rain Program. *See id.* §§ 7651b(a)(1), 7651c(a).

<sup>64</sup> 40 C.F.R § 60.33b(d)(2). This provision is still in effect. EPA also designed a trading program for mercury from power plants under § 111(d), 70 Fed. Reg. 28,606 (May 18, 2005), but the regulation of mercury under § 111(d) was found to violate the Act's requirement that hazardous air pollutants be regulated under § 112, *see New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *cert. dismissed*, 555 U.S. 1162 (2009), *and cert. denied*, 555 U.S. 1169 (2009).

<sup>65</sup> 42 U.S.C. § 7411(d)(1).

<sup>66</sup> *Id.* § 7410(a)(2)(A).

energy requirements or non-air impacts on health or the environment—provided that the states’ plans secure the same or better emission reductions as the “best system of emission reduction” identified in EPA’s emission guidelines. States can also innovate under § 111, and implement cutting-edge systems of emission reduction of which EPA may not have been aware or which it may not have deemed “adequately demonstrated.” However, neither the language of § 111 nor EPA’s implementing guidelines distinguish between the systems of emission reduction that state plans can implement and the systems of emission reduction that EPA is to review in identifying the “best system of emission reduction.” The systems of emission reduction to be evaluated by EPA and the systems that can be implemented by the states share the same legal contours. As such, for EPA to ignore well-known and adequately demonstrated systems of emission reduction that achieve greater emission reductions and satisfy the other statutory criteria would be arbitrary. Indeed, if EPA were to adopt a narrow scope of inquiry, closing its eyes to what states are doing, and identify a “best system” that failed to achieve meaningful emission reductions—and then approve state plans implementing other systems capable of achieving greater emission reductions cost-effectively—the Agency would clearly violate its statutory responsibility to identify the best system of emission reduction.

## **V. Conclusion**

Across the country, states and power companies are reducing emissions from fossil fuel fired power plants by improving plant efficiency, by increasing the use of lower-carbon generation capacity and zero-emitting energy, and by investing in demand-side energy efficiency and demand management. The widespread and long-established use of this system and its success in achieving cost-effective carbon pollution reductions for diverse states and companies indicate that it satisfies the statutory criteria for the “best system of emission reduction.” This system allows states and companies to adjust to locally relevant factors and generation-fleet characteristics, deploying the emission reduction strategies most appropriate and effective. The language of § 111 is sufficiently broad to encompass a system-based approach to securing carbon pollution reductions from existing power plants. Indeed, the constraints provided by § 111—directing EPA to identify the system of emission reduction best able to secure rigorous carbon emission reductions considering cost and impacts on energy and other environmental considerations—strongly suggest that a system-based approach is optimal in satisfying the statutory requirements by securing the vital cuts in carbon pollution that science demands through locally-tailored and innovative solutions.

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Nos. 12-1182 and 12-1183

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In The  
Supreme Court of the United States

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United States Environmental  
Protection Agency, et al.,

Petitioners,

v.

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

Respondents.

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American Lung Association, et al.,

Petitioners,

v.

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

Respondents.

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I HEREBY CERTIFY that on October 31, 2013, three (3) copies of the BRIEF for RESPONDENTS UTILITY AIR REGULATORY GROUP, ET AL., in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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Nos. 12-1182 and 12-1183

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IN THE

**Supreme Court of the United States**

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UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, ET AL.,  
*Petitioners,*

v.

EME HOMER CITY GENERATION L.P., ET AL.,  
*Respondents.*

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AMERICAN LUNG ASSOCIATION, ET AL.,  
*Petitioners,*

v.

EME HOMER CITY GENERATION, L.P., ET AL.,  
*Respondents.*

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**On Writs of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

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**BRIEF FOR RESPONDENTS  
UTILITY AIR REGULATORY GROUP, ET AL.**

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## QUESTIONS PRESENTED

The Clean Air Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), requires States to include in implementation plans "adequate provisions" that, "consistent with the provisions" of Title I of the Act, prohibit sources within their borders from emitting air pollutants in "amounts" that "contribute significantly" to other States' "nonattainment" of national ambient air quality standards (NAAQS). Invoking this provision, the Environmental Protection Agency (EPA) adopted the Transport Rule, requiring upwind-state emission reductions without regard to whether the required reductions went beyond those needed to eliminate a State's significant contribution and without regard to whether those reductions went beyond those needed for NAAQS attainment.

The questions presented are as follows:

1. Whether EPA's refusal to allow state implementation of the EPA-determined reduction requirements at the program's outset was unlawful.
2. Whether EPA lacks authority under the good neighbor provision to prohibit upwind-state emissions that reach a downwind State in amounts that EPA expressly found do not contribute significantly to nonattainment.
3. Whether EPA was required to assure that Transport Rule emission reductions do not exceed the amounts needed for NAAQS attainment.
4. Whether EPA was required to base good-neighbor emission reduction requirements on only the fraction of an upwind State's total emissions that reach a downwind State and contribute significantly to nonattainment in that State.
5. Whether the court of appeals had jurisdiction to consider *Chevron* step-one challenges to the rule.

(i)

## **PARTIES TO THE PROCEEDING**

A list of all parties to the proceeding is set forth at pages II-IV of the Brief for the Federal Petitioners.

### **RULE 29.6 STATEMENTS**

The **Utility Air Regulatory Group (UARG)** is a not-for-profit association of individual electric utilities and 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 percent or greater ownership interest in UARG.

**Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company** are all wholly-owned subsidiaries of Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of any of these respondents' stock. No publicly-held company holds 10 percent or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—

Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—as well as Southern Power Company, which owns generation assets and sells electricity at market-based rates in the wholesale market. These subsidiaries, each a respondent here, operate nearly 46,000 megawatts of coal, natural gas, oil, nuclear, and hydroelectric generating capacity. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for the operating companies.

Pursuant to Rule 29.6 of the Supreme Court of the United States, counsel for the Environmental Committee of the Florida Electric Power Coordinating Group, Inc. certifies that 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 company owns 10 percent or more of the FCG's stock.

The **Midwest Ozone Group** is an unincorporated association of businesses and organizations formed to assist in the development of scientifically sound and effective air quality strategies. The Midwest Ozone Group 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 percent or greater ownership interest in the Midwest Ozone Group.

Pursuant to Supreme Court Rule 29.6, counsel for the **National Mining Association** (NMA) certifies

that the NMA is an 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 company, and NMA has not issued shares or debt securities to the public, although NMA's individual members have done so.

The **National Rural Electric Cooperative Association** (NRECA) is the national association of rural electric cooperatives. NRECA does not have a parent corporation, and no publicly held company owns 10 percent or more of its stock.

Pursuant to Supreme Court Rule 29.6, counsel for **Peabody Energy Corporation** certifies that it is a publicly-traded company on the New York Stock Exchange under the symbol "BTU." Peabody Energy Corporation does not have a parent company, and as of December 31, 2012 filings, no holding companies own 10 percent or more of Peabody Energy Corporation's outstanding shares.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7 (D.C. Cir. 2012). The final rule of the Environmental Protection Agency (EPA or Agency) (Pet. App. 117a-1417a) is reported at 76 Fed. Reg. 48,208 (Aug. 8, 2011).

## JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (Pet. App. 1459a-1462a). The petitions for writs of certiorari were filed on March 29, 2013, and granted (and consolidated) on June 24, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set out in an appendix to the Brief for the Federal Petitioners.

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

1. The Clean Air Act (CAA or Act) employs a “co-operative federalism” approach to the development and implementation of air quality standards. As described by the State and Local Government Respondents supporting affirmance of the court of appeals' decision, EPA defines air quality “ends,” and the States then choose the “means” to achieve those ends through state implementation plans (SIPs). Brief of Respondents State of Texas, *et al.* (hereinafter Brief of State and Local Government Respondents or State Br.), at 1-2; see 42 U.S.C. § 7410(a). In

this way, the CAA makes control of air pollution “the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); see *id.* § 7407(a).

The CAA directs States to implement a series of programmatic requirements in their SIPs, which result in future emission reductions consistent with the terms of the specific CAA programs being implemented. See 42 U.S.C. § 7410(a)(2). Such programmatic requirements include, for example, “New Source Review” permitting programs, *id.* § 7410(a)(2)(C); visibility protection requirements, *id.* § 7410(a)(2)(J); and the “good-neighbor” program, which requires that SIPs “contain adequate provisions . . . prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act]” emissions of pollutants from sources within the State that will “contribute significantly to nonattainment” of national ambient air quality standards (NAAQS) in any other State. *Id.* § 7410(a)(2)(D).

This case involves the peculiar challenges posed by implementation of the good-neighbor program in the context of regional air pollution problems.

2. Before its amendment in 1990, the good neighbor provision focused on localized interstate impacts on nonattainment. That pre-1990 version targeted emissions from “any stationary source” in one State that “prevent[ed]” attainment of NAAQS in another State. *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1075-76 (6th Cir. 1984) (quoting pre-1990 version of good neighbor provision). The provision was structured to deal with NAAQS like the one for sulfur dioxide that involve elevated local pollution caused by emissions from a nearby source or a discrete group of nearby sources. See *id.* at 1075-77;

*Connecticut v. EPA*, 656 F.2d 902, 906 (2d Cir. 1981). The pre-1990 version was never used to address NAAQS like the ones for ozone or fine particulate matter (PM<sub>2.5</sub>). NAAQS for those pollutants address regional pollution formed through the transport and chemical transformation of so-called “precursor” pollutants that are emitted by numerous stationary and mobile sources over a large geographic area. See generally EPA, EPA-454/B-07-002, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM<sub>2.5</sub>, and Regional Haze at 4-5 (Apr. 2007), available at [www.epa.gov/scram001/guidance\\_sip.htm](http://www.epa.gov/scram001/guidance_sip.htm) (describing how ozone and PM<sub>2.5</sub> can result from precursor emissions far upwind).

In 1990, Congress amended the good neighbor provision to better address this type of regional pollution. See 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998) (“Under the 1990 Amendments, Congress recognized the growing evidence that ozone and its precursors can be transported over long distances and that the control of transported ozone was a key to achieving attainment of the ozone standard across the nation.”). As amended in 1990, the provision covered all “emissions activity within the State,” not just “any stationary source” in the State. And the trigger for regulation was changed from emissions that “prevent attainment” to those that “contribute significantly to nonattainment.” The good neighbor provision now provides that SIPs must:

contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act], 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 . . . any other State with respect to any such national primary or secondary ambient air quality standard . . . .

42 U.S.C. § 7410(a)(2)(D).

The text of the good neighbor provision establishes two criteria that define the scope of the contemplated “prohibit[ion]” on emissions that “contribute significantly to nonattainment.” First, only “significant[ ]” contributions to ambient air quality that is in “nonattainment” are properly subject to regulation by EPA. Accordingly, the provision cannot be invoked to prohibit emissions that contribute *insignificantly* to nonattainment or that contribute to air quality that is as good as, or better than, the NAAQS. Second, only that portion of the total emissions from an upwind State that both reaches a downwind State *and* contributes significantly to nonattainment in that State may be subject to the regulatory requirement. The good neighbor provision, in other words, targets only that portion of the upwind State’s emissions that contributes significantly to nonattainment areas in downwind States. It cannot be used to require regulation of emissions that are not transported outside the upwind State to such a downwind area.

The good neighbor provision is but one of the emission reduction measures Congress established to address nonattainment. In establishing this measure, Congress mandated that any prohibition on

emissions that contribute “significantly” must be “consistent with the provisions of [Title I of the CAA].” 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA’s “significant contribution” reduction requirements not only must observe the statutory limits discussed above but also must be “consistent with” separate but related CAA provisions.

Two elements are common to all of the statutory requirements in Subpart D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, that relate to *intrastate* nonattainment SIPs. First, nonattainment emission reduction requirements must stop at the point of NAAQS attainment. Second, reduction requirements must be moderated where achieving attainment would be infeasible or otherwise entail excessive costs. See, e.g., 42 U.S.C. § 7502(c)(2) (“plan provisions shall require reasonable further progress” toward attainment); *id.* § 7501(1) (defining “reasonable further progress” as “such annual incremental reductions in emissions . . . as . . . may reasonably be required . . . for the purpose of ensuring attainment”); *id.* § 7502(c)(1) (“[s]uch plan provisions shall provide for the implementation of all reasonably available control measures,” including “reasonably available control technology”); 40 C.F.R. § 51.100(o) (defining “[r]easonably available control technology” as including consideration of control costs); 42 U.S.C. § 7511b(d) (providing that, in support of state plan development, EPA “shall provide guidance to the States to be used in evaluating the relative cost-effectiveness of various options for the control of emissions from existing stationary sources . . . which contribute to nonattainment”); *id.* § 7509(d) (“[c]onsequences for failure to attain” NAAQS in an area include imposition of “such additional measures

as [EPA] may reasonably prescribe, including all measures *that can be feasibly implemented in the area in light of technological achievability, costs, and any . . . health and environmental impacts*” (emphasis added)).<sup>1</sup>

To be “consistent with” these intrastate nonattainment provisions, EPA, in establishing good-neighbor emission reduction obligations, may use costs and feasibility to moderate the level of emission reductions that otherwise would be required where limiting contributions to nonattainment in a downwind State would otherwise be unreasonable. As the court below observed: “EPA may consider cost, but only to further lower an individual State’s [emission reduction] obligations” under the good neighbor provision. Pet. App. 27a (citing *Michigan v. EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000) (per curiam); *North Carolina v. EPA*, 531 F.3d 896, 918 (D.C. Cir.) (per curiam), *modified on other grounds on reh’g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam)).

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<sup>1</sup> See also 42 U.S.C. § 7511(b)(2) (providing that, for ozone, the consequence of an area’s failure to attain generally is “re-classification” of the area so as to provide more time for attainment and to require application of additional, feasible controls); *id.* § 7513(e) (providing that, for particulate matter, attainment deadlines may be extended if attainment by the otherwise-applicable statutory date “would be impracticable” and the State demonstrates it has required the most stringent measures that “can feasibly be implemented in the [nonattainment] area” in question).

## **II. EPA's Approach to Defining Good-Neighbor Emission Reduction Obligations for Regional Pollution Problems**

### **A. EPA's Decision To Define States' Good-Neighbor Emission Reduction Obligations Through Separate and Distinct Comprehensive Regional Programs**

EPA first invoked the amended good neighbor provision to address a regional pollution problem in the late 1990s in the rulemaking that became known as the "NO<sub>x</sub> SIP Call."<sup>2</sup> See 63 Fed. Reg. 57,356 (Oct. 27, 1998). In that rulemaking, EPA addressed significant contributions to nonattainment of NAAQS for the pollutant ozone and, in this context, addressed what it means to "contribute significantly to nonattainment." See *id.* at 57,369.

For other CAA SIP programs, EPA has promulgated regulations that establish generally applicable requirements for identifying emissions that might need to be reduced and criteria for developing future emission limitations under those programs. EPA uses this "how-to manual" approach, for example, in addressing SIPs required by 42 U.S.C. § 7410(a)(2)(J) to implement the CAA visibility protection program, which calls for "reasonable progress" toward a national visibility goal, 42 U.S.C. § 7491(b)(2). EPA does not itself identify specific "reasonable progress" emission reductions for each State to implement through SIP revisions. Rather, EPA's regulations provide instructions for States to follow in developing their own "reasonable progress" emission reduction

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<sup>2</sup> "NO<sub>x</sub>" means "nitrogen oxides."

requirements for their SIPs. See 40 C.F.R. § 51.308(d), (e).

Theoretically, EPA could have developed a similar approach with respect to the good neighbor provision. If EPA had done so, then immediately after EPA promulgated any new NAAQS, each State would have had a defined process to follow that would allow it to identify—and to develop control requirements that would satisfy—any good-neighbor emission reduction obligations it might have. But, instead of establishing a process that would allow each State to determine whether emission reductions are required—and, if they are, to determine the required amounts of those reductions—EPA opted for a federal rulemaking approach on a multi-state scale, under which EPA itself (1) identifies those States that have good-neighbor emission reduction obligations, (2) defines or quantifies those obligations for each chosen State, and then (3) gives each such State the opportunity to implement those obligations through SIP revisions. See 63 Fed. Reg. at 57,369, 57,376.

In its NO<sub>x</sub> SIP Call rulemaking, EPA selected this multi-state approach because NO<sub>x</sub> and other ozone precursors emitted over a wide geographic area can contribute to ozone concentrations in the ambient air hundreds of miles away, through a variety of chemical and atmospheric processes that transform those precursors into ground-level ozone. See *id.* at 57,359, 57,360. As EPA explained:

It is becoming increasingly apparent that some of the most highly polluted ozone nonattainment areas will not be able to demonstrate attainment simply

through the implementation of control measures within the nonattainment area. In some cases, significant ozone concentration and precursor emission reductions within the upwind air mass being transported into the nonattainment area also appear to be necessary.

62 Fed. Reg. 1420, 1422 (Jan. 10, 1997).

EPA recognized that its decision to define by regulation the good-neighbor emission reduction obligations of upwind States must be harmonized with the CAA's cooperative federalism structure. Under this structure, EPA could not simultaneously define the reduction obligation and dictate the measures that sources in each covered State must use to meet that obligation. See *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)], and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.") (citing 42 U.S.C. § 7410(c)). Rather, the States must be given an opportunity to implement their emission reduction obligations as newly defined by EPA. Accordingly, EPA used the CAA's SIP call provision—42 U.S.C. § 7410(k)(5)—and gave each State included within the program the opportunity and time to revise its SIP to implement its EPA-defined statewide good-neighbor emission reduction obligation. EPA's approach in this respect was consonant with the Act's core structure, under which EPA promulgates NAAQS or regulations governing programmatic emission reduction requirements, and

States determine the mix of controls to implement those EPA-defined control objectives. As EPA explained in promulgating the NO<sub>x</sub> SIP Call,

[o]nce EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of [42 U.S.C. § 7410(a)(2)(D)]), it falls to the State to determine the appropriate mix of controls . . . .

63 Fed. Reg. at 57,369.

This decision, whatever its merit, had consequences for the establishment of future good-neighbor emission reduction obligations to address regional pollution problems. In particular, EPA's decision meant that a State would not—indeed, could not—know whether it “significantly contributed” to downwind nonattainment, and, if so, what emission reductions the good neighbor provision demanded of it, until EPA had conducted and completed a comprehensive good-neighbor regional rulemaking.

As EPA explained,

the data and analytical tools available at the time the section [7410(a)(2)(D)] SIP is developed and submitted to EPA necessarily affect the content of the [SIP] submission [required after promulgation of a new NAAQS]. Where . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States are available [*i.e.*, where EPA has adopted a final rule

identifying good-neighbor reductions for covered States], the State's SIP submission must address the existence of the contribution and the emission reductions necessary to eliminate the significant contribution.

70 Fed. Reg. 25,162, 25,263 (May 12, 2005). Because some States would be evaluated in EPA's regional rulemaking, however, EPA recognized that

*the section [7410(a)(2)(D)] SIP submission [for such a State] should indicate that the necessary information is not available at the time the submission is made . . . . EPA [will] . . . act at a later time after the initial section [7410(a)(2)(D)] submissions to issue a SIP call under section [7410(k)(5)] to States to revise their SIPs to provide for additional emission controls to satisfy the section [7410(a)(2)(D)] obligations if such action [is] warranted based upon subsequently-available data and analyses.*

*Id.* at 25,263-64 (emphasis added). In other words, if a State is not in a multi-state good-neighbor program, it has no obligation to submit a SIP requiring additional emission controls. If controls are found to be needed later, EPA will identify the State's emission reduction obligation at that time through a SIP call rulemaking.

## **B. The NO<sub>x</sub> SIP Call and CAIR**

The briefs of State and Local Government Respondents and of Industry and Labor Respondents

discuss EPA's first two regional good-neighbor programs—the NO<sub>x</sub> SIP Call, which addressed good-neighbor obligations under the 1997 “8-hour” ozone NAAQS and the 1979 “1-hour” ozone NAAQS, and the Clean Air Interstate Rule (CAIR), which addressed the 1997 NAAQS for 8-hour ozone and for annual PM<sub>2.5</sub>. This brief will not duplicate that discussion but emphasizes three important features of these programs that bear on the questions addressed here.

First, both of these programs used the same basic two-step framework for identifying and quantifying the good-neighbor emission reduction obligations for regionally widespread pollutants like ozone and PM<sub>2.5</sub>. That framework requires EPA: (1) to identify which States have emission reduction obligations and which do not; and (2) to define, in quantitative terms, that obligation for each covered State. See, *e.g.*, 63 Fed. Reg. at 57,365.

Second, as discussed in the Brief of State and Local Government Respondents, both the NO<sub>x</sub> SIP Call and CAIR respected the CAA's cooperative federalism structure by calling on States to submit SIPs to implement the emission reduction obligations identified in EPA's comprehensive rule. The NO<sub>x</sub> SIP Call gave States “real choice” as to how to implement the obligations defined by EPA. *Michigan*, 213 F.3d at 687-88. CAIR likewise gave the States “the flexibility to choose the measures to adopt to achieve the specified emissions reductions.” 70 Fed. Reg. at 25,167.

Finally, each of EPA's multi-state programs, including the Transport Rule, was unique. It was impossible for any State to know definitively whether it

would be included in these multi-state programs at all, let alone what its precise reduction obligations would be, until EPA took final rulemaking action resolving those issues. EPA relied exclusively on its own modeling to identify the States contributing to ozone and PM<sub>2.5</sub> nonattainment at levels exceeding the EPA-specified “insignificance” thresholds and to unravel the linkages between upwind and downwind States. Each of EPA’s good-neighbor rulemakings was infused with myriad technical assumptions and policy judgments that were subject to change between EPA’s proposal and its final promulgation of each program. As a result, predicting the outcome of these determinations in advance for each of these distinct good-neighbor programs would have been impossible—a “fool’s errand.” State Br. at 40.

### III. The Transport Rule

In August 2010, EPA proposed the Transport Rule as its response to the D.C. Circuit’s remand of CAIR in *North Carolina*. 75 Fed. Reg. 45,210 (Aug. 2, 2010). EPA promulgated the final Transport Rule a year later. 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a-1417a).

In the Transport Rule, EPA created, “from the ground up,” *North Carolina*, 531 F.3d at 929, a new good-neighbor emission reduction program, covering different States, addressing an additional NAAQS, and imposing different emission reductions than did CAIR or the NO<sub>x</sub> SIP Call. In developing the Transport Rule, EPA applied its two-step framework to develop programs for the 1997 NAAQS for ozone and PM<sub>2.5</sub> addressed in CAIR as well as the newer, 2006 “24-hour” NAAQS for PM<sub>2.5</sub>.

At step one, EPA found that upwind-state emissions contributing less than one percent of the relevant NAAQS to any downwind area “do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS.” 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a). EPA used this insignificance threshold to identify those States that were not subject to *any* good-neighbor emission reduction obligation for the ozone and PM<sub>2.5</sub> NAAQS. For those States contributing above the threshold, EPA in step two defined their emission reduction obligations using cost-effectiveness criteria that differed from those used in earlier programs. See 75 Fed. Reg. at 45,233 (contrasting Transport Rule cost analysis with that in the NO<sub>x</sub> SIP Call and CAIR).

The coverage of States in the proposed Transport Rule differed from that in CAIR, with some States added and others removed. *Id.* at 45,338 (explaining differences in coverage between CAIR and the proposed Transport Rule). The coverage also changed between the proposed and final rules for each of the NAAQS being addressed. Initially, a total of 31 States and the District of Columbia had emission reduction responsibilities. *Id.* at 45,212-13 (24 jurisdictions for annual PM<sub>2.5</sub> NAAQS; 25 for 24-hour PM<sub>2.5</sub> NAAQS; and 26 for ozone NAAQS). But the States covered by the program remained in flux until EPA promulgated the final Transport Rule. In the final rule, EPA imposed emission reduction obligations on Texas without prior notice, while EPA dropped other States from the program altogether. EPA included 27 States in the final rule. 76 Fed. Reg. at 48,210 (Pet. App. 130a-131a) (18 States for annual PM<sub>2.5</sub> NAAQS; 21 for 24-hour PM<sub>2.5</sub> NAAQS; and 20 for ozone NAAQS).

Two aspects of the final Transport Rule are important here. First, unlike its predecessors, the Transport Rule did not call on States to develop and submit SIPs establishing the means for accomplishing the EPA-defined ends. To the contrary, EPA immediately imposed federal implementation plans (FIPs) to implement those obligations. *Id.* at 48,208, 48,212, 48,219-20 (Pet. App. 117a, 139a-142a, 170a-176a).

Second, EPA declined to evaluate whether the emission reductions mandated by the final rule conformed to limits imposed by the text of the good neighbor provision—*i.e.*, whether the final rule’s requirements assured that emissions that either make no contribution or make only an “insignificant” contribution to nonattainment would be excluded from the rule’s coverage.

#### **IV. The Decision of the Court of Appeals**

When the D.C. Circuit was asked to review the Transport Rule, the court began, as every reviewing court must, by identifying the statutory limits imposed on agency authority. It then assessed EPA’s action in the context of those statutory limits.

As a result of this analysis, the court found that the Transport Rule violated the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) and the D.C. Circuit’s mandate in *North Carolina*. The rule crossed three clear statutory limitations on EPA’s authority by: (1) requiring reductions in emissions that contribute insignificantly to downwind nonattainment; (2) requiring greater emission reductions than needed to achieve attainment; and (3) requiring reductions in emissions from an upwind State that would never

reach the downwind nonattainment areas in question. Pet. App. 31a-40a. The court also found that EPA had no authority under 42 U.S.C. § 7410(c) to promulgate FIPs implementing this new and unique multi-state program without first having defined the end required of States (*i.e.*, state emission budgets) and then having given each State an opportunity to choose the means of achieving those ends through development and submittal of a SIP.

### SUMMARY OF ARGUMENT

The court of appeals correctly held that EPA acted beyond its statutory authority in promulgating the Transport Rule and that the rule was therefore unlawful. The court of appeals' decision should be affirmed.

I.A. The court of appeals had jurisdiction to address the FIP-before-SIP issue. Only the Transport Rule FIPs were before the court. No other EPA actions were affected by the court of appeals' vacatur of those FIPs. The Transport Rule FIPs and earlier SIP disapprovals (and findings of failure to submit) were separate and distinct EPA actions. As petitioners below were not collaterally attacking any earlier EPA actions, there was no jurisdictional impediment to the court's review of the merits of petitioners' FIP-before-SIP argument.

I.B. EPA chose to establish good-neighbor emission reduction requirements for ozone and PM<sub>2.5</sub> NAAQS through regional emission reduction programs. As a result, a State's good-neighbor ozone and PM<sub>2.5</sub> SIP obligations depended entirely on whether that State was included in the Transport Rule. Under any CAA program that must be imple-

mented in SIPs, States must be given the opportunity to exercise their statutory role at the implementation stage. The Transport Rule denied States that right.

The court of appeals correctly determined that the approach that EPA took in the Transport Rule was contrary to how the CAA's cooperative federalism structure works. EPA's argument here that States could have escaped EPA's imposition of a FIP by undertaking the regional analyses necessary to identify amounts of emissions that must be abated under the good neighbor provision conflicts with the system EPA chose to create to address regional interstate pollution. As EPA concluded in 1998, with respect to the ozone NAAQS, it was "EPA's responsibility" to determine the overall level of air pollutants that could be emitted in a given State without violating 42 U.S.C. § 7410(a)(2)(D)(i)(I). 63 Fed. Reg. at 57,369.

EPA reiterated this view of the good neighbor provision's applicability to regional pollution in defending the NO<sub>x</sub> SIP Call and in its CAIR rulemaking. The position EPA takes now in defense of the Transport Rule, however, flatly contradicts these long-standing pronouncements. And EPA's own actions in approving and disapproving good-neighbor SIPs establish that any SIP submittal by a potential Transport Rule State that was premised on the State's *not* contributing significantly to downwind nonattainment could not (and would not) have been approved until EPA concluded *in the final Transport Rule* that the State was outside the program.

II.A. The court of appeals correctly determined that the Transport Rule was statutorily flawed in

three distinct respects. The court's conclusion that the rule must be vacated as contrary to clear congressional intent should therefore be affirmed.

The first flaw is that the Transport Rule required upwind States to reduce amounts of pollutants that EPA itself had found to be "insignificant." Under 42 U.S.C. § 7410(a)(2)(D)(i)(I), the court of appeals held, EPA lacked statutory authority to compel such reductions. Once EPA found that amounts below one percent of the relevant NAAQS did not "contribute significantly" to nonattainment, EPA was precluded from requiring States to eliminate any portion of those "insignificant" contributions.

The second flaw is that the Transport Rule requires upwind-state reductions in emissions that never leave the State or contribute to downwind-state nonattainment. Because only part of the emissions originating in an upwind State will leave that State, and only a fraction of that part will "contribute significantly" to nonattainment in a downwind State, EPA exceeded its section 7410(a)(2)(D)(i)(I) authority.

The third flaw is that EPA failed in the Transport Rule to ensure that the collective obligations of the upwind States, when aggregated, did not produce unnecessary over-control (*i.e.*, more upwind-state emission controls than needed to achieve attainment of the NAAQS in downwind States). Under the plain terms of the good neighbor provision, the court held, EPA was required to account for such over-control. EPA does not here dispute the court of appeals' reading of the statute. The Agency can only suggest that the court's concern was theoretical in nature. But the record below contradicts EPA's attempts to dis-

miss the court's determination that the Transport Rule failed to respect this statutory limitation on EPA's authority.

II.B. The court of appeals had jurisdiction to consider the statutory objections to the lawfulness of the Transport Rule's "significant contribution" emission reduction requirements that were raised below. In addressing the statutory limits on EPA's "significant contribution" rulemaking authority, the court acted in accordance with its powers as a reviewing court.

The CAA imposes on a court reviewing EPA FIPs the obligation to "reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9). That is what the court of appeals did: it determined that the Transport Rule failed as a matter of law. In so doing, the court acted in a manner consistent with the principles that underpin the administrative exhaustion doctrine and did not contravene the provisions of 42 U.S.C. § 7607(d)(7)(B). EPA argues here for a regime under which agencies would be discharged from obeying clear statutory commands, and reviewing courts would be precluded from exercising their constitutional and statutory responsibilities, whenever EPA claims that a statute's plain meaning is not spelled out with sufficient specificity in a rulemaking comment. That is not the law.

**ARGUMENT****I. The Court of Appeals' Invalidation of EPA's FIP-Before-SIP Approach Should Be Affirmed.****A. The Court of Appeals Had Jurisdiction To Address the FIP-Before-SIP Issue.**

The challenge below to EPA's FIP-before-SIP approach arose in briefing timely-filed petitions to review EPA's Transport Rule FIPs. Neither in those petitions nor in the briefs below did anyone argue that the earlier EPA actions disapproving SIPs and making findings of failure to submit SIPs should be set aside. Accordingly, the court below vacated only the Transport Rule FIPs; it rendered no judgment and made no disposition with respect to any other EPA action. As a result, petitioners below did not collaterally attack earlier EPA actions. For that reason, and the reasons presented in the Brief of State and Local Government Respondents, there was no jurisdictional impediment to the court of appeals' review of the merits of the FIP-before-SIP argument.

Petitioners also largely ignore timely petitions filed by Georgia, Kansas, and Ohio for judicial review of EPA's disapproval of their respective good-neighbor SIP submissions.<sup>3</sup> Proceedings on those pe-

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<sup>3</sup> These EPA disapprovals are published at 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); and 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio). Petitions to review the disapproval of the Kansas and Georgia SIPs are pending in the D.C. Circuit. See *Westar Energy, Inc. v. EPA*, No. 11-1333 (D.C. Cir. filed Sept. 19, 2011); *Georgia v. EPA*, No. 11-1427 (D.C. Cir. filed Nov. 3, 2011). A petition to review the disapproval of the Ohio SIP is pending in the Sixth

titions for review have been stayed in the courts of appeals pending the outcome of this case.<sup>4</sup> But those SIP disapproval cases are independent of this Transport Rule FIP case. Consider what will happen to the SIP cases after the present case concludes.

Those pending SIP cases will be disposed of in one of two ways depending upon this Court's disposition of the present case. If the Court affirms the D.C. Circuit's decision and adopts its reasoning on the FIP-before-SIP issue, the issues in those SIP disapproval cases may be narrowed but not resolved. For example, EPA disapproved Kansas's SIP submission for two reasons: (1) it failed to anticipate the outcome of the Transport Rule; and (2) it was not supported by sufficient data. A Kansas challenge as to reason (1) would likely be rendered moot by a decision affirming the D.C. Circuit's reasoning, but a challenge as to reason (2) would not be moot. Kansas would need to prevail in its challenge on that latter basis to prevent EPA from including Kansas in a successor to the Transport Rule.

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Circuit. See *Ohio v. EPA*, No. 11-3988 (6th Cir. filed Sept. 19, 2011).

<sup>4</sup> The Georgia and Kansas SIP disapproval cases were stayed at EPA's request. EPA, in a joint submission with the States, argued that the SIP disapproval cases should be stayed pending the outcome of the review of the Transport Rule because the decision in the Transport Rule case "could narrow or eliminate some issues that would otherwise be presented in [the SIP disapproval] litigation, or eliminate the need for litigating [the SIP disapproval] case[s] altogether." Joint Motion To Hold Case in Abeyance ¶ 6, *Georgia v. EPA*, No. 11-1427 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353040; Joint Motion To Hold Case in Abeyance ¶ 6, *Westar Energy, Inc. v. EPA*, No. 11-1333 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353039.

On the other hand, if this Court were to agree with EPA that the States' challenge was a collateral attack on these SIP disapprovals, and vacates that part of the decision below for lack of jurisdiction, then the issue would be back before the court of appeals almost immediately. The abeyance of the SIP disapproval cases would be lifted, and the D.C. Circuit would be asked to consider the questions that EPA says should have been considered on review of the SIP disapprovals and not in this case. If the D.C. Circuit were to adopt in those cases the same reasoning it applied in its merits decision on review here—as one must assume it would—and find the SIP disapprovals to be unlawful, then the Transport Rule FIPs for these States as they relate to the 2006 PM<sub>2.5</sub> NAAQS would lack a lawful predicate and therefore would be vacated. And, because the Transport Rule FIPs are not severable, all other Transport Rule FIPs would fall as well. See State Br. at 23.

**B. Approval of Good-Neighbor SIP Submissions Depended Entirely on Whether the State Was Included in the Transport Rule.**

There are good reasons why EPA opted to define “contribute significantly” with respect to ozone and PM<sub>2.5</sub> NAAQS through comprehensive rulemakings governing multiple States. Ozone and PM<sub>2.5</sub> are fairly described as regional pollution problems that demand regional solutions. But that approach is consistent with the CAA only if States are given an opportunity to perform their statutory role at the implementation stage. *Michigan*, 213 F.3d at 687.

EPA failed to give States that opportunity in the Transport Rule. State Br. at 12-13. EPA simultane-

ously (1) identified the States that had any good-neighbor emission reduction obligations; (2) defined what those obligations would be; and (3) imposed FIPs to implement those obligations. This, the court of appeals correctly held, is not how the CAA's cooperative federalism structure is designed to work.

EPA responds by suggesting that the States could have done their jobs without EPA's help. EPA Br. at 26 ("Nothing in the Act makes the timing of the State's submission contingent on prior action by the EPA to define what portion of its contribution to downwind nonattainment is 'significant.>"). If States simply had performed the technical analyses themselves, EPA argues, they could have identified emissions that must be abated under the good neighbor provision and thus would have escaped EPA's FIPs. *Id.* at 27.

This litigation position is fundamentally at odds with the system EPA created in 1998 and with repeated Agency pronouncements since then. From the outset, EPA rejected adoption of a regulatory system that would allow States to determine for themselves what their good-neighbor emission reduction obligations would be. Cf., *e.g.*, 40 C.F.R. § 51.308(d)(1) (regulations telling States how to derive the emission reductions necessary to make "reasonable progress" toward visibility objectives). Instead, EPA concluded in 1998 that, for NAAQS like the ozone NAAQS, "[d]etermining the overall level of air pollutants allowed to be emitted in a State [without violating section 7410(a)(2)(D)]" would be "EPA's responsibility." 63 Fed. Reg. at 57,369. "Once EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section

[7410(a)(2)(D)],” *id.*, States would be responsible for choosing the mix of controls to abate those emissions.

Until it developed the Transport Rule, EPA readily acknowledged that its regional rulemaking approach was the administrative path EPA chose to create good-neighbor obligations that would trigger adoption of emission reduction SIPs. In the preamble to CAIR, for example, EPA explained that States outside the regional rulemaking were not required to adopt good-neighbor SIPs reducing their emissions. Instead, EPA explained, it can “issue a SIP call . . . to States to revise their SIPs to provide for additional emission controls to satisfy . . . [good-neighbor] obligations . . . based upon subsequently-available data and analyses.” 70 Fed. Reg. at 25,263-64. EPA’s argument here ignores this historical understanding and contradicts the arguments it advanced to defend its regional rulemaking approach when it was challenged in the court of appeals following promulgation of the NO<sub>x</sub> SIP Call. See *Michigan*, 213 F.3d at 685-88.

EPA’s argument here also is contradicted by its actions in approving and disapproving good-neighbor SIPs submitted in response to the 2006 PM<sub>2.5</sub> NAAQS. That record demonstrates that no State that EPA later included in the Transport Rule could have developed and submitted a SIP that EPA would have approved. The sole criterion that would allow EPA to approve a good-neighbor SIP submission under the 2006 PM<sub>2.5</sub> NAAQS was whether the State making the submission was excluded from the final Transport Rule’s coverage.

Compare the experience of Kansas, a State that EPA included in the final Transport Rule, and that of

Delaware, a State that EPA did not include in the final Transport Rule. Kansas and Delaware each submitted a SIP attempting to demonstrate through modeling data that the State did not contribute significantly to nonattainment or interfere with maintenance. EPA disapproved Kansas's submittal based on EPA's Transport Rule modeling supporting Kansas's inclusion in the Transport Rule. 76 Fed. Reg. at 43,145. EPA approved Delaware's submittal based on Transport Rule modeling that excluded Delaware from the program. 76 Fed. Reg. 53,638 (Aug. 29, 2011). In that approval, EPA made clear that it would have disapproved Delaware's SIP if EPA had made that State subject to the final Transport Rule. See *id.* at 53,638-39.

Because—and only because—Delaware was not included in the Transport Rule, EPA could approve the SIP, even though Delaware's technical demonstration was no more robust than the CAIR-based modeling provided by Kansas. *Id.* In short, whatever EPA may say now, the truth is that any submission by any potential Transport Rule State premised on the State not contributing significantly to downwind nonattainment could not have been approved before EPA promulgated the final Transport Rule with that State being excluded from coverage.

The Kansas and Delaware examples demonstrate that coverage of the good-neighbor regional program was dependent on promulgation of the Transport Rule in final form. As a result, specific emission reduction obligations for covered States did not, as a matter of law, come into existence until EPA's rule

was final.<sup>5</sup> No State may be required to submit a SIP now in order to satisfy requirements that are to be defined in the future. Cf. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”). And no State was required to guess the terms of the Transport Rule in preparing SIP submissions years before EPA promulgated that rule. As the State and Local Government Respondents argue, this is a classic case of “hide the ball.” State Br. at 20, 39. It is completely inconsistent with a system of cooperative federalism.

## **II. The Transport Rule Impermissibly Exceeds Statutory Boundaries.**

“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Georgetown Univ. Hosp.*, 488 U.S. at 208. EPA “is a

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<sup>5</sup> Similarly, the regulatory consequence of failing to submit a good-neighbor SIP following promulgation of the 2006 PM<sub>2.5</sub> NAAQS depended entirely on the outcome of EPA’s Transport Rule rulemaking. On June 9, 2010, EPA found that 29 States and territories had failed to submit good-neighbor SIPs for the 2006 PM<sub>2.5</sub> NAAQS. 75 Fed. Reg. 32,673 (June 9, 2010). Seventeen of those States and territories were not identified in the Transport Rule as “significantly contributing” to nonattainment of the 2006 PM<sub>2.5</sub> NAAQS in downwind States within the Transport Rule region. EPA has not imposed a FIP on any of these States. Indeed, EPA announced it had determined that, in light of its Transport Rule findings, one of those States—North Dakota—need not modify its SIP at all to address the good neighbor provision with respect to the 2006 PM<sub>2.5</sub> NAAQS. 78 Fed. Reg. 45,457 (July 29, 2013).

creature of statute, and has only those authorities conferred upon it by Congress; if there is no statute conferring authority, a federal agency has none.” *North Carolina*, 531 F.3d at 922 (internal quotation marks omitted).

When establishing States’ emission reduction obligations as part of a multi-state good-neighbor program, EPA must conform to the limits in 42 U.S.C. § 7410(a)(2)(D)(i)(I). The plain language of this provision precludes EPA from (1) prohibiting emissions that do not contribute significantly to nonattainment; (2) requiring emission reductions in amounts greater than necessary to achieve attainment; and (3) basing reduction requirements on emissions that never leave the upwind State and therefore can never reach the downwind-state nonattainment area. These statutory limits mean that a State can be required to prohibit no more than the amount of its total emissions that is transported to, and that contributes significantly to NAAQS nonattainment in, a downwind State. In promulgating the Transport Rule, EPA ignored these statutory boundaries.

#### **A. The Transport Rule Is Statutorily Flawed in Three Distinct Respects.**

The Transport Rule used a two-step approach in imposing good-neighbor ozone and PM<sub>2.5</sub> NAAQS emission reduction requirements. EPA first identified an air quality contribution threshold below which States could not be said to “contribute significantly” to nonattainment. 76 Fed. Reg. at 48,238-46 (Pet. App. 265a-309a). For each NAAQS, EPA made a finding in the rulemaking that a contribution of less than one percent of the NAAQS to any of the downwind nonattainment areas at issue “*do[es] not*

*significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS.” *Id.* at 48,236, 48,237 (Pet. App. 255a, 256a) (emphasis added).

After identifying the States that would be included in the multi-state program, EPA quantified the amount of emissions that each State must abate. Because good-neighbor emission reduction requirements must be “consistent with the provisions” of Title I of the CAA, the cost of emission controls may properly moderate the reduction amount needed to achieve good-neighbor air quality goals. See *supra* at 5-6 & n.1 (identifying numerous provisions of Title I that require consideration of cost and feasibility in limiting CAA nonattainment-based emission reduction obligations). Rather than using cost as a brake on required reductions in emissions contributing to air quality concentrations that exceed one percent of the NAAQS, however, EPA used cost as a license to compel reductions in emissions that contribute insignificantly to nonattainment, as well as to mandate emission reductions exceeding the amount required to achieve NAAQS attainment.<sup>6</sup>

The court of appeals found that, in adopting this approach, EPA exceeded its authority in “at least

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<sup>6</sup> The Brief of Industry and Labor Respondents (hereinafter Industry Br.) argues that EPA cannot consider costs in defining “significant contribution.” This Court need not resolve whether, and, if so, how, costs may be considered under the good neighbor provision in order to affirm the court of appeals’ vacatur of the Transport Rule. All respondents urging affirmance of the court of appeals’ decision agree that requiring reductions in emissions that contribute insignificantly to nonattainment cannot, as a matter of law, be justified on cost or any other grounds.

three independent but intertwined” ways. Pet. App. 31a. Each of the discrete flaws that the court of appeals identified in the Transport Rule compels the conclusion that the rule must be vacated as contrary to clear congressional intent.

*First*, the court of appeals found that, under 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA had “no statutory authority to compel States to reduce amounts of pollution that are ‘insignificant.’” *Id.* That is, the CAA “requires [an upwind] State to prohibit *at most* those ‘amounts’ which will ‘contribute significantly’—and no more.” *Id.* at 37a (emphasis added). Where “amounts below a numerical threshold do not contribute significantly to a downwind State’s nonattainment, EPA may not require an upwind State to do more.” *Id.*

The court of appeals properly found that EPA had exceeded its statutory authority. The good neighbor provision, the court noted, “is not a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State’s actual contribution to downwind air quality.” *Id.* at 23a. Once EPA promulgated a final rule finding that amounts below one percent of the relevant NAAQS “do not contribute significantly” to nonattainment, EPA could not require States to eliminate any emissions contributing below the one percent threshold.

The importance of administrative findings in determining the limits of an agency’s statutory authority is illustrated by *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Court began its analysis with the observation that an agency “may not exercise its authority in a manner that is inconsistent

with the administrative structure that Congress enacted into law.” *Id.* at 125 (internal quotation marks and citation omitted). The Court then considered the findings that the Food and Drug Administration (FDA) made to justify the regulation, but not the prohibition, of tobacco products. *Id.* at 135. *Based on the agency findings*, the Court held that, if those products *were* within the regulatory ambit of the Food, Drug and Cosmetic Act (FDCA), the FDA would have to remove them “from the market entirely.” *Id.* at 143. Thus, given the FDA’s own findings, the only authority it could conceivably exercise under the FDCA would be authority to prohibit such products “entirely”—but, because Congress in subsequent legislation had rejected any such ban, “there [was] . . . no room for tobacco products within the FDCA’s regulatory scheme.” *Id.*

The Court’s reasoning in that case applies here. Once EPA made the regulatory finding that emissions contributing to concentrations below the one percent threshold “do not significantly contribute to nonattainment,” 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a), the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) precluded EPA from regulating those emissions. Accordingly, any authority EPA has to require regulation of upwind States’ emissions is necessarily constrained by EPA’s own finding that amounts contributing below the one percent threshold do not significantly contribute. The Court’s admonition in *Brown & Williamson* applies here: “[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.” 529 U.S. at 161 (internal quotation marks and citation omitted).

EPA offers no effective rebuttal to the court of appeals' determination that, once EPA had made a finding marking "a floor below which 'amounts' of downwind pollution were not significant," the Agency "could not then ignore that mark and redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." Pet. App. 36a (emphasis in original). EPA suggests that "[t]he court of appeals' analysis is misguided" and that "[t]he court did not suggest that the EPA had set out to regulate emissions that will contribute *insignificantly* to downwind nonattainment, or even that the Transport Rule is likely to have that effect—only that the Rule does not eliminate that possibility." EPA Br. at 54 (emphasis in original). But regardless of whether EPA "set out to regulate" upwind emissions that do not contribute significantly to downwind nonattainment, under 42 U.S.C. § 7410(a)(2)(D)(i)(I) EPA is authorized only to require upwind-state prohibitions of emissions that create *significant* contributions.

*Second*, simple physics dictates—and EPA recognizes—that emissions originating in an upwind State, and the atmospheric products of those emissions, dissipate or deposit out of the atmosphere continually over time and distance. See, e.g., 76 Fed. Reg. at 48,316 (Pet. App. 621a-622a). In disregard of this principle, however, the Transport Rule failed to discount the portion of the emissions that never leaves the upwind State and reaches downwind-state nonattainment areas.

The court of appeals thus held that the Transport Rule ran "afoul of the [CAA's] proportionality requirement as described in . . . *North Carolina*." Pet.

App. 38a. “Under the statute,” the court explained, “each upwind State that contributes to a downwind nonattainment area is responsible for no more than its own ‘amounts which will . . . contribute significantly’ to the downwind State’s pollution problem.” *Id.* The Transport Rule, however, held each upwind State responsible for more than the emissions that traveled from the State to the downwind nonattainment areas at issue.

As the court of appeals observed, “the text of Section [7410(a)(2)(D)(i)(I)] tells us that the ‘amounts which will . . . contribute’ to a downwind State’s nonattainment are *at most* those amounts that *travel beyond an upwind State’s borders and end up in a downwind State’s nonattainment area.*” *Id.* at 23a (emphases added). Yet EPA acknowledged to the court of appeals that under the Agency’s construction of the good neighbor provision on which the Transport Rule rested, EPA “could require a State to reduce *more than the State’s total emissions that go out of State.*” *Id.* at 38a n.23 (emphasis in original); see also *id.* at 23a n.12. “[S]uch a claim of authority,” the court of appeals explained, “does not square with the statutory text—‘amounts’ of pollution obviously cannot ‘contribute’ to a downwind State’s pollution problem if they don’t even reach the downwind State.” *Id.* at 38a n.23.

Here, EPA neither repudiates this claim of sweeping authority nor identifies any statutory foundation for it. Instead, EPA blandly asserts that “no basis [exists] for the court of appeals’ concern that, under the EPA’s approach, an upwind State could be required to ‘reduce more than the State’s total emissions that go out of State.’” EPA Br. at 48 n.14. “The pollution that travels beyond an upwind State’s bor-

ders is not separate and distinct from the pollution with local impacts,” EPA says, and “[t]he only way to reduce 100% of a State’s contribution to a downwind area therefore would be to eliminate 100% of its emissions.” *Id.* at 48-49 n.14.

This is a non sequitur. While the “pollution” in a downwind State that is attributable to emissions from an upwind State is thoroughly mixed with the “pollution” created from emissions originating in the downwind State, it does not follow from this that an upwind State’s contribution is caused by all of the emissions originating in that upwind State. EPA’s atmospheric modeling determines the “contribution” in a downwind State that is attributable to the “emissions” from an upwind State, see 76 Fed. Reg. at 48,239 (Pet. App. 265a), and those upwind-state emissions reaching the downwind State are a fraction of the upwind State’s total emissions, see, *e.g.*, *id.* at 48,316 (Pet. App. 621a-622a) (reflecting the physical principle that pollutants deposit out of the atmosphere as emissions travel downwind).

*Third*, the court of appeals found that the Transport Rule was unlawful because EPA “failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States.” Pet. App. 39a. Because “EPA’s statutory authority . . . is limited to attaining the NAAQS in the downwind States[,] EPA [could] not require upwind States to do more than necessary for the downwind States to achieve the NAAQS.” *Id.* at 39a-40a. In the Transport Rule, however, “EPA did not try to take steps to avoid such over control.” *Id.* at 40a.

EPA does not dispute the court of appeals' reading of the statute. Rather, the Agency now suggests the court's "concern" was "theoretical and misplaced." EPA Br. at 50. As the Brief of Industry and Labor Respondents explains, EPA's after-the-fact explanations are unavailing; they are based on arguments that the Agency did not make below and that in any event the record contradicts. See Industry Br. at 18-20 (citing record evidence demonstrating over-control). As it is, the court of appeals recognized that, with "the end goal of the statute [being] attainment in the downwind State[,] EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment." Pet. App. 24a. Because, by its terms, the Transport Rule did not respect this statutory limitation on EPA's authority, the court properly found the rule to be unlawful.

**B. The Court of Appeals Had Jurisdiction To Consider Statutory Objections to the Lawfulness of EPA's "Significant Contribution" Emission Reduction Requirements.**

Petitioners argue that the court of appeals lacked jurisdiction under 42 U.S.C. § 7607(d)(7)(B) to declare EPA's Transport Rule emission reduction requirements contrary to the plain terms of the good neighbor provision because, they contend, rulemaking participants did not state with sufficient specificity what the statute means. EPA Br. at 33-42; Brief of American Lung Association, *et al.* (collectively, ALA), at 28-35. The respondents submitting this brief concur with the Brief of Industry and Labor Respondents that comments submitted in EPA's rulemaking by the Utility Air Regulatory Group (UARG),

Southern Company, and others raised statutory objections with sufficient specificity. See Industry Br. at 16, 47-48. The respondents submitting this brief further agree that the provisions of 42 U.S.C. § 7607(d)(7)(B) do not operate to limit the powers of a reviewing court.<sup>7</sup> See *id.* at 42-46. The respondents submitting this brief write separately to address the responsibility of the court of appeals under 42 U.S.C. § 7607(b) to determine whether the Transport Rule was consistent with clear statutory limits that Congress imposed on EPA and to explain further why 42 U.S.C. § 7607(d)(7)(B) cannot be construed to constrain the exercise of that jurisdiction.

Only by exercising its Article III power to interpret the law is a court able to review any agency decision. Because objections grounded in the Transport Rule's departure from the statute's terms were raised in the rulemaking, see Industry Br. at 16, 47-48; Comments of UARG at 64 (Oct. 1, 2010), EPA-HQ-OAR-2009-0491-2756, Deferred Joint Appendix, Vol. II at JA01060, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Mar. 14, 2012) (objecting to emission reduction requirements where EPA "fail[s] to adhere to the terms of the CAA"), the court below was obligated to decide whether the rule exceeded EPA's authority under the plain terms of the Act. To accept EPA's "waiver" arguments here

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<sup>7</sup> The Brief of Industry and Labor Respondents explains that although EPA and ALA assert that the court of appeals exceeded its jurisdiction in reaching the merits of the petitioners' arguments below, neither EPA nor ALA makes any effort to show that 42 U.S.C. § 7607(d)(7)(B) in fact establishes a "jurisdictional" requirement. See Industry Br. at 43. That brief demonstrates that the administrative exhaustion requirement in 42 U.S.C. § 7607(d)(7)(B) is nonjurisdictional. *Id.* at 43-46.

would require the Court to construe 42 U.S.C. § 7607(d)(7)(B) as a congressional shield that protects plainly ultra vires Agency action from judicial review in order to give repose to rules that exceed textual statutory limitations. Enshrining Executive Branch conduct that violates explicit legislative direction is hardly Congress's normal priority.

The CAA establishes for a court reviewing EPA FIPs under 42 U.S.C. § 7607(b) the obligation to “reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations.” 42 U.S.C. § 7607(d)(9);<sup>8</sup> cf. 5 U.S.C. § 706(2)(C) (judicial review provision of the Administrative Procedure Act (APA)).<sup>9</sup> This is what the court of appeals did here. It determined, under *Chevron* step one,<sup>10</sup> that the Transport Rule failed as a matter of law in three independent respects.

In this regard, this Court's discussion of the fundamental purpose of the “administrative exhaustion” doctrine, and of the values that the doctrine is meant to promote, provides context for determining whether, as petitioners' arguments assume, 42 U.S.C. § 7607(d)(7)(B) contemplates that rulemaking participants can themselves “waive” statutory limits on EPA's powers. In *McCarthy v. Madigan*, 503 U.S.

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<sup>8</sup> 42 U.S.C. § 7607(d)(1)(B) makes FIPs, including those promulgated by EPA in the Transport Rule, subject to the provisions of 42 U.S.C. § 7607(d).

<sup>9</sup> See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) (“The standard for substantive judicial review of EPA action under the Clean Air Act is taken directly from the APA.”).

<sup>10</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

140, 145 (1992), the Court explained that “the exhaustion doctrine recognizes the notion, grounded in deference to Congress’ delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.” This principle requires application of the exhaustion doctrine “when the action under review involves exercise of *the agency’s discretionary power* or when the agency proceedings in question allow the agency to apply *its special expertise*.” *Id.* (citing *McKart v. United States*, 395 U.S. 185, 194 (1969) (emphases added)). Where, however, there is “*nothing to be gained* from permitting the compilation of a detailed factual record, or from [the application of] agency expertise,” *Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (emphasis added), the rationale for requiring “exhaustion” before the agency disappears.

Consistent with the principles that underpin the exhaustion doctrine, the court of appeals properly addressed the statutory limits on EPA’s “significant contribution” rulemaking authority as an element of the court’s inherent powers as a reviewing court. Because, as the court of appeals found, the good neighbor provision is unambiguous regarding the three statutory limits on EPA’s authority, EPA had no “discretionary power” to exercise or “special expertise” to apply in determining whether to obey those limits. The issues here were pure questions of law not requiring application of EPA’s expertise. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (interpreting the law is “the province and duty of the judicial department”).

Indeed, given these circumstances, had the court of appeals *declined* to reach issues related to the limits on EPA's statutory authority, the court would have abdicated its responsibility under 42 U.S.C. § 7607(d)(9)(C) to "reverse any [EPA] action found to be . . . in excess of statutory jurisdiction, authority, or limitations." This past Term, the Court had occasion to note that, "for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act [are] authoritatively prescribed by Congress." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013). Accordingly, when such agencies "act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *Id.*

The implications of petitioners' assertion that 42 U.S.C. § 7607(d)(7)(B) deprived the court of appeals of jurisdiction to consider whether EPA acted within the scope of its congressionally delegated authority are breathtaking. The asserted principle that EPA advances would discharge agencies from obeying clear statutory commands and would bar reviewing courts from exercising their constitutional and statutory responsibilities whenever agencies might claim that rulemaking comments failed to recite a statute's plain meaning.

At issue here was a straightforward question of statutory interpretation, involving a provision of the CAA that the court below found *not* to be ambiguous. Objections were raised during the rulemaking to the exercise of EPA's "significant contribution" emission reduction authority; EPA was not "subjected to verbal traps" or required "to wade through reams of documents searching for "implied" challenges." *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 564

(D.C. Cir. 2009) (quoting *Mossville Env'tl. Action Now v. EPA*, 370 F.3d 1232, 1239 (D.C. Cir. 2004)).

To the contrary, as the majority below pointed out, “one of the central questions in the long history of EPA’s efforts to implement the good neighbor provision has been whether EPA has complied with the basic statutory limits on its authority.” Pet. App. 32a n.18. EPA thus, for example, “knew from the beginning [of the rulemaking here] that it was required to comply with *North Carolina*, including that part of the [court of appeals’] holding on which petitioners rel[ie]d” in challenging the Transport Rule. *Id.* Because the statutory provisions construed by the court below were *not* ambiguous, the *Chevron* framework removes all deference to the agency. As the court of appeals has stated, “at *Chevron* step one [the reviewing court] alone [is] tasked with determining Congress’s unambiguous intent,” and the court is therefore to “answer [the] inquir[y] without showing the agency any special deference.” *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

EPA was obligated, in developing its Transport Rule emission reduction requirements, to assure that statutory limits imposed on the exercise of the Agency’s good-neighbor powers would not be crossed. Because EPA ignored those limits, the court of appeals’ obligation under 42 U.S.C. § 7607(d)(9)(C) was to vacate the Transport Rule.<sup>11</sup> Accepting petitioners’

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<sup>11</sup> Other D.C. Circuit decisions recognize EPA’s independent obligation to justify “key assumptions as part of its affirmative ‘burden’” to promulgate valid rules, *Small Refiner*, 705 F.2d at 534-35, and recognize that “even the failure to object during the comment period is insufficient to bar [judicial] review” of those key assumptions. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472

view of the statute would enshrine outcomes that Congress explicitly precluded under statutory provisions that, on their face, give EPA notice of the limits on its authority. That is not the law.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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F.3d 882, 891-92 (D.C. Cir. 2006), *clarified on other grounds on denial of reh'g*, 489 F.3d 1245 (D.C. Cir 2007); see *Small Refiner*, 705 F.2d at 535. This principle has been applied to arguments, made in challenges to EPA actions under the CAA, that EPA failed (1) to set compliance deadlines consistent with the CAA, *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998) (per curiam), (2) to promulgate rules consistent with the requirements of 42 U.S.C. § 7607(d), *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam), and (3) to establish the validity of important modeling assumptions, *Small Refiner*, 705 F.2d at 534-35— notwithstanding claims in each case that those arguments were not raised in comments.

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Nos. 12-1182 and 12-1183

IN THE  
**Supreme Court of the United States**

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *ET AL.*,

*Petitioners,*

v.

EME HOMER CITY GENERATION L.P., *ET AL.*,

*Respondents.*

AMERICAN LUNG ASSOCIATION, *ET AL.*,

*Petitioners,*

v.

EME HOMER CITY GENERATION L.P., *ET AL.*,

*Respondents.*

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I HEREBY CERTIFY that on October 31, 2013, three (3) copies of the BRIEF FOR RESPONDENTS UTILITY AIR REGULATORY GROUP, *ET AL.*, in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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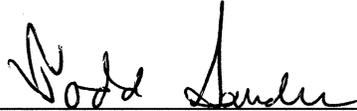
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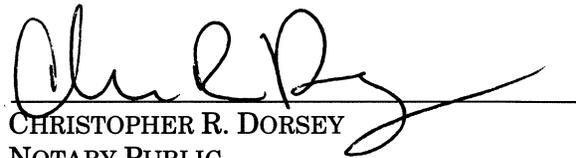
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Sworn to and subscribed before me this 31th day of October, 2013.




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CHRISTOPHER R. DORSEY  
 NOTARY PUBLIC  
 District of Columbia

My commission expires July 31, 2018.

Nos. 12-1182 and 12-1183

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IN THE  
**Supreme Court of the United States**

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UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, ET AL.,

*Petitioners,*

v.

EME HOMER CITY GENERATION L.P., ET AL.,

*Respondents.*

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AMERICAN LUNG ASSOCIATION, ET AL.,

*Petitioners,*

v.

EME HOMER CITY GENERATION L.P., ET AL.,

*Respondents.*

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**On Writs of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

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**BRIEF FOR RESPONDENTS  
UTILITY AIR REGULATORY GROUP, ET AL.**

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**CERTIFICATE OF COMPLIANCE**

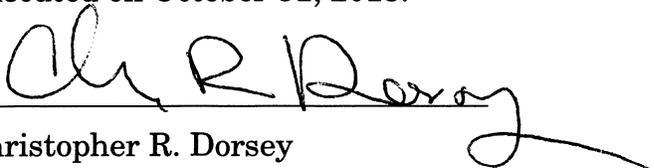
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As required by Supreme Court Rule 33.1(h), I certify that the document contains 10,046 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on October 31, 2013.



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November 2013 Update (Update #56 November 4, 2013)

New from Columbia Law School's Center for Climate Change Law:

New climate law blog items:

On the Anniversary of Sandy, New Study Presents Lessons Learned from Existing Tools to Protect Coastal Communities (October 30, 2013)  
Carbon Capture, Utilization and Storage in China: Emerging Policies and Laws (October 21, 2013)  
FAQs on Supreme Court's Cert Grant on EPA's Regulation of Greenhouse Gas Emissions (October 21, 2013)  
California Creates First State Energy Storage Mandate (October 19, 2013)  
Environmental Impact Statements Addressing Resiliency and Adaptation (October 17, 2013)  
Australians React Strongly to the Abolition of the Climate Commission (October 15, 2013)  
Is the EU Refocusing Its Climate Change Policy? (October 9, 2013)  
Industry Lawsuit Challenges French Fracking Ban (October 7, 2013)

New books:

The Law of Adaptation to Climate Change: U.S. and International Aspects (ABA, edited by Michael B. Gerrard and Katrina Fischer Kuh)  
Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (Cambridge Univ. Press, edited by Michael B. Gerrard and Gregory E. Wannier)

Hydraulic Fracturing Case Chart and Hydraulic Fracturing Regulatory Chart published by Arnold & Porter LLP

To receive Arnold & Porter's Hydraulic Fracturing Legal Updates, [click here](#)

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Here are the additions to the Climate Case Chart since Update #55.

## FEATURED DECISION

Coalition for Responsible Regulation v. EPA (U.S., cert. granted Oct. 15, 2013): added to the "Challenges to Federal Action" slide. On October 15, 2013, the U.S. Supreme Court granted certiorari with respect to six petitions seeking review of Coalition for Responsible Regulation v. Environmental Protection Agency, in which the D.C. Circuit upheld the authority of the United States Environmental Protection Agency (EPA) to regulate greenhouse gases under the Clean Air Act. The Supreme Court's grant of certiorari is limited to one question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." Certiorari was denied with respect to other

questions raised in petitions challenging the D.C. Circuit's decision, including issues relating to EPA's endangerment finding and tailpipe emissions standards.

## DECISIONS AND SETTLEMENTS

Washington Environmental Council v. Bellon (9th Cir. Oct. 17, 2013): added to the "Force Government to Act/Clean Air Act" slide. The Ninth Circuit dismissed on standing grounds a citizen suit brought by two environmental groups to compel the Washington Department of Ecology and two regional clean air agencies to regulate oil refineries under the Clean Air Act. The environmental groups alleged that the agencies' failure to define "reasonably available control technology" (RACT) greenhouse gas emissions limits violated Washington's State Implementation Plan. The district court for the Western District of Washington in 2011 ordered the agencies to complete the RACT process for refineries. On appeal, defendant-intervenor Western States Petroleum Association argued for the first time that plaintiffs lacked Article III standing, and in a decision issued on October 17, 2013, the Ninth Circuit agreed. The Ninth Circuit held that even assuming that plaintiffs established injury in fact resulting from climate changes, they had not provided evidence sufficient to establish the causality or redressability elements of standing at the summary judgment stage. The court assumed without deciding that "that man-made sources of [greenhouse gas] emissions are causally linked to global warming and detrimental climate change" but held that plaintiffs' "vague, conclusory statements" connecting the failure to set RACT standards to their injuries failed to satisfy their evidentiary burden. The Ninth Circuit further noted that establishing "a causal nexus" might be "a particularly challenging task" because "there is limited scientific capability in assessing, detecting, or measuring the relationship between a certain [greenhouse gas] emission source and localized climate impacts in a given region." The court rejected plaintiffs' argument that the causal link should be inferred because they were seeking to enforce a regulatory obligation; the court noted that plaintiffs could not benefit from the relaxed standing rule for sovereign states carved out by the Supreme Court in Massachusetts v. EPA. In concluding that plaintiffs had also failed to establishing the redressability element of standing, the Ninth Circuit pointed to the absence of evidence in the record that RACT standards would reduce the pollution causing plaintiffs' injuries.

Latinos Unidos de Napa v. City of Napa (Cal. Ct. App. Oct. 10, 2013): added to the "State NEPAs" slide. An affordable housing advocacy organization challenged the City of Napa's failure to prepare an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) for revisions to housing elements of the City's general plan and related actions. The City determined that the actions would not result in any new significant environmental effects not identified and mitigated in the EIR for the 1998 general plan. The California Court of Appeal affirmed the trial court's denial of the challenge. Citing substantial evidence in the administrative record that the actions would not have any new significant impacts, the Court of Appeal rejected petitioner's contention that the City had failed to disclose the actions' impacts and cumulative impacts on greenhouse gas emissions.

Safari Club International v. Jewell (U.S. cert. denied Oct. 7, 2013): added to the "Endangered Species Act" slide. On October 7, 2013, the Supreme Court denied Safari Club International's petition for writ of certiorari in the case challenging the designation of polar bears as a threatened species under the Endangered Species Act.

Sierra Club v. Moser (Kan. Oct. 4, 2013): added to the "Challenges to Coal-Fired Power Plants" slide.

The Kansas Supreme Court granted in part the Sierra Club's petition for judicial review of the issuance of an air emissions source construction permit for an 895-megawatt coal-fired power plant in Holcomb, Kansas. The court remanded the proceeding on the ground that the Kansas Department of Health and Environment should have applied EPA regulations regarding one-hour emission limits for nitrogen dioxide and sulfur dioxide that became effective before the permit was issued.

Save the Plastic Bag Coalition v. County of Marin (Cal. review denied Oct. 2, 2013): added to the "State NEPAs" slide. On October 2, 2013, the California Supreme Court declined to review the California Court of Appeals decision upholding Marin County's ordinance banning plastic bags. Plaintiff had alleged that increased paper bag use might increase greenhouse gas emissions.

Shurtleff v. EPA (D.D.C. Sept. 30, 2013): added to the "Climate Protesters and Scientists" slide. The Attorney General of Utah commenced a lawsuit against EPA pursuant to the Freedom of Information Act (FOIA) seeking documents concerning the "endangerment" finding that provided a basis for regulating greenhouse gases under the Clean Air Act. In September 2012, a magistrate judge recommended that the motion be granted in part, holding that the agency adequately conducted a search of relevant documents concerning the FOIA request, but that certain documents withheld pursuant to the attorney-client privilege should be disclosed. In September 2013, the district court accepted in large part the recommendations of the magistrate judge but rejected the conclusion that EPA's search of relevant documents had been adequate for all portions of the FOIA request. The court found that EPA had not included some portions of the request in one of the three "phases" into which it had divided most of the request, and that for those undesignated portions it had not provided detail about the types of searches, search terms, methods or processes used. The court ordered EPA to perform new searches for responsive documents or to provide proof that its earlier search had met the adequacy standard. The court otherwise rejected plaintiff's arguments that any delay in response constituted a basis for denying EPA summary judgment and that EPA should have searched files of additional employees and offices where EPA explained its basis for limiting its search. The court also denied plaintiff's motion to supplement the record with correspondence between EPA and Congress regarding the EPA administrator's use of "alias email accounts," citing EPA's statement that the FOIA search had encompassed documents in both the administrator's official and internal e-mail accounts. The court also declined to order the disclosure of the internal e-mail address or the e-mail addresses of employees in the Executive Office of the President. The court accepted the recommendation that for 17 documents withheld under the claim of attorney-client privilege, EPA must either disclose such documents or submit supplemental materials explaining in sufficient detail why such documents are subject to the privilege. On the other hand, the court found that EPA had adequately supported the withholding of attorney comments and edits on EPA's response to comments under the work product doctrine where EPA had received "a flood of comments" attacking its proposed endangerment finding, indicating the likelihood of litigation. The court also agreed with the magistrate judge that EPA fulfilled its FOIA obligations by directing plaintiff to publicly available documents and was not required to identify specific responsive documents.

California Clean Energy Committee v. City of San Jose (Cal. Ct. App. Sept. 30, 2013): added to the "State NEPAs" slide. In an unpublished opinion, the California Court of Appeal reversed the decision of the trial court dismissing plaintiff's challenge to the City of San Jose's compliance with CEQA in conjunction with its approval of an update to the City's general plan entitled "Envision San Jose 2040 General Plan." The appellate court disagreed with the trial court's conclusion that plaintiff had failed to exhaust its administrative remedies, noting that plaintiff had submitted comments critical of the draft EIR (including comments critical of the draft EIR's analysis of greenhouse gas emissions). The appellate court held that because the City Council had improperly delegated the duty to certify the EIR as complete to the planning commission, no administrative appeal was available to plaintiff, and plaintiff's

comment letter on the draft EIR sufficed to exhaust its administrative remedies.

SSHI LLC dba DR Horton v. City of Olympia (Wash. Ct. App. Sept. 24, 2013): added to the “Stop Government Action/Other Statutes” slide. Developer DR Horton challenged the City of Olympia’s denial of its master plan application for an 80-acre “neighborhood village.” In its challenge under the Washington Land Use Petition Act, DR Horton claimed, among other things, that the City Council erred in denying the application for failure to satisfy public transit requirements. In an unpublished opinion, the Washington Court of Appeals affirmed the trial court’s orders dismissing the petition. With respect to the public transit requirements, the appellate court held that the Council had not erred in concluding that the proposed master plan failed to satisfy transit requirements. The court also concluded that the public transit requirement did not violate the developer’s substantive due process rights because it was grounded in the legitimate public purpose of reducing greenhouse gases.

#### NEW CASES, MOTIONS, AND NOTICES

Conservation Law Foundation, Inc. v. Dominion Energy Brayton Point, LLC (D. Mass., voluntary motion to dismiss filed Oct. 22, 2013): added to the “Challenges to Coal-Fired Power Plants” slide. Three environmental groups filed a voluntary motion to dismiss with prejudice their citizen suit against the owner and operator of the Brayton Point Station, a coal-, natural gas-, and oil-fired electricity generating station in Somerset, Massachusetts. The groups indicated that they had reached a settlement with the defendant. The terms of the settlement were not filed with the court, but news reports indicated that the owners had agreed to remediate emissions violations and report on their efforts, install soot monitoring equipment, and pay \$76,000 in civil penalties, \$65,000 of which would fund projects in Somerset. Earlier in October a new owner of the power plant announced its intent to close the plant as of June 2017.

American Petroleum Institute, Notice of Intent to File Citizen Suit (Oct. 17, 2013): added to the “Challenges to Federal Action” slide. On October 17, 2013, the American Petroleum Institute submitted a 60-day notice of intent to sue to EPA Administrator Gina McCarthy. The notice letter asserted EPA failures, and anticipated failures, to comply with statutory deadlines for setting biomass-based diesel and renewable fuel requirements for 2014. The notice letter cataloged EPA’s “habitual, historical delays” in promulgating the annual renewable fuel standards and asserted that “EPA’s continual tardiness has real, adverse effects on industry.”

Center for Biological Diversity v. EPA (W.D. Wash, filed Oct. 16, 2013): added to the “Stop Government Action/Other Statutes” slide. On October 16, 2013, the Center for Biological Diversity (CBD) commenced a lawsuit in the district court for the Western District of Washington challenging EPA’s approvals of Oregon’s and Washington’s lists of impaired waters. CBD alleged that the approvals were arbitrary and capricious and in violation of the Clean Water Act because of EPA’s longstanding acknowledgment that “as a result of absorbing large quantities of human-made carbon dioxide emissions, ocean chemistry is changing, and this is likely to negatively affect marine ecosystems and species including coral reefs, shellfish, and fisheries.” CBD further alleged that EPA had before it “substantial evidence” that oyster production problems in Oregon and Washington stemmed from acidification. CBD submitted a letter to EPA in July 2013 asking it to reconsider the approvals.

American Fuel & Petrochemical Manufacturers v. EPA, No. 13-1268 (D.C. Cir., filed Oct. 10, 2013); American Petroleum Institute v. EPA, No. 13-1267 (D.C. Cir., filed Oct. 8, 2013): added to the “Challenges to Federal Action” slide. The American Petroleum Institute and American Fuel & Petrochemical Manufacturers filed petitions in the D.C. Circuit for review of EPA’s final rule setting the 2013 renewable fuel standards. In the final rule, EPA concluded that available fuels would be available to meet the statutory volumes of 2.75 billion gallons for advanced biofuels and 16.55 billion gallons for total renewable fuels. EPA reduced the cellulosic biofuel volume for 2013 from the statutory volume of 1.0 billion gallons to 6 million gallons.

Rocky Mountain Farmers Union v. Corey (9th Cir., petitions for rehearing en banc (RMFU, AFPM) filed Oct. 2, 2013): added to the “Challenges to State Action” slide. On October 2, 2013, two separate petitions for rehearing en banc were filed in the case challenging California’s low carbon fuel standard (LCFS). The Rocky Mountain Farmers Union plaintiffs—representing farming and ethanol interests—filed one petition, in which they argued that the Ninth Circuit had contravened Supreme Court precedent by “invok[ing] the state’s purported nondiscriminatory purposes to avoid strict scrutiny of a facially discriminatory regulatory regime” and that the court “also failed to recognize that the LCFS by design impermissibly regulates conduct occurring in other states.” Similarly, the American Fuels & Petrochemical Manufacturers Association (AFPM) plaintiffs—representing petrochemical, energy, and trucking industry groups—argued in their petition that the Ninth Circuit had impermissibly abandoned the strict scrutiny framework for assessing “regulations that, on their face, impose discriminatory burdens on imported products based on ‘state boundaries’” and that the LCFS’s lifecycle analysis regulated “interstate and foreign commerce—the production and transportation of fuels—occurring wholly outside of California.” The AFPM plaintiffs also argued that the Ninth Circuit’s conclusion that the LCFS’s crude oil provisions did not violate the dormant Commerce Clause was in conflict with Supreme Court and other federal circuit court precedents. The AFPM plaintiffs contended that the crude oil provisions, which benefited a certain California crude oil while burdening imported and Alaskan crude oils, were not immune from challenge merely because they also burdened other California crude oils.

American Tradition Institute v. University of Arizona (Ariz. Super. Ct., filed Sept. 6, 2013): added to the “Climate Protestors and Scientists” slide. The American Tradition Institute, now known as the Energy and Environment Legal Institute, announced on September 10, 2013 that it had filed a lawsuit challenging the University of Arizona’s compliance with Arizona’s Public Records Act. The plaintiff contends that the University failed either to produce responsive records or to provide adequate detail about certain records it withheld regarding “the notorious global warming ‘Hockey Stick’, and the group that made it famous, the Intergovernmental Panel on Climate Change.”

Communities for a Better Environment v. EPA (D.C. Cir., filed Oct. 31, 2011; oral argument Sept. 26, 2013): added to the “Force Government to Act” slide. In October 2011, petitioners challenged EPA’s final rule entitled “Review of National Ambient Air Quality Standards for Carbon Monoxide.” Among other things, petitioners challenged EPA’s decision not to set a secondary standard for carbon monoxide (CO) based on its climate-related effects. EPA had concluded that there was “insufficient information at this time to support the consideration of a secondary standard based on CO effects on climate processes.” The oral argument on September 26, 2013 addressed the issue of EPA’s obligation under *Massachusetts v. EPA* to regulate pollutants that cause climate change.

Here are recent additions to the Non-U.S. Climate Litigation Chart.

*Nucifora v. Valuer-General* (Australia, Queensland Land Court [2013] QLC 19, 6 May 2013): Nucifora appealed a land valuation in an Australia state court asserting that the land was overvalued because it did not take into account permanent changes in weather patterns due to climate change. The judge dismissed the appeal, finding that Nucifora had failed show that the farm was permanently devalued as a result of climate change. In its reasoning, the court noted that "climate change is "still a subject of considerable public debate." --Added to "Climate Adaptation" slide.

*Industrie de bois de Vielsalm & Cie v. Region Wallone* (European Court of Justice [2013] C-195/12 Judgment of the General Court, Sept. 26, 2013): European Union adopted Directive 2004/8/EC to promote high-efficiency cogeneration and reduce greenhouse gas emissions. Under the Directive, Member States are to adopt certain support mechanisms to encourage cogeneration. In implementing the Directive, Walloon decided to exclude biomass from wood, because of the potentially negative environmental consequences. Industrie de bois de Vielsalm (IBV), which operates a cogeneration plant from sawmill waste, applied to the Walloon Government for green certificates under the support mechanism and was rejected. IBV challenged the refusal arguing that the exclusion of biomass from wood (1) was inconsistent with the Directive and (2) violated the EU Charter of Fundamental Rights. The Constitutional Court of Belgium referred these issues to the EU Court of Justice. The Court of Justice found Walloon's interpretation of biomass was permissible under the Directive given its purpose. Furthermore, the Court found that while Member States were subject to the equal treatment and non-discrimination clauses of EU's Charter of Fundamental Rights in implementing the cogeneration support mechanism, the Walloon Government did not defy those clauses when it excluded wood and wood waste from its biomass support scheme. --Added to "EU Emissions Trading Scheme" slide.

*Commission v. Latvia* (European Court of Justice [2013] C-267/11, Judgment of the General Court, 3 Oct. 2013): Latvia brought an action for annulment of the contested decision of its national allocation plan (NAP) for the 2008-2012 period arguing that the Commission's request for further information was not timely under Art 9.3 Directive 2003/87. The General Court annulled the contested decision, and the Commission appealed. The court upheld the annulment. --Added to "EU Emissions Trading Scheme" slide.

*West Coast Ent. Inc. v Buller Coal Ltd* (Supreme Court of New Zealand [2013] NZSC 87, 19 Sept. 2013): Buller Coal Ltd and Solid Energy Ltd both applied to West Coast Regional Council and the Buller District Council for resource consents under the Resource Management Act of 1991 to mine coal for export purposes. At issue was whether the High Court wrongly upheld a declaration that the end use of the coal was irrelevant to the resource consents required under the act. The Supreme Court dismissed the appeal, finding that the purpose of the 2004 Amendment Act precluded consent authorities from taking into account indirect discharges of greenhouse gases in considering applications for resource consents. --Added to "Extraction of Natural Resources" slide.

Sincerely,

Michael B. Gerrard

Andrew Sabin Professor of Professional Practice  
Director, Center for Climate Change Law  
Columbia Law School  
435 West 116th Street  
New York, New York 10027  
(212) 854-3287  
michael.gerrard@law.columbia.edu

Senior Counsel  
Arnold & Porter LLP  
399 Park Avenue  
New York, New York 10022  
(212) 715-1190  
michael.gerrard@aporter.com

If you would like to be added to or deleted from the list to receive these email updates, please send an email to michael.gerrard@aporter.com. Please send additional material for inclusion in the chart, and updates to the "Current Status" column in the index, to the same email address.

For the U.S. climate change case chart, see <http://www.climatecasechart.com>.

Chart searching tip: the chart is a pdf document that allows users to search by word or case name. Simply type the word or case name into the "find" portion at the top center of each page and hit return.

For previous Columbia Climate Center Law updates, click [here](#) and then click on the "past email updates" link in the upper left hand corner.

For information about the ABA book Global Climate Change and U.S. Law, edited by Michael B. Gerrard, click [here](#).

For information about the ABA-ELI book The Law of Green Buildings, edited by J. Cullen Howe and Michael B. Gerrard, click [here](#).

For information about the ABA book The Law of Clean Energy: Efficiency and Renewables, edited by Michael B. Gerrard, click [here](#).

For information about Columbia Law School's Center for Climate Change Law, click [here](#).

---

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Document ID: 0.7.691.461292-000001

Owner: Barry, Margaret <margaret.barry@aporter.com>

Filename: image001.jpg

Last Modified: Mon Nov 04 15:46:38 EST 2013

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Attachment Name: image001.jpg

Locator: esa\pst\\*\vm-afb-med2\med2\_E\CW-Data\foi\140072-Custodian\_em-edid-edid9296  
\mcostell\MCostell\_Archive\_02242014.pst:00000000010e059e18f1754a91a954b716d6369d04b12d00:  
:070082c50d839c55e98a96d5a16dca29ac0cd8a3df4742ccab46d988015cd085e37e

Reason: It is an unsupported file type

From: Hoffer, Melissa (AGO)  
<melissa.hoffer@state.ma.us>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Peter  
Zalzal <pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: RE: Oil and Gas Pre-Call  
Date: Fri Nov 08 2013 10:15:49 EST  
Attachments:

---

Yes, that would work for me as well.

Thanks,

Melissa

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, November 08, 2013 10:06 AM  
To: 'Peter Zalzal'; Hoffer, Melissa (AGO)  
Subject: RE: Oil and Gas Pre-Call

Yes, that should work (assuming I am not on jury duty)

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 08, 2013 9:42 AM  
To: Michael J. Myers; Hoffer, Melissa (AGO) (melissa.hoffer@state.ma.us) (melissa.hoffer@state.ma.us)  
Subject: Oil and Gas Pre-Call

Hi Mike, Melissa

Are you available for a prep discussion sometime after 2:30 ET next Tuesday? Thank you both,

Peter

Peter Zalzal  
Staff Attorney

Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302  
T 303 447 7214  
C 303 946 0907  
F 303 440 8052  
pzalzal@edf.org  
edf.org

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton (vpatton@edf.org)  
<vpatton@edf.org>  
Cc:  
Bcc:  
Subject: oil and gas NSPS  
Date: Fri Nov 08 2013 10:34:27 EST  
Attachments:

---

Vickie, do you have a few minutes today to discuss strategy on this? Maybe at 230 eastern?

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: New Report Highlights Growing Taxpayer Burden from Climate Inaction  
Date: Fri Nov 08 2013 11:04:58 EST  
Attachments:

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To view this email as a web page, go here.

INCR a project of Ceres  
INCR Bulletin -  
November 8, 2013

#### In the News

International Finance Corporation Prices \$1 Billion Green Bond

This week, the International Finance Corporation (IFC) is pricing their second \$1 billion AAA 3-year green bond. According to sources within the IFC, they plan to issue around \$3.2 billion of green and "SRI" bonds during their current financial year.

[Read more here...](#)

#### Tools & Materials

INCR Sustainable Stock Exchanges Webinar with Guest Speakers

Missed last week's Sustainable Stock Exchanges Working Group call? Listen to a presentation about the World Federation of Exchanges Annual Meeting in Mexico City and presentations from guest speakers Dough Morrow, VP of Research at Corporate Knights, Anthony Miller, from UNCTAD and Simon McMahon from Sustainalytics.

[Watch the webinar.](#)

#### Events

INCR Member Hill Day

Thursday, November 14  
All-Day Event

Join other INCR members and partners at US SIF for a joint Hill Day event. The morning meeting will provide expert briefings on the Carbon Pollution Standards for Power Plants, the Master Limited Partnerships Parity Act, and the proposed expansion of Real Estate Investment Trusts to renewable energy projects. Following this briefing members will meet with staff and key Members of Congress on

these policy and investment opportunity issues. For more information and to register, contact Brandon Smithwood, Manager on the Policy Program.

#### 21st Century Investor Webinar: Fiduciary Duty

Thursday, November 21  
12:00 - 1:00 pm ET

Join Ceres for the next 21st Century Investor Blueprint webinar to learn about the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group. Register here.

#### INCR Integrated Reporting Working Group Call

Friday, November 22  
12:30 - 2:00 pm ET

Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

#### INCR Highlights

##### Report Highlights Growing Taxpayer Burden from Climate Inaction

Inaction on Climate Change Report CoverOne year after Hurricane Sandy, new research highlights the rising taxpayer costs to federal programs that provide flood insurance, crop insurance, wildfire protection and disaster relief. The Ceres report, Inaction on Climate change: The Cost to Taxpayers, outlines escalating government losses from more pronounced extreme weather events, which are strongly influenced by climate change, and makes specific recommendations to combat them.

"Taxpayer costs from climate change are getting bigger and bigger. Last year's extreme weather events alone cost every American more than \$300 a piece, or \$100 billion altogether - most of it to pay for federal crop, flood, wildfire and disaster relief," said Ceres president Mindy Lubber. "Yet, our public disaster relief and recovery programs have been slow to recognize that worsening climate impacts will drive up future losses to unsustainable levels."

Recommendations from the report include: improving transparency and accounting of the costs of extreme weather events to disaster relief and recovery programs; boosting research to understand how climate change will impact these programs; requiring recipients of federal relief and recovery assistance to adopt more stringent building codes and prohibit development in vulnerable areas; find ways to increase the level of private insurance market participation to reduce pressure on government relief and recovery programs.

Investors including Miller Howard Investments, First Affirmative Financial Network, and Newground Social Investment Investors are engaging the insurance industry on climate change and sustainability issues through dialogues and shareholder engagements. The group is asking large players such as Chubb Corporation and Cincinnati Financial to issue a sustainability report "describing short and long term responses to ESG-related issues" and "the company's role in reducing systemic harm to the U.S. and global economy from climate change."

Download the report.

Explore how investors are engaging the insurance industry on climate and sustainability issues.

For more information about the report and how to engage the insurance industry through dialogues and shareholder resolutions, contact Nancy Israel, Senior Manager, Insurance Program.

#### Stakeholders Discuss the Benefits of Reducing Oil Consumption at Energy Policy Series

This week, Ceres Board member Carl Pope and Carol Lee Rawn, Director Of Ceres Transportation Program, spoke at the Harvard Kennedy School Energy Policy Seminar Series. Joined by Robbie Diamond, CEO of Securing America's Future, the group discussed the benefits of reducing oil consumption.

Carl Pope, former Executive Director for the Sierra Club, stressed that projections of transportation reliance on oil are a significant concern, primarily because of the potential climate impacts of oil consumption, describing this as the "largest climate threat, going forward." Pope argued that strong public policies, such as Low Carbon Fuel Standards, could result in both lower oil prices and reduced oil consumption, with "no sacrifice required." The key is to create protected markets that allow alternative fuels, such as natural gas, to gain a strong foothold in the market, enabling them to overcome infrastructure barriers.

Carol Lee Rawn gave an overview of specific public policies that help reduce carbon emissions from the transportation sector-including CAFE standards and clean fuels standards, which have been adopted in California and are under consideration in other states. Rawn presented the results of a recent ICF study commissioned by Ceres and other stakeholders, which demonstrated that the California Low Carbon Fuel Standards are feasible and driving investment in cleaner fuels and production techniques.

For more information about Low Carbon Fuel Standards and how to engage the transportation sector, contact Carol Lee Rawn, Director, Ceres' Transportation Program.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy.

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Boston, MA 02111

[www.ceres.org](http://www.ceres.org)

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

This email was sent by:

Ceres

99 Chauncy Street

Boston, MA 02111

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From: Henderson, Kelly <khenderson@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Refinery NSPS call  
Date: Fri Nov 08 2013 11:23:59 EST  
Attachments:

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Thank you for your email. I am out of the office for the remainder of the day on Thursday 11/7, and all day Friday 11/8 and will not be checking email. If you need immediate assistance, please contact Sam Beckerman (sbeckerman@nrdc.org). Otherwise, I will return your email on Tuesday 11/12 after the Holiday.

From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Hoffer,  
Melissa (AGO) (melissa.hoffer@state.ma.us)  
(melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>;  
Doniger, David (ddoniger@nrdc.org) <ddoniger@nrdc.org>;  
Geertsma, Meleah (mgeertsma@nrdc.org) <mgeertsma@nrdc.org>;  
Joanne Spalding (joanne.spalding@sierraclub.org)  
<joanne.spalding@sierraclub.org>; 'tballo@earthjustice.org'  
(tballo@earthjustice.org) <tballo@earthjustice.org>; David  
McCabe (dmccabe@catf.us) <dmccabe@catf.us>; Darin Schroeder  
(dschroeder@catf.us) <dschroeder@catf.us>; Vickie Patton  
<vpatton@edf.org>; Tomas Carbonell <tcarbonell@edf.org>; Brian  
Korpics <bcorpics@edf.org>  
Cc:  
Bcc:  
Subject: Oil and Gas EPA Pre-Call  
Date: Fri Nov 08 2013 12:07:54 EST  
Attachments:

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U.S. & Canada: 866.740.1260

Access Code: 3681748

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Document ID: 0.7.691.522537

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Peter Zalzal <pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: Accepted: Oil and Gas EPA Pre-Call  
Date: Fri Nov 08 2013 12:18:54 EST  
Attachments:

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Accepted: Oil and Gas EPA Pre-Call

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: oil and gas NSPS  
Date: Mon Nov 11 2013 01:01:17 EST  
Attachments:

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Hi Mike, I was on the road all day Friday and again today. Are you available Tuesday at 9am ET or another time on Tuesday? Best wishes, Vickie

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, November 08, 2013 8:34 AM  
To: Vickie Patton  
Subject: oil and gas NSPS

Vickie, do you have a few minutes today to discuss strategy on this? Maybe at 230 eastern?

Michael J. Myers

Chief, Affirmative Litigation Section

Environmental Protection Bureau

New York State Attorney General

The Capitol

Albany, NY 12224

(518) 402-2594

michael.myers@ag.ny.gov

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From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: This Thursday: INCR Member Hill Day  
Date: Mon Nov 11 2013 10:42:45 EST  
Attachments:

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INCR a project of CeresEvents Calendar

This Thursday: INCR Members Invited to November Hill Day in Washington, D.C.

Thursday, November 14  
9:30 - 5:00 pm EST

DC FallJoin INCR members and partners from the US SIF for a joint Hill Day event next month in Washington, D.C. Morning meetings will provide an overview of expert briefings on the Carbon Pollution Standards for Power Plants, the Master Limited Partnerships Parity Act, and the proposed expansion of Real Estate Investment Trusts to renewable energy. Following this briefing, members will meet with staff and key Members of Congress on these issues. This event will be an opportunity to learn about shared federal climate and energy policy priorities and advocate for these policies with key Congressional offices.

For more information and to register, contact Brandon Smithwood, Manager, Policy Program.

Events Calendar

\*Thursday, November 14, All-Day Event - INCR Member Hill Day - Join other INCR members and partners at the US SIF for a joint Hill Day event. The morning meeting will provide an overview of expert briefings on the Carbon Pollution Standards for Power Plants, the Master Limited Partnerships Parity Act, and the proposed expansion of Real Estate Investment Trusts to renewable energy projects. Following this briefing members will meet with staff and key Members of Congress on these investment risks and opportunity issues. For more information and to register, contact Brandon Smithwood, Manager on the Policy Program at Ceres.

\*Thursday, November 21, 12:00 - 1:00 pm ET - 21st Century Investor Blueprint Webinar - Join Ceres for the 21st Century Investor Blueprint webinar to learn about the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group. Register here. For more information, contact Peter Ellsworth, Senior Manager, Investor Programs.

\*Friday, November 22, 12:30 - 2:00 pm ET - INCR Integrated Reporting Working Group Call - Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

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Boston, MA 02111

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

This email was sent by:

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99 Chauncy Street

Boston, MA 02111

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: oil and gas NSPS  
Date: Mon Nov 11 2013 22:01:46 EST  
Attachments:

---

Thanks Vickie. 930 am eastern tomorrow would work.

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Monday, November 11, 2013 1:01 AM  
To: Michael J. Myers  
Subject: RE: oil and gas NSPS

Hi Mike, I was on the road all day Friday and again today. Are you available Tuesday at 9am ET or another time on Tuesday? Best wishes, Vickie

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, November 08, 2013 8:34 AM  
To: Vickie Patton  
Subject: oil and gas NSPS

Vickie, do you have a few minutes today to discuss strategy on this? Maybe at 230 eastern?

Michael J. Myers

Chief, Affirmative Litigation Section

Environmental Protection Bureau

New York State Attorney General

The Capitol

Albany, NY 12224

(518) 402-2594

michael.myers@ag.ny.gov

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Janet Henry (JJhenry@aep.com) <jjhenry@aep.com>  
Cc: Thea Schwartz(tschwartz@atg.state.vt.us) <tschwartz@atg.state.vt.us>; Lori D.(Lori.DiBella@ct.gov) DiBella <lori.dibella@ct.gov>; allen.brooks@doj.nh.gov <allen.brooks@doj.nh.gov>; Jon Martin <jon.martin@dol.lps.state.nj.us>; MattZimmerman (MZimmerman@mde.state.md.us) <mzimmerman@mde.state.md.us>; gschultz@riag.ri.gov <gschultz@riag.ri.gov>; Myles Flint <myles.flint@usdoj.gov>; 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>; fcourtright@mde.state.md.us <fcourtright@mde.state.md.us>; douglass.shallcross@state.ma.us <douglass.shallcross@state.ma.us>; 'nmarks@nrdc.org' (nmarks@nrdc.org) <nmarks@nrdc.org>; aettinger@elpc.org <aettinger@elpc.org>; jmccmanus@aep.com <jmccmanus@aep.com>; jbkeane@aep.com <jbkeane@aep.com>  
Bcc: Peter Washburn </o=lawnet/ou=first administrative group/cn=recipients/cn=peterwashburn>  
Subject: AEP - Request for mitigation funds  
Date: Tue Nov 12 2013 11:49:18 EST  
Attachments: AEP Request Letter 2.pdf

---

Janet, please see the attached request for additional mitigation funds under the consent decree. This reflects an additional request to the one made on Sept. 27, i.e., is not a cumulative one. Thanks and let me know if you have any questions.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

Document ID: 0.7.691.523741-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>

Filename: AEP Request Letter 2.pdf

Last Modified: Tue Nov 12 11:49:18 EST 2013

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

November 12, 2013

By Electronic Mail

Janet J. Henry, Esquire  
American Electric Power Service Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215

RE: *United States et al. v. American Electric Power Service Corp., et al.* (S.D. Ohio No. C2-99-1250/Environmental Mitigation Project Fund Request

Dear Ms. Henry:

We are submitting this request on behalf of New York State for environmental mitigation project funding pursuant to Paragraphs 127 and 128 of the Consent Decree in this case.

Specifically, the State would like to request a total of \$2,193,000 for two projects that build on the Buffalo Green and Healthy Homes Initiative ("BGHHI") created by our office in 2008 with funding from the Consent Decree. The BGHHI funds health, safety and energy efficiency improvements for low-income Buffalo homeowners. The environmental mitigation project funding is used to fund the energy efficiency improvement component of the Initiative.

The projects to be funded by the present request include \$193,600 to support outreach necessary to extend the BGHHI to Buffalo's resettled refugee communities; and 2) \$2,000,000 to support the replication of the BGHHI "model" in the New York cities of Rochester and Syracuse.

Thank you for your attention to this matter. Please contact me if you have any questions about the request.

Sincerely,

/s/ Michael J. Myers

Michael J. Myers  
Assistant Attorney General  
Environmental Protection Bureau  
(518) 402-2594  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

cc: Recipients listed in Consent Decree

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: douglas.shallcross@state.ma.us  
<douglas.shallcross@state.ma.us>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>  
Bcc:  
Subject: FW: AEP - Request for mitigation funds  
Date: Tue Nov 12 2013 11:51:15 EST  
Attachments: AEP Request Letter 2.pdf

---

Re-sending to Doug to correct a misspelling in the address

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Michael J. Myers  
Sent: Tuesday, November 12, 2013 11:49 AM  
To: Janet Henry (JJhenry@aep.com)  
Cc: Thea Schwartz(tschwartz@atg.state.vt.us); Lori D.(Lori.DiBella@ct.gov) DiBella; allen.brooks@doj.nh.gov; Jon Martin; MattZimmerman (MZimmerman@mde.state.md.us); gschultz@riag.ri.gov; Myles Flint; 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); 'fcourtright@mde.state.md.us'; 'douglass.shallcross@state.ma.us'; 'nmarks@nrdc.org' (nmarks@nrdc.org); 'aettinger@elpc.org'; 'jmccmanus@aep.com'; 'jbkeane@aep.com'  
Subject: AEP - Request for mitigation funds

Janet, please see the attached request for additional mitigation funds under the consent decree. This reflects an additional request to the one made on Sept. 27, i.e., is not a cumulative one. Thanks and let me know if you have any questions.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov



Document ID: 0.7.691.523751-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Filename: AEP Request Letter 2.pdf  
Last Modified: Tue Nov 12 11:51:15 EST 2013

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

November 12, 2013

By Electronic Mail

Janet J. Henry, Esquire  
American Electric Power Service Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215

RE: *United States et al. v. American Electric Power Service Corp., et al.* (S.D. Ohio No. C2-99-1250/Environmental Mitigation Project Fund Request

Dear Ms. Henry:

We are submitting this request on behalf of New York State for environmental mitigation project funding pursuant to Paragraphs 127 and 128 of the Consent Decree in this case.

Specifically, the State would like to request a total of \$2,193,000 for two projects that build on the Buffalo Green and Healthy Homes Initiative ("BGHHI") created by our office in 2008 with funding from the Consent Decree. The BGHHI funds health, safety and energy efficiency improvements for low-income Buffalo homeowners. The environmental mitigation project funding is used to fund the energy efficiency improvement component of the Initiative.

The projects to be funded by the present request include \$193,600 to support outreach necessary to extend the BGHHI to Buffalo's resettled refugee communities; and 2) \$2,000,000 to support the replication of the BGHHI "model" in the New York cities of Rochester and Syracuse.

Thank you for your attention to this matter. Please contact me if you have any questions about the request.

Sincerely,

/s/ Michael J. Myers

Michael J. Myers  
Assistant Attorney General  
Environmental Protection Bureau  
(518) 402-2594  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

cc: Recipients listed in Consent Decree

From: Peter Washburn </o=lawnet/ou=first administrative group/cn=recipients/cn=peterwashburn>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: AEP - Request for mitigation funds  
Date: Tue Nov 12 2013 11:53:05 EST  
Attachments:

---

Thanks Mike.

-----  
From: Michael J. Myers  
Sent: Tuesday, November 12, 2013 11:49 AM  
To: Janet Henry (JJhenry@aep.com)  
Cc: Thea Schwartz(tschwartz@atg.state.vt.us); Lori D.(Lori.DiBella@ct.gov) DiBella; allen.brooks@doj.nh.gov; Jon Martin; MattZimmerman (MZimmerman@mde.state.md.us); gschultz@riag.ri.gov; Myles Flint; 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); 'fcourtright@mde.state.md.us'; 'douglass.shallcross@state.ma.us'; 'nmarks@nrdc.org' (nmarks@nrdc.org); 'aettinger@elpc.org'; 'jmccmanus@aep.com'; 'jbkeane@aep.com'  
Subject: AEP - Request for mitigation funds

Janet, please see the attached request for additional mitigation funds under the consent decree. This reflects an additional request to the one made on Sept. 27, i.e., is not a cumulative one. Thanks and let me know if you have any questions.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Motion re Stay of Proceedings  
Date: Tue Nov 12 2013 13:00:22 EST  
Attachments: 13-1108 Oil and Gas Abeyance Motion.pdf

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Document ID: 0.7.691.523836-000001

Owner: Vickie Patton <vpatton@edf.org>

Filename: 13-1108 Oil and Gas Abeyance Motion.pdf

Last Modified: Tue Nov 12 13:00:22 EST 2013

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**ORAL ARGUMENT NOT YET SCHEDULED**

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

_____	)	
AMERICAN PETROLEUM	)	
INSTITUTE,	)	
	)	
<i>Petitioner,</i>	)	Case No. 13-1108
	)	
v.	)	
	)	
U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
<i>Respondent.</i>	)	
_____	)	

**UNOPPOSED MOTION OF RESPONDENT EPA TO CONTINUE  
STAY OF PROCEEDINGS TO ALLOW FURTHER  
ADMINISTRATIVE RECONSIDERATION**

Respondent United States Environmental Protection Agency (“EPA”) hereby moves, without opposition by any party, to continue the existing stay of proceedings in this case until February 24, 2014, and to require the parties to submit a further motion or motions to govern further proceedings on or before that date. In support of this motion, EPA states as follows:

1. This case originated from consolidated petitions for judicial review of EPA’s final rule under the Clean Air Act entitled “Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews,” published at 77 Fed. Reg. 49,490 (Aug. 16,

2012) (“Final Rule”). Several petitioners also filed petitions for administrative reconsideration of the Final Rule. The Final Rule contains final actions on two different national standards promulgated by EPA: (1) new source performance standards (“NSPS”), promulgated under section 111 of the Clean Air Act, 42 U.S.C. § 7411, and (2) national emission standards for hazardous air pollutants (“NESHAP”), promulgated under section 112 of the Clean Air Act, 42 U.S.C. § 7412. Because EPA exercised its discretion to combine these actions in the same rulemaking, the actions were finalized together.

2. After the petitions for judicial review were filed and consolidated by the Court, EPA conferred with all of the Petitioners to discuss how to proceed in the case, including whether the NSPS- and NESHAP-related portions of the litigation should be severed and proceed on separate tracks. Following these discussions, and without opposition by any party, EPA filed a motion on January 16, 2013, requesting that the Court sever the litigation into NSPS- and NESHAP-related cases due to the differences between these two types of national standards, the potential for EPA to take action on the reconsideration petitions on a different schedule for each set of standards, and to serve the interest of efficiency by narrowing the parties and issues involved in each case in the event further litigation becomes necessary.

3. On April 3, 2013, the Court issued an order granting this motion. The NSPS-related portion of the litigation was assigned a new docket number, No. 13-1108. As EPA's motion had requested, the Court also ordered that motions to govern further proceedings in Case No. 13-1108 be filed on or before August 30, 2013, and that the case be held in abeyance until that date.

4. Both prior and subsequent to the Court's Order of April 3, 2013, EPA has taken further steps in response to the NSPS-related portions of the petitions for administrative reconsideration that are pending before the Agency. On April 12, 2013, EPA signed a notice of proposed rulemaking addressing certain NSPS issues on an expedited basis. See 78 Fed. Reg. 22,126 (Apr. 12, 2013) Following the conclusion of the public comment period for this proposed rule, EPA then signed on August 2, 2013 a rule taking final action on this proposal. This final rule has since been published in the Federal Register at 78 Fed. Reg. 58,416 (Sept. 23, 2013).

5. Following EPA's signature of the August 2 final rule, the Court granted EPA's unopposed motion for a thirty-day extension until September 30, 2013, of the deadline for filing motions to govern further proceedings. Clerk's Order dated Aug. 30, 2013. EPA requested this extension so that it would have additional time to confer with the Petitioners and provide them an update on the status of EPA's evaluation of other issues raised by the administrative reconsideration petitions.

6. On September 10, 2013, EPA informed Petitioners that it has identified several additional issues that warrant reconsideration and continues to evaluate the remaining issues in the administrative petitions for reconsideration. EPA further informed Petitioners that it presently anticipates the Agency will sign by December 17, 2013, a notice of proposed rulemaking addressing such additional NSPS issues, and that it presently anticipates the Agency will take final action on the proposal by November 25, 2014.

7. In light of the current reconsideration status and anticipated dates for further proposed and final action on reconsideration, EPA respectfully requests that the Court continue to hold this case in abeyance until February 24, 2014, and order the parties to file a motion or motions to govern further proceedings on or prior to that date. The parties will work in good faith to reach agreement on a motion to govern further proceedings, but reserve the right to file separate motions if an agreement cannot be reached.

8. All Petitioners have confirmed through counsel that they do not oppose this motion.

## CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court grant this unopposed motion and enter an order holding this case in abeyance until February 24, 2014, and requiring the parties file a motion or motions to govern further proceedings on or before that date.

Respectfully submitted,

ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment & Natural Resources Division

Dated: September 30, 2013      By: /s/ Brian H. Lynk  
BRIAN H. LYNK, D.C. Bar. No. 459525  
Environmental Defense Section  
United States Department of Justice  
P.O. Box 7611  
Washington, DC 20044  
(202) 514-6187 (tel.)  
(202) 514-8865 (fax)  
[brian.lynk@usdoj.gov](mailto:brian.lynk@usdoj.gov)

Overnight delivery:  
Patrick Henry Building, Suite 8000  
601 D Street, NW  
Washington, DC 20004

Attorneys for Respondent

Of Counsel:  
AMY HUANG BRANNING  
Office of General Counsel (2344A)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Unopposed Motion of Respondent EPA to Continue Stay of Proceedings to Allow Further Administrative Reconsideration has been filed with the Clerk of the Court this 30th day of September 2013, using the CM/ECF System. True and correct copies were sent to each of the following counsel by electronic mail, in addition to service through the appellate CM/ECF system:

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*Attorneys for Petitioners in Case No. 12-1409*

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Charles Howland Knauss  
Katten Muchin Rosenman LLP  
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*Attorneys for Petitioner Texas  
Oil & Gas Association (Case No. 12-1411)*

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John Jacus  
Davis, Graham & Stubbs  
1550 Seventeenth Street  
Suite 500  
Denver, CO 80202-0000  
*Attorneys for Petitioner  
Western Energy Alliance (Case No. 12-1412)*

Dated: September 30, 2013

/s/ Brian H. Lynk  
Brian H. Lynk

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Motion re Stay of Proceedings  
Date: Tue Nov 12 2013 13:15:37 EST  
Attachments:

---

Thanks Vickie.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Tuesday, November 12, 2013 1:00 PM  
To: Michael J. Myers  
Subject: Motion re Stay of Proceedings

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Peter Zalzal (pzalzal@edf.org)  
<pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: Having trouble with the pass code. Can you confirm and resend?  
Date: Tue Nov 12 2013 15:02:00 EST  
Attachments:

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Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal <pzalzal@edf.org>  
To: Peter Zalzal <pzalzal@edf.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Hoffer, Melissa (AGO) (melissa.hoffer@state.ma.us) (melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>; Doniger, David (ddoniger@nrdc.org) <ddoniger@nrdc.org>; Geertsma, Meleah (mgeertsma@nrdc.org) <mgeertsma@nrdc.org>; Joanne Spalding (joanne.spalding@sierraclub.org) <joanne.spalding@sierraclub.org>; 'tballo@earthjustice.org' (tballo@earthjustice.org) <tballo@earthjustice.org>; David McCabe (dmccabe@catf.us) <dmccabe@catf.us>; Darin Schroeder (dschroeder@catf.us) <dschroeder@catf.us>; Vickie Patton <vpatton@edf.org>; Tomas Carbonell <tcarbonell@edf.org>; Brian Korpics <bcorpics@edf.org>  
Cc:  
Bcc:  
Subject: Copy: Oil and Gas EPA Pre-Call  
Date: Tue Nov 12 2013 15:02:08 EST  
Attachments:

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StartTime: Tue Nov 12 15:00:00 Eastern Standard Time 2013  
EndTime: Tue Nov 12 16:00:00 Eastern Standard Time 2013  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: No

1153

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From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Hoffer,  
Melissa (AGO) (melissa.hoffer@state.ma.us)  
(melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>;  
Doniger, David (ddoniger@nrdc.org) <ddoniger@nrdc.org>;  
Geertsma, Meleah (mgeertsma@nrdc.org) <mgeertsma@nrdc.org>;  
Joanne Spalding (joanne.spalding@sierraclub.org)  
<joanne.spalding@sierraclub.org>; 'tballo@earthjustice.org'  
(tballo@earthjustice.org) <tballo@earthjustice.org>; David  
McCabe (dmccabe@catf.us) <dmccabe@catf.us>; Darin Schroeder  
(dschroeder@catf.us) <dschroeder@catf.us>; Vickie Patton  
<vpattson@edf.org>; Tomas Carbonell <tcarbonell@edf.org>; Brian  
Korpics <bcorpics@edf.org>  
Cc:  
Bcc:  
Subject: Oil and Gas EPA Pre-Call  
Date: Tue Nov 12 2013 15:02:08 EST  
Attachments:

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From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Hoffer, Melissa (AGO) (melissa.hoffer@state.ma.us) (melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>; Doniger, David (ddoniger@nrdc.org) <ddoniger@nrdc.org>; Geertsma, Meleah (mgeertsma@nrdc.org) <mgeertsma@nrdc.org>; Joanne Spalding (joanne.spalding@sierraclub.org) <joanne.spalding@sierraclub.org>; 'tballo@earthjustice.org' (tballo@earthjustice.org) <tballo@earthjustice.org>; David McCabe (dmccabe@catf.us) <dmccabe@catf.us>; Darin Schroeder (dschroeder@catf.us) <dschroeder@catf.us>; Vickie Patton <vpatton@edf.org>; Tomas Carbonell <tcarbonell@edf.org>; Brian Korpics <bcorpics@edf.org>  
Cc:  
Bcc:  
Subject: O&G Corrected Call-in  
Date: Tue Nov 12 2013 15:03:16 EST  
Attachments:

---

All –

Apologies, here is the corrected call-in info for our call starting now:

866-740-1260; 3681748

Peter Zalzal  
Staff Attorney

Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302  
T 303 447 7214  
C 303 946 0907  
F 303 440 8052  
pzalzal@edf.org  
edf.org

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any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Timothy Ballo  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Tomas  
Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: Postpone call on11/14  
Date: Tue Nov 12 2013 18:15:17 EST  
Attachments:

---

When I set the call for Thurs., I had expected that the program would have a plan forward that we could discuss. The shutdown, however, has delayed everything. As you know, EPA had previously stated that the agency plans to sign the proposed Wood Heaters rule in December. EPA is still intending to sign a proposed rule promptly. At this point, however, EPA does not know if the delay from the shutdown, which has interfered with review of the proposal, will mean that signature will be delayed.

I will reschedule the call when the Agency has been able to confirm a planned date for signature.

In the meantime, we would like to get an extension in our duty to respond to the complaint so we can sort this out and then discuss a settlement. We believe that a 60 day extension in our answer date would provide sufficient time.

Thanks

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

THIS IS A CONFIDENTIAL COMMUNICATION INTENDED ONLY FOR THE ABOVE-NAMED RECIPIENT. THE MESSAGE, OR ATTACHMENTS, MAY CONTAIN ATTORNEY-CLIENT INFORMATION, INCLUDING PRIVILEGED AND CONFIDENTIAL MATTER. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE DELETE THE MESSAGE AND NOTIFY THE SENDER IMMEDIATELY.



From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Peter Zalzal <pzalzal@edf.org>; 'Tomas  
Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: RE: Oil and Gas Pre-Call  
Date: Wed Nov 13 2013 10:29:36 EST  
Attachments:

---

Peter/Tomas', what is Dina's last name?

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 08, 2013 9:42 AM  
To: Michael J. Myers; Hoffer, Melissa (AGO) (melissa.hoffer@state.ma.us) (melissa.hoffer@state.ma.us)  
Subject: Oil and Gas Pre-Call

Hi Mike, Melissa

Are you available for a prep discussion sometime after 2:30 ET next Tuesday? Thank you both,

Peter

Peter Zalzal  
Staff Attorney

Environmental Defense Fund  
2060 Broadway, Suite 300

Boulder, CO 80302  
T 303 447 7214  
C 303 946 0907  
F 303 440 8052  
pzalzal@edf.org  
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To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Tomas  
Carbonell <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: RE: Oil and Gas Pre-Call  
Date: Wed Nov 13 2013 10:30:37 EST  
Attachments:

---

Hi Mike, Dina's last name is Kruger. Thanks,

Peter

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, November 13, 2013 8:30 AM  
To: Peter Zalzal; Tomas Carbonell  
Subject: RE: Oil and Gas Pre-Call

Peter/Tomas', what is Dina's last name?

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 08, 2013 9:42 AM  
To: Michael J. Myers; Hoffer, Melissa (AGO) (melissa.hoffer@state.ma.us) (melissa.hoffer@state.ma.us)  
Subject: Oil and Gas Pre-Call

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Peter

Peter Zalzal  
Staff Attorney

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Boulder, CO 80302  
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From: Rubin, James W. <james.rubin@dentons.com>  
To: Palmore, Joseph (OSG) <joseph.palmore@usdoj.gov>; Andrew G. Frank </o=lawnet/ou=first administrative group/cn=recipients/cn=andrewfrank>; Sean Donahue <sean@donahuegoldberg.com>; Pamela Campos <pcampos@edf.org>; Graham McCahan <gmccahan@edf.org>; McKinstry, Robert (Phila) <mckinstry@ballardspahr.com>; Boudreau, Lorene L. (Phila) <boudreaul@ballardspahr.com>; Collins, Brendan (Phila) <collins@ballardspahr.com>; Steven Wu </o=lawnet/ou=first administrative group/cn=recipients/cn=stevenwu>; Claude Platton </o=lawnet/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=cplatton>; Bethany Davis Noll </o=lawnet/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=bdavisno>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: CSAPR  
Date: Wed Nov 13 2013 14:29:30 EST  
Attachments:

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From: Rubin, James W.  
Sent: Friday, November 08, 2013 10:21 AM  
To: 'Palmore, Joseph (OSG)'; 'Andrew G. Frank'; 'Sean Donahue'  
Cc: 'Pamela Campos'; 'Graham McCahan'; 'McKinstry, Robert (Phila)'; 'Boudreau, Lorene L. (Phila)'; 'Collins, Brendan (Phila)'; 'Steven Wu'; 'Claude Platton'; 'Bethany Davis Noll'; 'Michael J. Myers'  
Subject: RE: CSAPR

OK, I have set up a number for a call at 5:15 EDT on 11/14:

1-866-225-1342  
Code: 1002256384#

If you have a problem joining on, you can reach me on my cell at 202-701-8594

James W. Rubin

D +1 202 408 9146 | US Internal 29146  
james.rubin@dentons.com  
www.dentons.com

From: Rubin, James W. <james.rubin@dentons.com>  
To: Palmore, Joseph (OSG) <joseph.palmore@usdoj.gov>; Andrew G. Frank </o=lawnet/ou=first administrative group/cn=recipients/cn=andrewfrank>; Sean Donahue <sean@donahuegoldberg.com>; Pamela Campos <pcampos@edf.org>; Graham McCahan <gmccahan@edf.org>; McKinstry, Robert (Phila) <mckinstry@ballardspahr.com>; Boudreau, Lorene L. (Phila) <boudreaul@ballardspahr.com>; Collins, Brendan (Phila) <collins@ballardspahr.com>; Steven Wu </o=lawnet/ou=first administrative group/cn=recipients/cn=stevenwu>; Claude Platton </o=lawnet/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=cplatton>; Bethany Davis Noll </o=lawnet/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=bdavisno>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Rubin, James W. <james.rubin@dentons.com>  
Cc:  
Bcc:  
Subject: Copy: RE: CSAPR  
Date: Wed Nov 13 2013 14:29:50 EST  
Attachments:

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StartTime: Thu Nov 14 17:15:00 Eastern Standard Time 2013  
EndTime: Thu Nov 14 18:00:00 Eastern Standard Time 2013  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Wed Nov 13 14:30:00 Eastern Standard Time 2013

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From: Rubin, James W.  
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To: 'Palmore, Joseph (OSG)'; 'Andrew G. Frank'; 'Sean Donahue'  
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D +1 202 408 9146 | US Internal 29146  
james.rubin@dentons.com  
www.dentons.com

From: Debra\_A\_Hepler@ohsd.uscourts.gov  
<debra\_a\_hepler@ohsd.uscourts.gov>  
To: jjhenry@aep.com <jjhenry@aep.com>;  
Flint, Myles (ENRD) <myles.flint@usdoj.gov>;  
penny\_barrick@ohsd.uscourts.gov  
<penny\_barrick@ohsd.uscourts.gov>; allen.brooks@doj.nh.gov  
<allen.brooks@doj.nh.gov>; argentieri.sabrina@epa.gov  
<argentieri.sabrina@epa.gov>; Brooks.Phillip@epamail.epa.gov  
<brooks.phillip@epamail.epa.gov>; Bruce Nilles  
<bruce.nilles@sierraclub.org>; Apple Chapman  
<chapman.apple@epamail.epa.gov>; Shallcross, Douglas (DEP)  
<douglas.shallcross@state.ma.us>; Braczyk, Edward (DEP)  
<edward.braczyk@state.ma.us>; Faith Bugel <fbugel@elpc.org>;  
Augenstern, Fred (AGO) <fred.augenstern@state.ma.us>; Gregory  
Fried <fried.gregory@epamail.epa.gov>; Gregory Schultz  
(gschultz@riag.ri.gov) <gschultz@riag.ri.gov>; jjhenry@aep.com  
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MZimmerman@mde.state.md.us <mzimmerman@mde.state.md.us>;  
nmarks@nrdc.org <nmarks@nrdc.org>; Chris Pilla  
<pilla.chris@epamail.epa.gov>; David Schulz  
<schulz.david@epamail.epa.gov>; Doug Snyder  
<snyder.doug@epamail.epa.gov>; Thea Schwartz  
<tschwartz@atg.state.vt.us>; Fisherow, Walter Benjamin (ENRD)  
<walter.benjamin.fisherow@usdoj.gov>  
Cc:  
Bcc:  
Subject: Telephone Status Conference in Case No. 99-1182 - United States v AEP  
Date: Wed Nov 13 2013 14:34:16 EST  
Attachments:

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Dear Counsel:

Judge Sargus is scheduling a telephone conference call in the above-captioned case for Friday, November 15, 2013 at 4:00 p.m. Our Court Reporter has received a request for the transcript of a proceeding held on December 17, 2012 and the purpose of the call is whether or not the transcript should be released. The call-in information for the call is below.

The call in number is 888-684-8852 -- please call about 5 minutes prior to the scheduled time of call.

You will be asked for an access code, which is: 9586353#

Then you will be asked for a Conference Security Code, which is 1182

Debra Hepler  
Judicial Assistant to Judge Edmund A. Sargus, Jr.  
(614) 719-3240

From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Sustainable Stock Exchanges Work Highlighted on Global Stage This Month  
Date: Fri Nov 15 2013 14:08:16 EST  
Attachments:

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To view this email as a web page, go here.

INCR a project of Ceres  
INCR Bulletin -  
November 15, 2013

#### In the News

Google and KKR Invest \$400 Million in Solar Plants

INCR member KKR and Google invested around \$400 million in six solar plants in California and Arizona. The plants, being built by Recurrent Energy LLC, are designed to produce about 106 megawatts of combined electricity.

[Read more here...](#)

#### Tools & Materials

Register for 21st Century Investor Webinar: Fiduciary Duty

Join Ceres for the 21st Century Investor Blueprint webinar on Thursday, November 21st from 12:00 - 1:00 pm ET on the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group.

[Register here.](#)

#### Events

INCR Policy Working Group Call

Tuesday, November 19  
1:00 - 2:00 pm ET

Join INCR members and expert speakers for the monthly INCR Policy Working Group Call. Members and staff will debrief about this month's Hill Day event and follow-up with policymakers. To learn more and register, contact Brandon Smithwood, Senior Manager, Policy Program.

## 21st Century Investor Webinar: Fiduciary Duty

Thursday, November 21  
12:00 - 1:00 pm ET

Join Ceres for the next 21st Century Investor Blueprint webinar to learn about the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group. Register here.

## INCR Integrated Reporting Working Group Call

Friday, November 22  
12:30 - 2:00 pm ET

Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

## Sustainable Stock Exchanges Working Group Call

Monday, November 25  
12:00 - 1:00 pm ET

Join INCR members and Ceres staff for the monthly INCR SSE Working Group call where members will discuss recent global events and how to move forward with the INCR listing standards proposal. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

## RI Americas Conference 2013: Long-term, Sustainable, Fiduciary Investing

December 10th - 11th

Join Responsible Investor and Ceres' Chris Davis, Director of INCR at the fifth annual RI Americas conference in New York City. The event will provide an in-depth legal view on the changing face of fiduciary duties, investment returns and market sustainability. Register here.

## INCR Highlights

### Sustainable Stock Exchanges Work Highlighted on Global Stage This Month

WFE Annual Meeting From Mexico to Canada to Switzerland, stock exchanges' roles in promoting sustainability reporting were center stage this month at several global events. While the debate continues about which exchanges might embrace a listing standard on ESG reporting, recent reports highlight where markets have uptake of ESG reporting.

CK Capital released its second benchmarking report on stock exchanges' rankings of issuer ESG reporting (focused on seven commonly-reported Key Performance Indicators). That release was swiftly followed by a sustainability panel at the World Federation of Exchanges Annual Meeting and General Assembly in Mexico City, where exchanges and NGOs discussed leading disclosure initiatives. In these meetings, Ceres challenged the WFE to launch a Sustainability Working Group so that exchanges can discuss INCR's proposed listing standard and learn from peers on best practice and new ESG projects.

Last week in Geneva, investors, NGOs and UN representatives gathered for the 30th International Standards for Accounting and Reporting (ISAR) conference to discuss the release of a best practices

document for regulators and exchanges on sustainability. There, Ceres discussed the INCR Listing Standards proposal and encouraged UN agencies to help facilitate dialogue between investors and exchanges in order to bridge the gap between the ESG disclosures investors want and the willingness of exchanges to provide them across markets. That same day, EIRIS launched a report on exchanges' views on sustainability initiatives.

To participate in discussions of INCR's Listing Standards proposal, and next steps for stock exchange engagement, please join the INCR Sustainable Stock Exchanges Working Group meeting November 25th, from 12:00-1:00 pm Eastern.

Register here.

### INCR Members Meet on The Hill to Press Policymakers on Clean-Energy Solutions

Yesterday, INCR and US SIF held a joint "Hill Day" in Washington, DC. to outline key operative priorities and tactics on climate and clean energy. During the morning session, investors were briefed by a panel of policy experts, including the CEO of energy efficiency REIT Hannon Armstrong, First Wind's VP of Federal Affairs, The Center for Climate and Energy Solutions' VP for Strategic Outreach, and INCR member Ken Locklin of Impax Asset Management.

The panel provided a briefing on key policy priorities- including the Carbon Pollution Standard for Power Plants, the Production Tax Credit for Wind and Energy, and an expansion of Master Limited Partnerships and Real Estate Investment Trusts to include renewable energy. In the afternoon, investors met with staff for Democrats and Republicans on tax writing and energy committees. The investor interest in climate change and clean energy policy was welcomed by most of the offices visited, and several Senators and Representatives are eager to work with INCR members to advance solutions and legislation.

For more information about the Hill Day event and to join the next Policy Working Group call on November 19th at 1:00 pm ET, contact Brandon Smithwood, Senior Manager, Policy Program.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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Ceres  
99 Chauncy Street  
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From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: National Journal: Colorado Fracking Rules to Target Methane  
Date: Fri Nov 15 2013 16:35:57 EST  
Attachments: image001.jpg  
image002.jpg

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## Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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2005. In that same period, another trend began: Colorado's politics shifted from red, where they were in the 1990's and early 2000's, to blue. After George W. Bush won the state with 52 percent of the vote in 2004, Barack Obama carried the state comfortably in both 2008 and 2012.

It's already known that Hickenlooper's administration is in the process of writing air-quality rules that are expected to be released early next week. This inclusion of methane, a greenhouse gas whose heat-trapping power is 20 times more potent than carbon dioxide in the short-term—is a new development. Concerns about methane have grown as the country shifts from coal to natural gas, which burns half as many carbon emissions as coal. The methane could cancel out the other climate benefits, some environmentalists and experts worry.

"No one has really broken down methane," Hickenlooper said of states' fracking rules.

The news is coming on the heels of four cities in Colorado—Fort Collins, Boulder, Lafayette, and Broomfield—voting on anti-fracking measures. The first three passed the initiatives by comfortable margins. The measure in Broomfield, the most conservative community, initially failed, but its result was overturned in a recount Thursday. Another recount is now expected.

Meanwhile, the House is expected to vote on legislation next week that bans the Obama administration from regulating fracking, an extraction technique that involves blasting large amounts of sand and water along with chemicals into shale formations to release oil and gas. It's key to developing unconventional fossil resources but controversial for its impact on the environment.

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From: Peter Zalzal <pzalzal@edf.org>  
To: David McCabe <dmccabe@catf.us>; Darin Schroeder <dschroeder@catf.us>; Joanne Spalding <joanne.spalding@sierraclub.org>; Tomas Carbonell <tcarbonell@edf.org>; Meleah Geertsma <mgeertsma@nrdc.org>; Kelly Henderson <khenderson@nrdc.org>; 'tballo@earthjustice.org' (tballo@earthjustice.org) <tballo@earthjustice.org>; Ann Weeks <aweeks@catf.us>; David Doniger <ddoniger@nrdc.org>; Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>; Ben Longstreth <blongstreth@nrdc.org>; Andres Restrepo <andres.restrepo@sierraclub.org>; Conrad Schneider <cschneider@catf.us>; Vickie Patton <vpatton@edf.org>; Brian Korpics <bcorpics@edf.org>  
Cc:  
Bcc:  
Subject: National Journal: Colorado Fracking Rules to Target Methane  
Date: Fri Nov 15 2013 16:39:48 EST  
Attachments: image001.jpg  
image002.jpg

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All, see National Journal story from today on forthcoming Colorado Rule

Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Nov 18 2013 01:13:30 EST  
Attachments: image001.jpg  
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Reason: It is an unsupported file type

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Nov 18 2013 09:23:50 EST  
Attachments: image001.jpg  
image002.jpg

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Looks very good. Thanks for passing along.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Monday, November 18, 2013 1:13 AM  
To: Michael J. Myers  
Subject: National Journal: Colorado Fracking Rules to Target Methane

Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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Email

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Peter Zalzal <pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Nov 18 2013 10:09:49 EST  
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(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 15, 2013 4:36 PM  
To: Michael J. Myers  
Subject: National Journal: Colorado Fracking Rules to Target Methane

Colorado Fracking Rules to Target Methane

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By Amy Harder

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Filename: image001.jpg

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Filename: image002.jpg

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:07000d19fba5608fb7378b4fda122f68312fe823bbc90109e9cf4c38be7dcd46772b

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From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: This Thursday- 21st Century Investor Webinar: Fiduciary Duty  
Date: Mon Nov 18 2013 12:23:02 EST  
Attachments:

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INCR a project of CeresEvents Calendar

21st Century Investor Webinar: Fiduciary Duty

Thursday, November 21  
12:00 - 1:00 pm ET

Join us for a free webinar on Thursday, November 21st to learn about the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhart Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group.

The fiduciary case for integrating material ESG factors into investment policies and practices must be understood by pension fund, foundation and endowment trustees if ESG risks and opportunities are to be incorporated into investment decisions to improve long-term investment outcomes for beneficiaries. In a fireside chat format, our panelists will answer questions about fiduciary duty in the context of material ESG risks that can impact investment return and the financial obligation fund sponsors have to their beneficiaries.

Register here.

For more information, contact Peter Ellsworth, Senior Manager, Investor Programs.

Events Calendar

\*Tuesday, November 19, 1:00 - 2:00 pm ET - INCR Policy Working Group Call - Join INCR members and expert speakers for the monthly INCR Policy Working Group Call. Members and staff will debrief about this month's Hill Day event and follow-up with policymakers. To learn more and register, contact Brandon Smithwood, Senior Manager, Policy Program.

\*Thursday, November 21, 12:00 - 1:00 pm ET - 21st Century Investor Blueprint Webinar - Join Ceres for the 21st Century Investor Blueprint webinar to learn about the role of fiduciary duty in sustainable investing. Guest speakers include Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group. Register here.

\*Monday, November 25, 12:00 - 1:00 pm ET - Sustainable Stock Exchanges Working Group Call - Join INCR members and Ceres staff for the monthly INCR SSE Working Group call where members will discuss recent global events and how to move forward with the INCR listing standards proposal. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

\*Monday, December 9, 12:30 - 2:00 pm ET - INCR Integrated Reporting Working Group Call - Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

\*December 10th - 11th - RI Americas Conference 2013: Long-term, Sustainable, Fiduciary Investing - Join Responsible Investor and Ceres staff at the fifth annual RI Americas conference in New York City. The event will provide an in-depth legal view on the changing face of fiduciary duties, investment returns and market sustainability. Register here.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

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From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane  
Date: Tue Nov 19 2013 18:03:52 EST  
Attachments: CO Oil and Gas Proposal.pdf  
image001.jpg  
image002.jpg

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FYI

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, November 18, 2013 8:10 AM  
To: Peter Zalzal  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

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Chief, Affirmative Litigation Section  
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November 15, 2013

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DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION NUMBER 7

CONTROL OF OZONE VIA OZONE PRECURSORS AND CONTROL OF HYDROCARBONS VIA OIL AND GAS EMISSIONS

(EMISSIONS OF VOLATILE ORGANIC COMPOUNDS AND NITROGEN OXIDES)

5 CCR 1001-9

II.B. Exemptions

Emissions of the organic compounds listed as having negligible photochemical reactivity in the common provisions definition of Negligibly Reactive Volatile Organic Compound are exempt from the provisions of this regulation.

(State Only) Notwithstanding the foregoing exemption, hydrocarbon emissions from oil and gas operations, including methane and ethane, are subject to this regulation as set forth in Sections XVII. and XVIII.

>>>>>>>>

**XVII. (State Only, except Section XVII.E.3.a. which was submitted as part of the Regional Haze SIP) Statewide Controls for Oil and Gas Operations and Natural Gas-Fired Reciprocating Internal Combustion Engines**

XVII.A. (State Only) Definitions

XVII.A.1 "Air Pollution Control Equipment," as used in this Section XVII, means a combustion device or vapor recovery unit. Air pollution control equipment also means alternative emissions control equipment and pollution prevention devices and processes intended to reduce uncontrolled actual emissions that comply with the requirements of Section XVII.B.2.e.

~~XVII.A.2. "Atmospheric", when used to modify the term "condensate storage tank", means a type of condensate storage tank that vents, or is designed to vent, to the atmosphere.~~

XVII.A.2. "Approved Instrument Based Monitoring Method" as used in this Section XVII. means an infra-red camera, Method 21, or other Division approved instrument based monitoring device or method. If an owner/operator elects to use a Division approved Continuous Emission Monitoring program, the Division may approve a streamlined inspection and reporting program for such operations. Any instrument based monitoring method approved by the Division under this definition must be at least as effective as Method 21 or an infra-red camera.

XVII.A.3. "Auto-Igniter" means a device which will automatically attempt to relight the pilot flame in the combustion chamber of a control device in order to combust volatile organic compound emissions.

- XVII.A.3. “Condensate Storage Tank” means any production tank or series of production tanks that are manifolded together that store condensate.
- XVII.A.4. “Component” means each pump seal, compressor seal, flange, pressure relief device, connector, open ended line, and valve that contains or contacts a process stream with hydrocarbons. Process streams consisting of glycol, amine, produced water, or methanol are not components for purposes of this Section XVII.
- XVII.A.5. “Connector” means flanged, screwed, or other jointed fittings used to connect two pipes or a pipe and a piece of process equipment or that close an opening in a pipe that could be connected to another pipe. Joined fittings welded completely around the circumference of the interface are not considered connectors.
- XVII.A.6. “Date of First Production” means the date reported to the COGCC as the “first date of production.”
- XVII.A.47. “Glycol Natural Gas Dehydrator” means any device in which a liquid glycol (including ethylene glycol, diethylene glycol, or triethylene glycol) absorbent directly contacts a natural gas stream and absorbs water.
- XVII.A.8. “Multi-Well Site” means a common well pad from which multiple wells may be drilled to various bottomhole locations.
- XVII.A.9. “Natural Gas Compressor Station” means a facility which contains one or more compressors designed to compress natural gas from well pressure to gathering system pressure and recompress natural gas prior to processing.
- XVII.A.10. “Normal Operation” means all periods of operation, excluding malfunction as defined in Section I.G of the Common Provisions regulation. For storage tanks at well production facilities, normal operation includes but is not limited to liquid dumps from the separator.
- XVII.A.11. “Stabilized” when used to refer to crude oil, condensate, intermediate hydrocarbon liquids, or produced water means that the vapor pressure of the liquid is sufficiently low to prevent the production of vapor phase upon transferring the liquid to an atmospheric pressure in a storage tank, and that any emissions that occur are limited to those commonly referred to within the industry as working, breathing, and standing losses.
- XVII.A.12. “Storage Tank” means any fixed roof storage vessel or series of storage vessels that are manifolded together via liquid line. Storage vessel is as defined in 40 CFR Part 60, Subpart OOOO. Storage tanks may be located at a well production facility or other location.
- XVII.A.13. “Unsafe to Monitor” means a component is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of such monitoring.
- XVII.A.14. “Visible Emissions” means observations of smoke for any period or periods of duration greater than or equal to one (1) minute in any fifteen (15) minute period during normal operation. Visible emissions do not include radiant energy or water vapor.
- XVII.A.15. “Well Production Facility” means all equipment at a single stationary source directly associated with one or more oil wells or gas wells. This equipment includes, but is

not limited to, equipment used for storage, separation, treating, dehydration, artificial lift, combustion, compression, pumping, metering, monitoring, and flowline.

#### XVII.B. (State Only) General Provisions

XVII.B.1. General requirements for prevention of emissions and good air pollution control equipment, prevention of leakage, and flares and combustion devices practices for all oil and gas exploration and production operations, well production facilities, natural gas compressor stations, and natural gas processing plants.

XVII.B.1.a.~~XVII.B.1.b.~~ All intermediate hydrocarbon liquid condensate collection, storage, processing, and handling operations, regardless of size, shall be designed, operated, and maintained so as to minimize emission of volatile organic compounds to the atmosphere to the extent reasonably practicable.

XVII.B.1.b. At all times, including periods of start-up and shutdown, the facility and air pollution control equipment shall be maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether or not acceptable operating and maintenance procedures are being used will be based on information available to the Division, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

XVII.B.2. General requirements for air pollution control equipment, flares, and combustion devices used to comply with Section XVII.

XVII.B.2.a.~~XVII.B.1.a.~~ All air pollution control equipment shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file. In addition, all such air pollution control equipment shall be adequately designed and sized to achieve the control efficiency rates required by this Section XVII and to handle reasonably foreseeable fluctuations in emissions of volatile organic compounds and hydrocarbons during normal operations. Fluctuations in emissions that occur when the separator dumps into the tank are reasonably foreseeable.

XVII.B.2.b.~~XVII.B.1.c.~~ If a flare or other combustion device is used to control emissions of hydrocarbons~~volatile organic compounds to comply with Section XVII~~, it shall be enclosed, have no visible emissions during normal operations, and be designed so that an observer can, by means of visual observation from the outside of the enclosed flare or combustion device, or by other convenient means approved by the Division, determine whether it is operating properly.

XVII.B.2.c.~~XVII.B.1.d.~~ Any of the effective dates for installation of controls on condensate storage tanks, dehydrators, and/or internal combustion engines may be extended at the air pollution control-Division's discretion for good cause shown.

XVII.B.2.d. Auto-igniters

All combustion devices used to control emissions of hydrocarbons shall be equipped with and operate an auto-igniter as follows:

XVII.B.2.d.(i) All combustion devices installed on or after May 1, 2014, will be equipped with an operational auto-igniter upon installation of the combustion device.

XVII.B.2.d.(ii) All combustion devices installed before May 1, 2014, will be equipped with an operational auto-igniter by or before May 1, 2016, or after the next combustion device planned shutdown, whichever comes first.

XVII.B.2.e.XVII.B.2. Alternative emissions control equipment shall qualify as air pollution control equipment, and may be used in lieu of, or in combination with, combustion devices and vapor recovery units to achieve the emission reductions required by this Section XVII, if the Division approves the equipment, device or process. As part of the approval process the Division, at its discretion, may specify a different control efficiency than the control efficiencies required by this Section XVII.

XVII.B.3. Oil refineries are not subject to ~~this section of the rule~~Section XVII.

XVII.B.4. ~~Condensate tanks, Glycol natural gas~~ dehydrators and internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard ("NSPS") under 40 CFR Part 60 are not subject to this Section XVII.

XVII.C. (State Only) Emission reduction from ~~condensate~~ storage tanks at oil and gas exploration and production operations, well production facilities, natural gas compressor stations, ~~natural gas drip stations~~ and natural gas processing plants.

XVII.C.1. Control requirements for storage tanks

XVII.C.1.a. Beginning May 1, 2008, owners or operators of all ~~atmospheric condensate~~ storage tanks storing condensate with uncontrolled actual emissions of volatile organic compounds equal to or greater than twenty (20) tons per year based on a rolling twelve-month total ~~shall must~~ operate air pollution control equipment that has an average control efficiency of at least 95% for VOCs ~~on such tanks.~~

XVII.C.1.b. Owners or operators of all storage tanks with uncontrolled actual emissions of volatile organic compounds equal to or greater than six (6) tons per year based on a rolling twelve-month total must operate air pollution control equipment that achieves an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.C.1.b.(i) A storage tank constructed on or after May 1, 2014, must be in compliance by the date that the storage tank commences operation.

XVII.C.1.b.(ii) A storage tank constructed before May 1, 2014, must be in compliance by May 1, 2015.

XVII.C.1.b.(iii) A storage tank not otherwise subject to Sections XVII.C.1.b.(i) or XVII.C.1.b.(ii), above, that increases uncontrolled actual emissions to six tons VOC or more per year on a rolling twelve month basis after May 1,

2014, must be in compliance within sixty days of discovery of the emissions increase.

XVII.C.1.c. Control requirements within 90 days of the date of first production.

XVII.C.1.c.(i) Beginning May 1, 2014, owners or operators of storage tanks at well production facilities shall collect and control emissions by routing emissions to operating air pollution control equipment during the first 90 calendar days after the date of first production. The air pollution control equipment shall achieve an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons. Except that this requirement does not apply to storage tanks that are projected to have emissions less than 1.5 tons of VOC during the first 90 days after the date of first production.

XVII.C.1.c.(ii) The air pollution control equipment and any associated monitoring equipment required pursuant to Section XVII.C.1.c., above may be removed at any time after the first 90 calendar days as long as the source can demonstrate that uncontrolled actual emissions from the storage tank are below the threshold in Section XVII.C.1.b., above.

~~XVII.C.2. For condensate storage tanks with past, uncontrolled actual emissions of volatile organic compounds of less than 20 tons per year based on a rolling twelve-month total that may become subject to Section XVII.C.1. by virtue of the addition of a newly drilled well or the recompletion or stimulation of an existing well, owners or operators of such tanks shall have until 90 days after the date of 1<sup>st</sup> production of the newly drilled, recompleted or stimulated well to install and operate any required air pollution control equipment. If the owner or operator determines that emissions of volatile organic compounds will be below the 20-ton per year threshold, the owner or operator shall notify the Division of this determination in writing and include an explanation of the methodology used to make this determination.~~

XVII.C.2. Capture requirements for storage tanks that are fitted with air pollution control equipment as required by Sections XII.D. or XVII.C.1.

XVII.C.2.a. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall route all hydrocarbon emissions to air pollution control equipment, and shall operate without venting hydrocarbon emissions from the thief hatch (or other access point to the tank) or pressure relief device during normal operation unless venting is reasonably required for maintenance, gauging, or safety of personnel and equipment.

XVII.C.2.b. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall develop, certify, and implement a documented Storage Tank Emission Management System (STEM) plan to identify appropriate strategies to minimize emissions from venting at thief hatches (or other access points to a storage tank) and pressure relief devices during normal operation. As part of STEM, owners and operators shall evaluate and employ appropriate control technologies, monitoring practices, operational practices, and/or other strategies designed to meet the requirements set forth in Section XVII.C.2.a., above, and will update the STEM plan as necessary to achieve or maintain compliance. Owners and operators are not required to develop and implement STEM for storage tanks containing only stabilized liquids. The minimum elements of STEM are listed below.

XVII.C.2.b.(i) STEM must include a monitoring strategy that incorporates the minimum monitoring frequency set forth in Section XVII.F.5.e., procedures for evaluating ongoing storage tank emission capture performance, and, if applicable, the selected strategies.

XVII.C.2.b.(ii) STEM must include a certification by the owner or operator that the selected STEM strategy or strategies are designed to minimize emissions from storage tanks and associated equipment components at the facility or facilities, including thief hatches and pressure relief devices.

### XVII.C.3. Monitoring

~~:- The owner or operator of any condensate storage tank that is required to control volatile organic compound emissions pursuant to this Section XVII.C. shall visually inspect or monitor the Air Pollution Control Equipment to ensure that it is operating at least as often as condensate is loaded out from the tank, unless a more frequent inspection or monitoring schedule is followed. In addition, if a flare or other combustion device is used, the owner or operator shall visually inspect the device for visible emissions at least as often as condensate is loaded out from the tank. The monitoring strategy of each STEM plan must include monitoring in accordance with Approved Instrument Based Monitoring Methods, as specified in Section XVII.F.5.~~

XVII.C.3.a. In addition to any applicable Approved Instrument Based Monitoring Methods, audio, visual, olfactory ("AVO") inspection of the storage tank and any associated equipment (i.e. separator, air pollution control equipment, or other pressure reducing equipment), must be completed as often as liquids are loaded out from the storage tank. However, AVO inspection is required no more frequently than every seven (7) days or less frequently than every thirty (30) days. AVO monitoring is not required for components and tanks that are unsafe to monitor. AVO inspection must include, at a minimum:

XVII.C.3.a.(i) Visual inspection of any thief hatch, pressure relief valve, or other access point to ensure that they are closed and properly sealed;

XVII.C.3.a.(ii) Visual inspection or monitoring of the air pollution control equipment to ensure that it is operating, including that the pilot light is lit on combustion devices used as air pollution control equipment;

XVII.C.3.a.(iii) If a flare or other combustion device is used, visual inspection of the auto-igniter and valves for piping of gas to the pilot light, to ensure they are functioning properly;

XVII.C.3.a.(iv) Visual inspection of the air pollution control equipment to ensure that the valves for the piping from the storage tank to the air pollution control equipment are open; and

XVII.C.3.a.(v) If a flare or other combustion device is used, inspection of the device for the presence or absence of smoke. If smoke is observed, either the equipment will be immediately shut-in to investigate the potential cause for smoke and perform repairs, as necessary, or Method

22 shall be conducted to determine whether visible emissions are present for a period of at least one (1) minute in fifteen (15) minutes.

XVII.C.4. Recordkeeping

The owner or operator of each storage tank subject to XII.D. or XVII.C. must maintain records of STEM as applicable, including the plan, any updates, and the certification, to be made available to the Division upon request. In addition, for a period of two years, the owner or operator must maintain records of any required monitoring and make them available to the Division upon request, including:

- XVII.C.4.a. The AIRS ID for the storage tank.
- XVII.C.4.b. The date and duration of any period where the thief hatch, pressure relief device, or other access point are found to be venting hydrocarbon emissions.
- XVII.C.4.c. The date and duration of any period where the air pollution control equipment is not operating.
- XVII.C.4.d. Where a flare or other combustion device is being used, the date and result of any Method 22 test.
- XVII.C.4.e. The timing of and efforts made to eliminate venting, restore operation of air pollution control equipment, and mitigate visible emissions.

XVII.D. (State Only) Emission reductions from glycol natural gas dehydrators

XVII.D.1. Beginning May 1, 2008, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.2., shall reduce uncontrolled actual emissions of volatile organic compounds by at least 90 percent through the use of a condenser or air pollution control equipment.

XVII.D.2. The control requirement in Section XVII.D.1. shall apply where:

XVII.D.2.a. Actual uncontrolled emissions of volatile organic compounds from the glycol natural gas dehydrator are equal to or greater than two tons per year; and

XVII.D.2.b. The sum of actual uncontrolled emissions of volatile organic compounds from any single glycol natural gas dehydrator or grouping of glycol natural gas dehydrators at a stationary source is equal to or greater than 15 tons per year. To determine if a grouping of dehydrators meets or exceeds the 15 tons per year threshold, sum the total actual uncontrolled emissions of volatile organic compounds from all individual dehydrators at a stationary source, including those with emissions less than two tons per year.

XVII.D.3. Beginning May 1, 2015, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, and drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.4., shall reduce uncontrolled actual emissions of hydrocarbons by at least 95 percent on a rolling twelve-month basis through the use of a condenser or air pollution control equipment. If a

combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.D.4. The control requirement in Section XVII.D.3. shall apply where:

XVII.D.4.a. Actual uncontrolled emissions of volatile organic compounds from a single new glycol natural gas dehydrator are equal to or greater than two tons per year; or

XVII.D.4.b. Actual uncontrolled emissions of volatile organic compounds from a single existing glycol natural gas dehydrator are equal to or greater than six (6) tons per year, or two (2) tons per year if the glycol natural gas dehydrator is located within 1,320 feet of a building unit or designated outside activity area.

XVII.D.4.d. For purposes of Section XVII.D.4:

XVII.D.4.d.(i) Building Unit shall mean a residential building unit, and every five thousand (5,000) square feet of building floor area in commercial facilities or every fifteen thousand (15,000) square feet of building floor area in warehouses that are operating and normally occupied during working hours.

XVII.D.4.d.(ii) A designated outside activity area shall mean an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of public assembly owned or operated by a local government, which the local government seeks to have established as a Designated Outside Activity Area; or an outdoor venue or recreation area where ingress to or egress from could be impeded in the even of an emergency condition at an oil and gas location less than three hundred and fifty (350) feet from the venue due to the configuration of the venue and the number of persons known or expected to simultaneously occupy the venue on a regular basis.

XVII.E. Control of emissions from new, modified, existing, and relocated natural gas fired reciprocating internal combustion engines.

XVII.E.1. (State Only) The requirements of this Section XVII.E. shall not apply to any engine having actual uncontrolled emissions below permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.2. (State Only) New, Modified and Relocated Natural Gas Fired Reciprocating Internal Combustion Engines

XVII.E.2.a. Except as provided in Section XVII.E.2.b. below, the owner or operator on any natural gas fired reciprocating internal combustion engine that is either constructed or relocated to the state of Colorado from another state, on or after the date listed in the table below shall operate and maintain each engine according to the manufacturer's written instructions or procedures to the extent practicable and consistent with technological limitations and good engineering and maintenance practices over the entire life of the engine so that it achieves the emission standards required in Section XVII.E.2.b. Table 1, below.

XVII.E.2.b. Actual emissions from natural gas fired reciprocating internal combustion engines shall not exceed the emission performance standards in Table 1, below as expressed in units of grams per horsepower-hour (G/hp-hr)

TABLE 1				
Maximum Engine Hp	Construction or Relocation Date	Emission Standards is G/hp-hr		
		NOx	CO	VOC
< 100 Hp	Any	NA	NA	NA
≥100 Hp and < 500 Hp	On or after January 1, 2008	2.0	4.0	1.0
	On or after January 1, 2011	1.0	2.0	0.7
≥500 Hp	On or after January 1, 2011	1.0	2.0	0.7
	On or after July 1, 2007	2.0	4.0	1.0
	On or after July 1, 2010	1.0	2.0	0.7
	On or after July 1, 2010	1.0	2.0	0.7

### XVII.E.3. Existing Natural Gas Fired Reciprocating Internal Combustion Engines

#### XVII.E.3.a. (Regional Haze SIP) Rich Burn Reciprocating Internal Combustion Engines

XVII.E.3.a.(i) Except as provided in Sections XVII.3.1.(i)(b) and (c) and XVII.E.3.a.(ii), all rich burn reciprocating internal combustion engines with a manufacturer's name plate design rate greater than 500 horsepower, constructed or modified before February 1, 2009 shall install and operate both a non-selective catalytic reduction system and an air fuel controller by July 1, 2010. A rich burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of less than 2% by volume.

XVII.E.3.a.(i)(a) All control equipment required by this Section XVII.E.3.a. shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file.

XVII.E.3.a.(i)(b) Internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard under 40 CFR Part 60 are not subject to this Section XVII.E.3.a.

XVII.E.3.a.(i)(c) The requirements of this Section XVII.E.3.a. shall not apply to any engine having actual uncontrolled emissions permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.3.a.(ii) Any rich burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of combined volatile organic compound and nitrogen oxides emission reductions (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.a. Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.E.3.b. (State Only) Lean Burn Reciprocating Internal Combustion Engines

XVII.E.3.b.(i) Except as provided in Section XVII.E.3.b.(ii), all lean burn reciprocating internal combustion engines with a manufacturer's nameplate design rate greater than 500 horsepower shall install and operate an oxidation catalyst by July 1, 2010. A lean burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of 2% by volume, or greater.

XVII.E.3.b.(ii) Any lean burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of volatile organic compound emission reduction (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.b.(i). Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.F. [\(State Only\) Leak detection and repair program for well production facilities, storage tanks, and compressor stations](#)

[XVII.F.1. Beginning January 1, 2015, owners and operators of well production facilities and compressor stations will identify and repair leaks from components at these facilities in accordance with the requirements of this Section XVII.F. The following shall apply in lieu of any directed inspection and maintenance program requirements established pursuant to Regulation Number 3, Part B, Section III.D.2.](#)

[XVII.F.2. Owners and operators of well production facilities or natural gas compressor stations that monitor components as part of this Section XVII.F. may opt to estimate emissions from components for the purpose of evaluating the applicability of component fugitive emissions to Regulation Number 3 by utilizing the emission factors defined as less than 10,000 ppmv of Table 2-8 of the 1995 EPA Protocol for Equipment Leak Emission Estimates \(Document EPA-453/R-95-017\).](#)

[XVII.F.3. Owners and operators of well production facilities or natural gas compressor stations shall utilize the Approved Instrument Based Monitoring Method and AVO program as outlined in Section XVII.F. AVO monitoring is not required of components and tanks that are unsafe to monitor or inaccessible to monitor, pursuant to XVII.F.5.g.](#)

XVII.F.4. Inspection schedules for natural gas compressor stations

Beginning January 1, 2015, owners and operators of natural gas compressor stations shall inspect components for leaks using an Approved Instrument Based Monitoring Method, in accordance with the following Table 2, except for components subject to XVII.F.5.g. For purposes of this Section XVII.F.4., fugitive emissions shall be calculated using the emission factors of Table 2-4 of the 1995 EPA Protocol for Equipment Leak Emission Estimates (Document EPA-453/R-95-017), or another Division approved method.

<b>TABLE 2</b>	
<u>Fugitive VOC Emissions (tpy)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 12</u>	<u>Annually</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly</u>
<u>&gt; 50</u>	<u>Monthly</u>

XVII.F.5. Requirements for well production facilities and/or storage tanks

XVII.F.5.a. Beginning August 1, 2014, all new well production facilities shall have a documented pressure test performed on all equipment and piping prior to start up. Documentation of this 90 day testing and monitoring shall be provided in the first annual report to the Division, as required by Section XVII.F.9.

XVII.F.5.b. Beginning January 1, 2015, within 90 days of startup of all new well production facilities and/or storage tanks, owners and/or operators shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method. Such action shall qualify as an inspection pursuant to the inspection frequency schedule in Table 3.

XVII.F.5.c. Consistent with the provisions of XVII.F.5.f., owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks using an Approved Instrument Based Monitoring Method, in accordance with the implementation schedule in XVII.F.5.e. Inspection frequency shall be determined according to Table 3.

XVII.F.5.d. Consistent with the provisions of XVII.F.5.f., owners and operators of new well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method beginning on January 1, 2015. Inspection frequency shall be determined according to Table 3.

XVII.F.5.e. The estimated uncontrolled actual emissions from storage tanks determine the frequency at which inspections must be performed. If no storage tanks are located at a well production facility or multi-well site, operators will rely on the potential to emit of VOC for all of the emissions sources, including emissions from components located at the facility. All components at a well production facility or storage tank must be inspected:

<b>TABLE 3</b>	
<u>Threshold (per XVII.F.5.e.) VOC Emissions (tpy, uncontrolled actual for sites with tanks or PTE for sites without tanks)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 6</u>	<u>One time using Approved Instrument Based Monitoring Method and thereafter using monthly AVO</u>
<u>&gt; 6 and &lt; 12</u>	<u>Annually with monthly AVO</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly with monthly AVO</u>
<u>&gt; 50</u>	<u>Monthly</u>
<u>Multi-well sites without storage tanks after April 15, 2014, that have a PTE &gt; 20 tpy VOC</u>	<u>Monthly</u>

XVII.F.5.f. Phase-in of Approved Instrument Based Monitoring Methods

Owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method, in accordance with the following schedule:

XVII.F.5.f.(i) Beginning January 1, 2015, facilities with uncontrolled actual VOC emissions greater than 50 tpy or multi-well sites.

XVII.F.5.f.(ii) Beginning July 1, 2015, facilities with uncontrolled actual VOC emissions greater than 20 tpy but less than or equal to 50 tpy.

XVII.F.5.f.(iii) Beginning January 1, 2016, facilities with uncontrolled actual VOC emissions greater than 6 tpy but less than or equal to 20 tpy.

XVII.F.5.f.(iv) By July 1, 2016, facilities with uncontrolled actual VOC emissions less than or equal to 6 tpy.

XVII.F.5.g. If a component is difficult, unsafe, or inaccessible to monitor, the owner or operator shall not be required to monitor the component until it becomes feasible to do so.

XVII.F.5.g.(i) Difficult to monitor components are those that cannot be monitored without elevating the monitoring personnel more than two meters above a supported surface or are unable to be reached via a wheeled scissor-lift or hydraulic type scaffold that allows access to components up to 7.6 meters (25 feet) above the ground.

XVII.F.5.g.(ii) Unsafe to monitor components are those that cannot be monitored without exposing monitoring personnel to an immediate danger as a consequence of completing the monitoring.

XVII.F.5.g.(iii) Inaccessible to monitor components are those that are buried, insulated in a manner that prevents access to the components by

a monitor probe, or obstructed by equipment or piping that prevents access to the components by a monitor probe.

XVII.F.6. Leak detection requiring repair

Leaks shall be identified utilizing the methods listed in this Section XVII.F.6.a. through XVII.F.6.d. Only leaks detected pursuant to this Section XVII.F.6. shall require repair under Section XVII.F.

XVII.F.6.a. For Method 21 monitoring at existing facilities, a leak is any concentration of hydrocarbon above 2,000 parts per million (ppm), except for existing well production facilities where leak is defined as any concentration of hydrocarbon above 500 ppm.

XVII.F.6.b. For Method 21 monitoring at facilities constructed after May 1, 2014, a leak is any concentration of hydrocarbon above 500 ppm.

XVII.F.6.c. For infra-red camera and AVO monitoring, a leak is any detectable emissions not associated with normal equipment operation, such as pneumatic device actuation and crank case ventilation.

XVII.F.6.d. For other Division approved monitoring devices or methods, leak identification requiring repair will be established as set forth in the Division's approval.

XVII.F.7. Repair and remonitoring

XVII.F.7.a. First attempt to repair a leak shall be made no later than five (5) working days after discovery, unless parts are unavailable, the equipment requires shutdown to complete repair, or other good cause exists. If parts are unavailable, they shall be ordered promptly and the repair shall be made within fifteen (15) working days of receipt of the parts. If shutdown is required, the leak shall be repaired during the next scheduled shutdown. If delay is attributable to other good cause, repairs shall be completed within fifteen (15) working days after the cause of delay ceases to exist.

XVII.F.7.b. Within fifteen (15) working days of completion of a repair, the leak shall be remonitored to verify the repair was effective.

XVII.F.7.c. Leaks discovered pursuant to the leak detection methods of Section XVII.F. shall not be subject to enforcement by the Division unless the owner or operator fails to perform the required repairs in accordance with Section XVII.F.7.

XVII.F.7.d. For leaks identified using an Approved Instrument Based Monitoring Method, owners and operators have the option of either repairing the leak in accordance with the repair schedule set forth in Section XVII.F.7. or conducting follow-up monitoring using Method 21 within five (5) working days of the leak detected. If the follow-up Method 21 monitoring shows that the leak concentration is less than or equal to 2,000 ppm hydrocarbon for existing facilities (other than existing well production facilities), or 500 ppm for new facilities or existing well production facilities, then the emission shall not be considered a leak for purposes of this Section.

XVII.F.8. Recordkeeping

The owner or operator of each facility subject to the inspection and maintenance requirements in this Section XVII.F. shall maintain the following for a period of two (2) years and make them available to the Division upon request.

XVII.F.8.a. Documentation of the pre-start-up pressure tests for new well production facilities;

XVII.F.8.b. The date and site information for each inspection;

XVII.F.8.c. A list of the leaking components and the monitoring method used to determine the presence of the leak;

XVII.F.8.d. The date of first attempt to repair the leak and, if necessary, any additional attempt to repair the leak;

XVII.F.8.e. The date the leak was repaired;

XVII.F.8.f. The delayed repair list including the basis for placing leaks on the list;

XVII.F.8.g. The date the leak was remonitored to verify the effectiveness of the repair, and the results of the remonitoring; and

XVII.F.8.h. A list of identification numbers for components that are designated as unsafe or inaccessible to monitor, as described in Section XVII.F.5.g., an explanation for each component stating why the component is so designated, and the plan for monitoring such component(s).

XVII.F.9. Reporting

The owner or operator of each facility subject to the inspection and maintenance requirements in Section XVII.F. shall submit a single annual report on or before April 30th of each year summarizing inspection and maintenance activities at all of their subject facilities during the previous calendar year. This report shall contain at a minimum the following information:

XVII.F.9.a. The number of facilities inspected;

XVII.F.9.b. The total number of inspections;

XVII.F.9.c. The total number of leaks identified, broken out by component type;

XVII.F.9.d. The total number of leaks repaired;

XVII.F.9.e. The number of leaks on the delayed repair list as of December 31st; and

XVII.F.9.f. Each report shall be accompanied by a self-certification form. The form shall contain a certification by a responsible official of the truth, accuracy, and completeness of such form, report, or certification stating that, based on information and belief formed after reasonable

inquiry, the statements and information in the document are true, accurate, and complete.

XVII.G. (State Only) Control of emissions from well production facilities.

XVII.G.1. Well Operation and Maintenance.

On or after August 1, 2014, during normal operation gas coming off of a separator produced from any newly constructed, hydraulically fractured, or recompleted oil or gas well must be either routed to a gas gathering line or controlled by air pollution control equipment that achieves an average hydrocarbon control efficiency of 95% from the date of first production. If a combustion device is used, it shall have a design destruction efficiency of at least 98% of hydrocarbons.

XVII.H. (State Only) Venting during downhole well maintenance and unloading events.

XVII.H.1. Well Maintenance.

Beginning May 1, 2014, hydrocarbon emissions from flowing wells must be captured or controlled during downhole well maintenance or servicing activities, unless venting is necessary for safety.

XVII.H.1.a. Operators shall use best management practices to minimize the need for well venting associated with downhole well maintenance and liquids unloading. During liquids unloading events, any means of creating differential pressure will first be used to attempt to unload the liquids from the well without venting. If these methods are not successful in unloading the liquids from the well, the well may be vented to the atmosphere to create the necessary differential pressure to bring the liquids to the surface.

XVII.H.1.b. Venting will be minimized to the extent possible, using best management practices during the well maintenance and liquids unloading events in XVII.H.1.a. The owner and/or operator shall be present on-site during any planned well maintenance and liquids unloading event in XVII.H.1.a. and shall ensure that any venting to the atmosphere is limited to the maximum extent practicable.

XVII.H.1.c. Records of the cause, date, time, and duration of venting events under this Section XVII.H. will be kept and made available to the Division upon request.

XVIII. (State Only) Natural Gas-Actuated Pneumatic Controllers Associated with Oil and Gas Operations ~~in the 8-Hour Ozone Control Area or Any Ozone Nonattainment or Attainment/Maintenance Area~~

XVIII.A. \_\_\_\_\_ Applicability

This section applies to pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations) ~~in the 8-Hour Ozone Control Area or any Ozone Nonattainment or Attainment/Maintenance Area.~~

XVIII.B. \_\_\_\_\_ Definitions

XVIII.B.1. "Affected Operations" shall mean pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations).

XVIII.B.2. "Enhanced Maintenance" is specific to high-bleed devices and shall include but is not limited to cleaning, tuning, and repairing leaking gaskets, tubing fittings, and seals; tuning to operate over a broader range of proportional band; and eliminating unnecessary valve positioners.

XVIII.B.3. "High-Bleed Pneumatic Controller" shall mean a pneumatic controller that is designed to have a constant bleed rate that emits in excess of 6 standard cubic feet per hour (scfh) of natural gas to the atmosphere.

XVIII.B.4. "Low-Bleed Pneumatic controller" shall mean a pneumatic controller that is designed to have a constant bleed rate that emits less than or equal to 6 scfh of natural gas to the atmosphere.

XVIII.B.5. "Natural Gas Processing Plant" shall mean any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both.

XVIII.B.6. ~~"No-bleed Pneumatic Controller" shall mean any pneumatic controller that is not using hydrocarbon gas as the valve's actuating gas.~~

XVIII.B.67. "Pneumatic Controller" shall mean an instrument that is actuated using natural gas pressure and used to control or monitor process parameters such as liquid level, gas level, pressure, valve position, liquid flow, gas flow, and temperature.

XVIII.C. \_\_\_\_\_ Emission Reduction Requirements

The owners and operators of affected operations shall reduce emissions of volatile organic compounds from pneumatic controllers associated with affected operations as follows:

XVIII.C.1. \_\_\_\_\_ In the 8-Hour Ozone Control Area:

[XVIII.C.1.a.](#) All pneumatic controllers placed in service on or after February 1, 2009, shall emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.2.1.b.](#) All high-bleed pneumatic controllers in service prior to February 1, 2009 shall be replaced or retrofit such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, by May 1, 2009, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.31.c.](#) All high-bleed pneumatic controllers that must remain in service -due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.

[XVIII.C.3-a.1.c.\(i\)](#) For high-bleed pneumatic controllers in service prior to February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and /or process purposes by March 1, 2009. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.3-b.1.c.\(ii\)](#) For high-bleed pneumatic controllers placed in service on or after February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to be installed due to safety and /or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.2.](#) [Statewide:](#)

[XVIII.C.2.a.](#) [All pneumatic controllers placed in service on or after May 1, 2014, shall:](#)

[XVIII.C.2.a.\(i\)](#) [Emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.; or](#)

[XVIII.C.2.a.\(ii\)](#) [Utilize no-bleed pneumatic controllers where on-site electrical grid power is being used and is technically and economically feasible.](#)

[XVIII.C.2.b.](#) [All high-bleed pneumatic controllers in service prior to May 1, 2014, shall be replaced or retrofitted by May 1, 2015, such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.](#)

[XVIII.C.2.c.](#) [All high-bleed pneumatic controllers that must remain in service due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.](#)

[XVIII.C.2.c.\(i\)](#) [For high-bleed pneumatic controllers in service prior to May 1, 2014, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and/or process purposes by March 1, 2015. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.](#)

[XVIII.C.2.c.\(ii\)](#) [For high-bleed pneumatic controllers placed in service on or after May 1, 2014, the owner/operator shall submit justification for high-bleed](#)

pneumatic controllers to be installed due to safety and/or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

#### XVIII.D. Monitoring

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

##### XVIII.D.1. In the 8-Hour Ozone Control Area:

XVIII.D.1.a. Effective May 1, 2009, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.1.b. Effective May 1, 2009, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

##### XVIII.D.2. Statewide:

XVIII.D.2.a. Effective May 1, 2015, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.b. Effective May 1, 2015, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

#### XVIII.E. Recordkeeping

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

XVIII.E.1. The owner or operator of affected operations shall maintain a log of the total number of high-bleed pneumatic controllers and their associated controller numbers per facility, the total number of high-bleed pneumatic controllers per company and the associated justification that the high-bleed pneumatic controllers must be used pursuant to SectionSections XVIII.C.31.c. and XVIII.C.2.c. The log shall be updated on a monthly basis.

XVIII.E.2. The owner or operator shall maintain a log of enhanced maintenance which shall include, at a minimum, inspection dates, the date of the maintenance activity, high-bleed pneumatic controller number, description of the maintenance performed, results and date of any corrective action taken, and the printed name and signature of the individual performing the maintenance. The log shall be updated on a monthly basis.

XVIII.E.3. Records of enhanced maintenance of pneumatic controllers shall be maintained for a minimum of three years and readily made available to the ~~division~~Division upon request.

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:07007556c70cf9d72e534f833f404d8bea20b6295a0c2b917123b326a41e6257702f

Reason: It is an unsupported file type

From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Cc: Vickie Patton <vpatton@edf.org>; Tomas Carbonell <tcarbonell@edf.org>  
Bcc:  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane  
Date: Tue Nov 19 2013 23:33:38 EST  
Attachments: CO Oil and Gas Proposal.pdf  
image001.jpg  
image002.jpg

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Mike, Morgan,

I have attached Colorado's proposed oil and gas air quality revisions. Best wishes,

Peter

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, November 18, 2013 8:10 AM  
To: Peter Zalzal  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

Thanks Peter, good news.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 15, 2013 4:36 PM  
To: Michael J. Myers  
Subject: National Journal: Colorado Fracking Rules to Target Methane

## Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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November 15, 2013

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Democratic Gov. John Hickenlooper of Colorado plans to announce a framework targeting methane—a potent greenhouse gas—as part of his state's regulations controlling fracking.

"We are very close now—within the week—to hammering out a specific methane regulatory framework that I think will make sure people's air is much cleaner than what some of their fears would lead them to believe," Hickenlooper said in an interview with National Journal Tuesday. His office confirmed an announcement is expected next week.

In both politics and energy production, Colorado is a bellwether state. So how Hickenlooper moves forward on these issues will be a key indicator of how other states and the country as a whole move forward.

Colorado, which has traditionally ranked in the top 10 of the country's oil and natural-gas producing states, has more than doubled its oil production and increased its gas production by 30 percent since 2005. In that same period, another trend began: Colorado's politics shifted from red, where they were in the 1990's and early 2000's, to blue. After George W. Bush won the state with 52 percent of the vote in 2004, Barack Obama carried the state comfortably in both 2008 and 2012.

It's already known that Hickenlooper's administration is in the process of writing air-quality rules that are expected to be released early next week. This inclusion of methane, a greenhouse gas whose heat-trapping power is 20 times more potent than carbon dioxide in the short-term—is a new development. Concerns about methane have grown as the country shifts from coal to natural gas, which burns half as many carbon emissions as coal. The methane could cancel out the other climate benefits, some environmentalists and experts worry.

"No one has really broken down methane," Hickenlooper said of states' fracking rules.

The news is coming on the heels of four cities in Colorado—Fort Collins, Boulder, Lafayette, and Broomfield—voting on anti-fracking measures. The first three passed the initiatives by comfortable margins. The measure in Broomfield, the most conservative community, initially failed, but its result was overturned in a recount Thursday. Another recount is now expected.

Meanwhile, the House is expected to vote on legislation next week that bans the Obama administration from regulating fracking, an extraction technique that involves blasting large amounts of sand and water along with chemicals into shale formations to release oil and gas. It's key to developing unconventional fossil resources but controversial for its impact on the environment.

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DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION NUMBER 7

CONTROL OF OZONE VIA OZONE PRECURSORS AND CONTROL OF HYDROCARBONS VIA OIL AND GAS EMISSIONS

(EMISSIONS OF VOLATILE ORGANIC COMPOUNDS AND NITROGEN OXIDES)

5 CCR 1001-9

II.B. Exemptions

Emissions of the organic compounds listed as having negligible photochemical reactivity in the common provisions definition of Negligibly Reactive Volatile Organic Compound are exempt from the provisions of this regulation.

(State Only) Notwithstanding the foregoing exemption, hydrocarbon emissions from oil and gas operations, including methane and ethane, are subject to this regulation as set forth in Sections XVII. and XVIII.

>>>>>>>>

**XVII. (State Only, except Section XVII.E.3.a. which was submitted as part of the Regional Haze SIP) Statewide Controls for Oil and Gas Operations and Natural Gas-Fired Reciprocating Internal Combustion Engines**

XVII.A. (State Only) Definitions

XVII.A.1 "Air Pollution Control Equipment," as used in this Section XVII, means a combustion device or vapor recovery unit. Air pollution control equipment also means alternative emissions control equipment and pollution prevention devices and processes intended to reduce uncontrolled actual emissions that comply with the requirements of Section XVII.B.2.e.

~~XVII.A.2. "Atmospheric", when used to modify the term "condensate storage tank", means a type of condensate storage tank that vents, or is designed to vent, to the atmosphere.~~

XVII.A.2. "Approved Instrument Based Monitoring Method" as used in this Section XVII. means an infra-red camera, Method 21, or other Division approved instrument based monitoring device or method. If an owner/operator elects to use a Division approved Continuous Emission Monitoring program, the Division may approve a streamlined inspection and reporting program for such operations. Any instrument based monitoring method approved by the Division under this definition must be at least as effective as Method 21 or an infra-red camera.

XVII.A.3. "Auto-Igniter" means a device which will automatically attempt to relight the pilot flame in the combustion chamber of a control device in order to combust volatile organic compound emissions.

- XVII.A.3. “Condensate Storage Tank” means any production tank or series of production tanks that are manifolded together that store condensate.
- XVII.A.4. “Component” means each pump seal, compressor seal, flange, pressure relief device, connector, open ended line, and valve that contains or contacts a process stream with hydrocarbons. Process streams consisting of glycol, amine, produced water, or methanol are not components for purposes of this Section XVII.
- XVII.A.5. “Connector” means flanged, screwed, or other jointed fittings used to connect two pipes or a pipe and a piece of process equipment or that close an opening in a pipe that could be connected to another pipe. Joined fittings welded completely around the circumference of the interface are not considered connectors.
- XVII.A.6. “Date of First Production” means the date reported to the COGCC as the “first date of production.”
- XVII.A.47. “Glycol Natural Gas Dehydrator” means any device in which a liquid glycol (including ethylene glycol, diethylene glycol, or triethylene glycol) absorbent directly contacts a natural gas stream and absorbs water.
- XVII.A.8. “Multi-Well Site” means a common well pad from which multiple wells may be drilled to various bottomhole locations.
- XVII.A.9. “Natural Gas Compressor Station” means a facility which contains one or more compressors designed to compress natural gas from well pressure to gathering system pressure and recompress natural gas prior to processing.
- XVII.A.10. “Normal Operation” means all periods of operation, excluding malfunction as defined in Section I.G of the Common Provisions regulation. For storage tanks at well production facilities, normal operation includes but is not limited to liquid dumps from the separator.
- XVII.A.11. “Stabilized” when used to refer to crude oil, condensate, intermediate hydrocarbon liquids, or produced water means that the vapor pressure of the liquid is sufficiently low to prevent the production of vapor phase upon transferring the liquid to an atmospheric pressure in a storage tank, and that any emissions that occur are limited to those commonly referred to within the industry as working, breathing, and standing losses.
- XVII.A.12. “Storage Tank” means any fixed roof storage vessel or series of storage vessels that are manifolded together via liquid line. Storage vessel is as defined in 40 CFR Part 60, Subpart OOOO. Storage tanks may be located at a well production facility or other location.
- XVII.A.13. “Unsafe to Monitor” means a component is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of such monitoring.
- XVII.A.14. “Visible Emissions” means observations of smoke for any period or periods of duration greater than or equal to one (1) minute in any fifteen (15) minute period during normal operation. Visible emissions do not include radiant energy or water vapor.
- XVII.A.15. “Well Production Facility” means all equipment at a single stationary source directly associated with one or more oil wells or gas wells. This equipment includes, but is

not limited to, equipment used for storage, separation, treating, dehydration, artificial lift, combustion, compression, pumping, metering, monitoring, and flowline.

#### XVII.B. (State Only) General Provisions

XVII.B.1. General requirements for prevention of emissions and good air pollution control equipment, prevention of leakage, and flares and combustion devices practices for all oil and gas exploration and production operations, well production facilities, natural gas compressor stations, and natural gas processing plants.

XVII.B.1.a.~~XVII.B.1.b.~~ All intermediate hydrocarbon liquid condensate collection, storage, processing, and handling operations, regardless of size, shall be designed, operated, and maintained so as to minimize emission of volatile organic compounds to the atmosphere to the extent reasonably practicable.

XVII.B.1.b. At all times, including periods of start-up and shutdown, the facility and air pollution control equipment shall be maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether or not acceptable operating and maintenance procedures are being used will be based on information available to the Division, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

XVII.B.2. General requirements for air pollution control equipment, flares, and combustion devices used to comply with Section XVII.

XVII.B.2.a.~~XVII.B.1.a.~~ All air pollution control equipment shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file. In addition, all such air pollution control equipment shall be adequately designed and sized to achieve the control efficiency rates required by this Section XVII and to handle reasonably foreseeable fluctuations in emissions of volatile organic compounds and hydrocarbons during normal operations. Fluctuations in emissions that occur when the separator dumps into the tank are reasonably foreseeable.

XVII.B.2.b.~~XVII.B.1.c.~~ If a flare or other combustion device is used to control emissions of hydrocarbons~~volatile organic compounds to comply with Section XVII~~, it shall be enclosed, have no visible emissions during normal operations, and be designed so that an observer can, by means of visual observation from the outside of the enclosed flare or combustion device, or by other convenient means approved by the Division, determine whether it is operating properly.

XVII.B.2.c.~~XVII.B.1.d.~~ Any of the effective dates for installation of controls on condensate storage tanks, dehydrators, and/or internal combustion engines may be extended at the air pollution control-Division's discretion for good cause shown.

XVII.B.2.d. Auto-igniters

All combustion devices used to control emissions of hydrocarbons shall be equipped with and operate an auto-igniter as follows:

XVII.B.2.d.(i) All combustion devices installed on or after May 1, 2014, will be equipped with an operational auto-igniter upon installation of the combustion device.

XVII.B.2.d.(ii) All combustion devices installed before May 1, 2014, will be equipped with an operational auto-igniter by or before May 1, 2016, or after the next combustion device planned shutdown, whichever comes first.

XVII.B.2.e.XVII.B.2. Alternative emissions control equipment shall qualify as air pollution control equipment, and may be used in lieu of, or in combination with, combustion devices and vapor recovery units to achieve the emission reductions required by this Section XVII, if the Division approves the equipment, device or process. As part of the approval process the Division, at its discretion, may specify a different control efficiency than the control efficiencies required by this Section XVII.

XVII.B.3. Oil refineries are not subject to ~~this section of the rule~~Section XVII.

XVII.B.4. ~~Condensate tanks, Glycol natural gas~~ dehydrators and internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard ("NSPS") under 40 CFR Part 60 are not subject to this Section XVII.

XVII.C. (State Only) Emission reduction from ~~condensate~~ storage tanks at oil and gas exploration and production operations, well production facilities, natural gas compressor stations, ~~natural gas drip stations~~ and natural gas processing plants.

XVII.C.1. Control requirements for storage tanks

XVII.C.1.a. Beginning May 1, 2008, owners or operators of all ~~atmospheric condensate~~ storage tanks storing condensate with uncontrolled actual emissions of volatile organic compounds equal to or greater than twenty (20) tons per year based on a rolling twelve-month total ~~shall must~~ operate air pollution control equipment that has an average control efficiency of at least 95% for VOCs ~~on such tanks.~~

XVII.C.1.b. Owners or operators of all storage tanks with uncontrolled actual emissions of volatile organic compounds equal to or greater than six (6) tons per year based on a rolling twelve-month total must operate air pollution control equipment that achieves an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.C.1.b.(i) A storage tank constructed on or after May 1, 2014, must be in compliance by the date that the storage tank commences operation.

XVII.C.1.b.(ii) A storage tank constructed before May 1, 2014, must be in compliance by May 1, 2015.

XVII.C.1.b.(iii) A storage tank not otherwise subject to Sections XVII.C.1.b.(i) or XVII.C.1.b.(ii), above, that increases uncontrolled actual emissions to six tons VOC or more per year on a rolling twelve month basis after May 1,

2014, must be in compliance within sixty days of discovery of the emissions increase.

XVII.C.1.c. Control requirements within 90 days of the date of first production.

XVII.C.1.c.(i) Beginning May 1, 2014, owners or operators of storage tanks at well production facilities shall collect and control emissions by routing emissions to operating air pollution control equipment during the first 90 calendar days after the date of first production. The air pollution control equipment shall achieve an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons. Except that this requirement does not apply to storage tanks that are projected to have emissions less than 1.5 tons of VOC during the first 90 days after the date of first production.

XVII.C.1.c.(ii) The air pollution control equipment and any associated monitoring equipment required pursuant to Section XVII.C.1.c., above may be removed at any time after the first 90 calendar days as long as the source can demonstrate that uncontrolled actual emissions from the storage tank are below the threshold in Section XVII.C.1.b., above.

~~XVII.C.2. For condensate storage tanks with past, uncontrolled actual emissions of volatile organic compounds of less than 20 tons per year based on a rolling twelve-month total that may become subject to Section XVII.C.1. by virtue of the addition of a newly drilled well or the recompletion or stimulation of an existing well, owners or operators of such tanks shall have until 90 days after the date of 1<sup>st</sup> production of the newly drilled, recompleted or stimulated well to install and operate any required air pollution control equipment. If the owner or operator determines that emissions of volatile organic compounds will be below the 20-ton per year threshold, the owner or operator shall notify the Division of this determination in writing and include an explanation of the methodology used to make this determination.~~

XVII.C.2. Capture requirements for storage tanks that are fitted with air pollution control equipment as required by Sections XII.D. or XVII.C.1.

XVII.C.2.a. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall route all hydrocarbon emissions to air pollution control equipment, and shall operate without venting hydrocarbon emissions from the thief hatch (or other access point to the tank) or pressure relief device during normal operation unless venting is reasonably required for maintenance, gauging, or safety of personnel and equipment.

XVII.C.2.b. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall develop, certify, and implement a documented Storage Tank Emission Management System (STEM) plan to identify appropriate strategies to minimize emissions from venting at thief hatches (or other access points to a storage tank) and pressure relief devices during normal operation. As part of STEM, owners and operators shall evaluate and employ appropriate control technologies, monitoring practices, operational practices, and/or other strategies designed to meet the requirements set forth in Section XVII.C.2.a., above, and will update the STEM plan as necessary to achieve or maintain compliance. Owners and operators are not required to develop and implement STEM for storage tanks containing only stabilized liquids. The minimum elements of STEM are listed below.

XVII.C.2.b.(i) STEM must include a monitoring strategy that incorporates the minimum monitoring frequency set forth in Section XVII.F.5.e., procedures for evaluating ongoing storage tank emission capture performance, and, if applicable, the selected strategies.

XVII.C.2.b.(ii) STEM must include a certification by the owner or operator that the selected STEM strategy or strategies are designed to minimize emissions from storage tanks and associated equipment components at the facility or facilities, including thief hatches and pressure relief devices.

### XVII.C.3. Monitoring

~~:- The owner or operator of any condensate storage tank that is required to control volatile organic compound emissions pursuant to this Section XVII.C. shall visually inspect or monitor the Air Pollution Control Equipment to ensure that it is operating at least as often as condensate is loaded out from the tank, unless a more frequent inspection or monitoring schedule is followed. In addition, if a flare or other combustion device is used, the owner or operator shall visually inspect the device for visible emissions at least as often as condensate is loaded out from the tank. The monitoring strategy of each STEM plan must include monitoring in accordance with Approved Instrument Based Monitoring Methods, as specified in Section XVII.F.5.~~

XVII.C.3.a. In addition to any applicable Approved Instrument Based Monitoring Methods, audio, visual, olfactory ("AVO") inspection of the storage tank and any associated equipment (i.e. separator, air pollution control equipment, or other pressure reducing equipment), must be completed as often as liquids are loaded out from the storage tank. However, AVO inspection is required no more frequently than every seven (7) days or less frequently than every thirty (30) days. AVO monitoring is not required for components and tanks that are unsafe to monitor. AVO inspection must include, at a minimum:

XVII.C.3.a.(i) Visual inspection of any thief hatch, pressure relief valve, or other access point to ensure that they are closed and properly sealed;

XVII.C.3.a.(ii) Visual inspection or monitoring of the air pollution control equipment to ensure that it is operating, including that the pilot light is lit on combustion devices used as air pollution control equipment;

XVII.C.3.a.(iii) If a flare or other combustion device is used, visual inspection of the auto-igniter and valves for piping of gas to the pilot light, to ensure they are functioning properly;

XVII.C.3.a.(iv) Visual inspection of the air pollution control equipment to ensure that the valves for the piping from the storage tank to the air pollution control equipment are open; and

XVII.C.3.a.(v) If a flare or other combustion device is used, inspection of the device for the presence or absence of smoke. If smoke is observed, either the equipment will be immediately shut-in to investigate the potential cause for smoke and perform repairs, as necessary, or Method

22 shall be conducted to determine whether visible emissions are present for a period of at least one (1) minute in fifteen (15) minutes.

XVII.C.4. Recordkeeping

The owner or operator of each storage tank subject to XII.D. or XVII.C. must maintain records of STEM as applicable, including the plan, any updates, and the certification, to be made available to the Division upon request. In addition, for a period of two years, the owner or operator must maintain records of any required monitoring and make them available to the Division upon request, including:

- XVII.C.4.a. The AIRS ID for the storage tank.
- XVII.C.4.b. The date and duration of any period where the thief hatch, pressure relief device, or other access point are found to be venting hydrocarbon emissions.
- XVII.C.4.c. The date and duration of any period where the air pollution control equipment is not operating.
- XVII.C.4.d. Where a flare or other combustion device is being used, the date and result of any Method 22 test.
- XVII.C.4.e. The timing of and efforts made to eliminate venting, restore operation of air pollution control equipment, and mitigate visible emissions.

XVII.D. (State Only) Emission reductions from glycol natural gas dehydrators

XVII.D.1. Beginning May 1, 2008, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.2., shall reduce uncontrolled actual emissions of volatile organic compounds by at least 90 percent through the use of a condenser or air pollution control equipment.

XVII.D.2. The control requirement in Section XVII.D.1. shall apply where:

XVII.D.2.a. Actual uncontrolled emissions of volatile organic compounds from the glycol natural gas dehydrator are equal to or greater than two tons per year; and

XVII.D.2.b. The sum of actual uncontrolled emissions of volatile organic compounds from any single glycol natural gas dehydrator or grouping of glycol natural gas dehydrators at a stationary source is equal to or greater than 15 tons per year. To determine if a grouping of dehydrators meets or exceeds the 15 tons per year threshold, sum the total actual uncontrolled emissions of volatile organic compounds from all individual dehydrators at a stationary source, including those with emissions less than two tons per year.

XVII.D.3. Beginning May 1, 2015, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, and drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.4., shall reduce uncontrolled actual emissions of hydrocarbons by at least 95 percent on a rolling twelve-month basis through the use of a condenser or air pollution control equipment. If a

combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.D.4. The control requirement in Section XVII.D.3. shall apply where:

XVII.D.4.a. Actual uncontrolled emissions of volatile organic compounds from a single new glycol natural gas dehydrator are equal to or greater than two tons per year; or

XVII.D.4.b. Actual uncontrolled emissions of volatile organic compounds from a single existing glycol natural gas dehydrator are equal to or greater than six (6) tons per year, or two (2) tons per year if the glycol natural gas dehydrator is located within 1,320 feet of a building unit or designated outside activity area.

XVII.D.4.d. For purposes of Section XVII.D.4:

XVII.D.4.d.(i) Building Unit shall mean a residential building unit, and every five thousand (5,000) square feet of building floor area in commercial facilities or every fifteen thousand (15,000) square feet of building floor area in warehouses that are operating and normally occupied during working hours.

XVII.D.4.d.(ii) A designated outside activity area shall mean an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of public assembly owned or operated by a local government, which the local government seeks to have established as a Designated Outside Activity Area; or an outdoor venue or recreation area where ingress to or egress from could be impeded in the even of an emergency condition at an oil and gas location less than three hundred and fifty (350) feet from the venue due to the configuration of the venue and the number of persons known or expected to simultaneously occupy the venue on a regular basis.

XVII.E. Control of emissions from new, modified, existing, and relocated natural gas fired reciprocating internal combustion engines.

XVII.E.1. (State Only) The requirements of this Section XVII.E. shall not apply to any engine having actual uncontrolled emissions below permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.2. (State Only) New, Modified and Relocated Natural Gas Fired Reciprocating Internal Combustion Engines

XVII.E.2.a. Except as provided in Section XVII.E.2.b. below, the owner or operator on any natural gas fired reciprocating internal combustion engine that is either constructed or relocated to the state of Colorado from another state, on or after the date listed in the table below shall operate and maintain each engine according to the manufacturer's written instructions or procedures to the extent practicable and consistent with technological limitations and good engineering and maintenance practices over the entire life of the engine so that it achieves the emission standards required in Section XVII.E.2.b. Table 1, below.

XVII.E.2.b. Actual emissions from natural gas fired reciprocating internal combustion engines shall not exceed the emission performance standards in Table 1, below as expressed in units of grams per horsepower-hour (G/hp-hr)

TABLE 1				
Maximum Engine Hp	Construction or Relocation Date	Emission Standards is G/hp-hr		
		NOx	CO	VOC
< 100 Hp	Any	NA	NA	NA
≥100 Hp and < 500 Hp	On or after January 1, 2008	2.0	4.0	1.0
	On or after January 1, 2011	1.0	2.0	0.7
≥500 Hp	On or after January 1, 2011	1.0	2.0	0.7
	On or after July 1, 2007	2.0	4.0	1.0
	On or after July 1, 2010	1.0	2.0	0.7
	On or after July 1, 2010	1.0	2.0	0.7

### XVII.E.3. Existing Natural Gas Fired Reciprocating Internal Combustion Engines

#### XVII.E.3.a. (Regional Haze SIP) Rich Burn Reciprocating Internal Combustion Engines

XVII.E.3.a.(i) Except as provided in Sections XVII.3.1.(i)(b) and (c) and XVII.E.3.a.(ii), all rich burn reciprocating internal combustion engines with a manufacturer's name plate design rate greater than 500 horsepower, constructed or modified before February 1, 2009 shall install and operate both a non-selective catalytic reduction system and an air fuel controller by July 1, 2010. A rich burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of less than 2% by volume.

XVII.E.3.a.(i)(a) All control equipment required by this Section XVII.E.3.a. shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file.

XVII.E.3.a.(i)(b) Internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard under 40 CFR Part 60 are not subject to this Section XVII.E.3.a.

XVII.E.3.a.(i)(c) The requirements of this Section XVII.E.3.a. shall not apply to any engine having actual uncontrolled emissions permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.3.a.(ii) Any rich burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of combined volatile organic compound and nitrogen oxides emission reductions (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.a. Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.E.3.b. (State Only) Lean Burn Reciprocating Internal Combustion Engines

XVII.E.3.b.(i) Except as provided in Section XVII.E.3.b.(ii), all lean burn reciprocating internal combustion engines with a manufacturer's nameplate design rate greater than 500 horsepower shall install and operate an oxidation catalyst by July 1, 2010. A lean burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of 2% by volume, or greater.

XVII.E.3.b.(ii) Any lean burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of volatile organic compound emission reduction (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.b.(i). Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.F. [\(State Only\) Leak detection and repair program for well production facilities, storage tanks, and compressor stations](#)

[XVII.F.1. Beginning January 1, 2015, owners and operators of well production facilities and compressor stations will identify and repair leaks from components at these facilities in accordance with the requirements of this Section XVII.F. The following shall apply in lieu of any directed inspection and maintenance program requirements established pursuant to Regulation Number 3, Part B, Section III.D.2.](#)

[XVII.F.2. Owners and operators of well production facilities or natural gas compressor stations that monitor components as part of this Section XVII.F. may opt to estimate emissions from components for the purpose of evaluating the applicability of component fugitive emissions to Regulation Number 3 by utilizing the emission factors defined as less than 10,000 ppmv of Table 2-8 of the 1995 EPA Protocol for Equipment Leak Emission Estimates \(Document EPA-453/R-95-017\).](#)

[XVII.F.3. Owners and operators of well production facilities or natural gas compressor stations shall utilize the Approved Instrument Based Monitoring Method and AVO program as outlined in Section XVII.F. AVO monitoring is not required of components and tanks that are unsafe to monitor or inaccessible to monitor, pursuant to XVII.F.5.g.](#)

XVII.F.4. Inspection schedules for natural gas compressor stations

Beginning January 1, 2015, owners and operators of natural gas compressor stations shall inspect components for leaks using an Approved Instrument Based Monitoring Method, in accordance with the following Table 2, except for components subject to XVII.F.5.g. For purposes of this Section XVII.F.4., fugitive emissions shall be calculated using the emission factors of Table 2-4 of the 1995 EPA Protocol for Equipment Leak Emission Estimates (Document EPA-453/R-95-017), or another Division approved method.

<b>TABLE 2</b>	
<u>Fugitive VOC Emissions (tpy)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 12</u>	<u>Annually</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly</u>
<u>&gt; 50</u>	<u>Monthly</u>

XVII.F.5. Requirements for well production facilities and/or storage tanks

XVII.F.5.a. Beginning August 1, 2014, all new well production facilities shall have a documented pressure test performed on all equipment and piping prior to start up. Documentation of this 90 day testing and monitoring shall be provided in the first annual report to the Division, as required by Section XVII.F.9.

XVII.F.5.b. Beginning January 1, 2015, within 90 days of startup of all new well production facilities and/or storage tanks, owners and/or operators shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method. Such action shall qualify as an inspection pursuant to the inspection frequency schedule in Table 3.

XVII.F.5.c. Consistent with the provisions of XVII.F.5.f., owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks using an Approved Instrument Based Monitoring Method, in accordance with the implementation schedule in XVII.F.5.e. Inspection frequency shall be determined according to Table 3.

XVII.F.5.d. Consistent with the provisions of XVII.F.5.f., owners and operators of new well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method beginning on January 1, 2015. Inspection frequency shall be determined according to Table 3.

XVII.F.5.e. The estimated uncontrolled actual emissions from storage tanks determine the frequency at which inspections must be performed. If no storage tanks are located at a well production facility or multi-well site, operators will rely on the potential to emit of VOC for all of the emissions sources, including emissions from components located at the facility. All components at a well production facility or storage tank must be inspected:

<b>TABLE 3</b>	
<u>Threshold (per XVII.F.5.e.) VOC Emissions (tpy, uncontrolled actual for sites with tanks or PTE for sites without tanks)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 6</u>	<u>One time using Approved Instrument Based Monitoring Method and thereafter using monthly AVO</u>
<u>&gt; 6 and &lt; 12</u>	<u>Annually with monthly AVO</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly with monthly AVO</u>
<u>&gt; 50</u>	<u>Monthly</u>
<u>Multi-well sites without storage tanks after April 15, 2014, that have a PTE &gt; 20 tpy VOC</u>	<u>Monthly</u>

XVII.F.5.f. Phase-in of Approved Instrument Based Monitoring Methods

Owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method, in accordance with the following schedule:

XVII.F.5.f.(i) Beginning January 1, 2015, facilities with uncontrolled actual VOC emissions greater than 50 tpy or multi-well sites.

XVII.F.5.f.(ii) Beginning July 1, 2015, facilities with uncontrolled actual VOC emissions greater than 20 tpy but less than or equal to 50 tpy.

XVII.F.5.f.(iii) Beginning January 1, 2016, facilities with uncontrolled actual VOC emissions greater than 6 tpy but less than or equal to 20 tpy.

XVII.F.5.f.(iv) By July 1, 2016, facilities with uncontrolled actual VOC emissions less than or equal to 6 tpy.

XVII.F.5.g. If a component is difficult, unsafe, or inaccessible to monitor, the owner or operator shall not be required to monitor the component until it becomes feasible to do so.

XVII.F.5.g.(i) Difficult to monitor components are those that cannot be monitored without elevating the monitoring personnel more than two meters above a supported surface or are unable to be reached via a wheeled scissor-lift or hydraulic type scaffold that allows access to components up to 7.6 meters (25 feet) above the ground.

XVII.F.5.g.(ii) Unsafe to monitor components are those that cannot be monitored without exposing monitoring personnel to an immediate danger as a consequence of completing the monitoring.

XVII.F.5.g.(iii) Inaccessible to monitor components are those that are buried, insulated in a manner that prevents access to the components by

a monitor probe, or obstructed by equipment or piping that prevents access to the components by a monitor probe.

XVII.F.6. Leak detection requiring repair

Leaks shall be identified utilizing the methods listed in this Section XVII.F.6.a. through XVII.F.6.d. Only leaks detected pursuant to this Section XVII.F.6. shall require repair under Section XVII.F.

XVII.F.6.a. For Method 21 monitoring at existing facilities, a leak is any concentration of hydrocarbon above 2,000 parts per million (ppm), except for existing well production facilities where leak is defined as any concentration of hydrocarbon above 500 ppm.

XVII.F.6.b. For Method 21 monitoring at facilities constructed after May 1, 2014, a leak is any concentration of hydrocarbon above 500 ppm.

XVII.F.6.c. For infra-red camera and AVO monitoring, a leak is any detectable emissions not associated with normal equipment operation, such as pneumatic device actuation and crank case ventilation.

XVII.F.6.d. For other Division approved monitoring devices or methods, leak identification requiring repair will be established as set forth in the Division's approval.

XVII.F.7. Repair and remonitoring

XVII.F.7.a. First attempt to repair a leak shall be made no later than five (5) working days after discovery, unless parts are unavailable, the equipment requires shutdown to complete repair, or other good cause exists. If parts are unavailable, they shall be ordered promptly and the repair shall be made within fifteen (15) working days of receipt of the parts. If shutdown is required, the leak shall be repaired during the next scheduled shutdown. If delay is attributable to other good cause, repairs shall be completed within fifteen (15) working days after the cause of delay ceases to exist.

XVII.F.7.b. Within fifteen (15) working days of completion of a repair, the leak shall be remonitored to verify the repair was effective.

XVII.F.7.c. Leaks discovered pursuant to the leak detection methods of Section XVII.F. shall not be subject to enforcement by the Division unless the owner or operator fails to perform the required repairs in accordance with Section XVII.F.7.

XVII.F.7.d. For leaks identified using an Approved Instrument Based Monitoring Method, owners and operators have the option of either repairing the leak in accordance with the repair schedule set forth in Section XVII.F.7. or conducting follow-up monitoring using Method 21 within five (5) working days of the leak detected. If the follow-up Method 21 monitoring shows that the leak concentration is less than or equal to 2,000 ppm hydrocarbon for existing facilities (other than existing well production facilities), or 500 ppm for new facilities or existing well production facilities, then the emission shall not be considered a leak for purposes of this Section.

XVII.F.8. Recordkeeping

The owner or operator of each facility subject to the inspection and maintenance requirements in this Section XVII.F. shall maintain the following for a period of two (2) years and make them available to the Division upon request.

XVII.F.8.a. Documentation of the pre-start-up pressure tests for new well production facilities;

XVII.F.8.b. The date and site information for each inspection;

XVII.F.8.c. A list of the leaking components and the monitoring method used to determine the presence of the leak;

XVII.F.8.d. The date of first attempt to repair the leak and, if necessary, any additional attempt to repair the leak;

XVII.F.8.e. The date the leak was repaired;

XVII.F.8.f. The delayed repair list including the basis for placing leaks on the list;

XVII.F.8.g. The date the leak was remonitored to verify the effectiveness of the repair, and the results of the remonitoring; and

XVII.F.8.h. A list of identification numbers for components that are designated as unsafe or inaccessible to monitor, as described in Section XVII.F.5.g., an explanation for each component stating why the component is so designated, and the plan for monitoring such component(s).

XVII.F.9. Reporting

The owner or operator of each facility subject to the inspection and maintenance requirements in Section XVII.F. shall submit a single annual report on or before April 30th of each year summarizing inspection and maintenance activities at all of their subject facilities during the previous calendar year. This report shall contain at a minimum the following information:

XVII.F.9.a. The number of facilities inspected;

XVII.F.9.b. The total number of inspections;

XVII.F.9.c. The total number of leaks identified, broken out by component type;

XVII.F.9.d. The total number of leaks repaired;

XVII.F.9.e. The number of leaks on the delayed repair list as of December 31st; and

XVII.F.9.f. Each report shall be accompanied by a self-certification form. The form shall contain a certification by a responsible official of the truth, accuracy, and completeness of such form, report, or certification stating that, based on information and belief formed after reasonable

inquiry, the statements and information in the document are true, accurate, and complete.

XVII.G. (State Only) Control of emissions from well production facilities.

XVII.G.1. Well Operation and Maintenance.

On or after August 1, 2014, during normal operation gas coming off of a separator produced from any newly constructed, hydraulically fractured, or recompleted oil or gas well must be either routed to a gas gathering line or controlled by air pollution control equipment that achieves an average hydrocarbon control efficiency of 95% from the date of first production. If a combustion device is used, it shall have a design destruction efficiency of at least 98% of hydrocarbons.

XVII.H. (State Only) Venting during downhole well maintenance and unloading events.

XVII.H.1. Well Maintenance.

Beginning May 1, 2014, hydrocarbon emissions from flowing wells must be captured or controlled during downhole well maintenance or servicing activities, unless venting is necessary for safety.

XVII.H.1.a. Operators shall use best management practices to minimize the need for well venting associated with downhole well maintenance and liquids unloading. During liquids unloading events, any means of creating differential pressure will first be used to attempt to unload the liquids from the well without venting. If these methods are not successful in unloading the liquids from the well, the well may be vented to the atmosphere to create the necessary differential pressure to bring the liquids to the surface.

XVII.H.1.b. Venting will be minimized to the extent possible, using best management practices during the well maintenance and liquids unloading events in XVII.H.1.a. The owner and/or operator shall be present on-site during any planned well maintenance and liquids unloading event in XVII.H.1.a. and shall ensure that any venting to the atmosphere is limited to the maximum extent practicable.

XVII.H.1.c. Records of the cause, date, time, and duration of venting events under this Section XVII.H. will be kept and made available to the Division upon request.

XVIII. (State Only) Natural Gas-Actuated Pneumatic Controllers Associated with Oil and Gas Operations in the 8-Hour Ozone Control Area or Any Ozone Nonattainment or Attainment/Maintenance Area

XVIII.A. \_\_\_\_\_ Applicability

This section applies to pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations) in the 8-Hour Ozone Control Area or any Ozone Nonattainment or Attainment/Maintenance Area.

XVIII.B. \_\_\_\_\_ Definitions

XVIII.B.1. “Affected Operations” shall mean pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations).

XVIII.B.2. “Enhanced Maintenance” is specific to high-bleed devices and shall include but is not limited to cleaning, tuning, and repairing leaking gaskets, tubing fittings, and seals; tuning to operate over a broader range of proportional band; and eliminating unnecessary valve positioners.

XVIII.B.3. “High-Bleed Pneumatic Controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits in excess of 6 standard cubic feet per hour (scfh) of natural gas to the atmosphere.

XVIII.B.4. “Low-Bleed Pneumatic controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits less than or equal to 6 scfh of natural gas to the atmosphere.

XVIII.B.5. “Natural Gas Processing Plant” shall mean any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both.

XVIII.B.6. “No-bleed Pneumatic Controller” shall mean any pneumatic controller that is not using hydrocarbon gas as the valve’s actuating gas.

XVIII.B.67. “Pneumatic Controller” shall mean an instrument that is actuated using natural gas pressure and used to control or monitor process parameters such as liquid level, gas level, pressure, valve position, liquid flow, gas flow, and temperature.

XVIII.C. \_\_\_\_\_ Emission Reduction Requirements

The owners and operators of affected operations shall reduce emissions of volatile organic compounds from pneumatic controllers associated with affected operations as follows:

XVIII.C.1. \_\_\_\_\_ In the 8-Hour Ozone Control Area:

XVIII.C.1.a. All pneumatic controllers placed in service on or after February 1, 2009, shall emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.31.c.

XVIII.C.2.1.b. All high-bleed pneumatic controllers in service prior to February 1, 2009 shall be replaced or retrofit such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, by May 1, 2009, unless allowed pursuant to Section XVIII.C.31.c.

XVIII.C.31.c. All high-bleed pneumatic controllers that must remain in service -due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.

XVIII.C.3-a.1.c.(i) For high-bleed pneumatic controllers in service prior to February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and /or process purposes by March 1, 2009. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

XVIII.C.3-b.1.c.(ii) For high-bleed pneumatic controllers placed in service on or after February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to be installed due to safety and /or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

XVIII.C.2. Statewide:

XVIII.C.2.a. All pneumatic controllers placed in service on or after May 1, 2014, shall:

XVIII.C.2.a.(i) Emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.; or

XVIII.C.2.a.(ii) Utilize no-bleed pneumatic controllers where on-site electrical grid power is being used and is technically and economically feasible.

XVIII.C.2.b. All high-bleed pneumatic controllers in service prior to May 1, 2014, shall be replaced or retrofitted by May 1, 2015, such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.

XVIII.C.2.c. All high-bleed pneumatic controllers that must remain in service due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.

XVIII.C.2.c.(i) For high-bleed pneumatic controllers in service prior to May 1, 2014, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and/or process purposes by March 1, 2015. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

XVIII.C.2.c.(ii) For high-bleed pneumatic controllers placed in service on or after May 1, 2014, the owner/operator shall submit justification for high-bleed

pneumatic controllers to be installed due to safety and/or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

#### XVIII.D. Monitoring

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

##### XVIII.D.1. In the 8-Hour Ozone Control Area:

XVIII.D.1.a. Effective May 1, 2009, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.1.b. Effective May 1, 2009, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

##### XVIII.D.2. Statewide:

XVIII.D.2.a. Effective May 1, 2015, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.b. Effective May 1, 2015, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

#### XVIII.E. Recordkeeping

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

XVIII.E.1. The owner or operator of affected operations shall maintain a log of the total number of high-bleed pneumatic controllers and their associated controller numbers per facility, the total number of high-bleed pneumatic controllers per company and the associated justification that the high-bleed pneumatic controllers must be used pursuant to SectionSections XVIII.C.31.c. and XVIII.C.2.c. The log shall be updated on a monthly basis.

XVIII.E.2. The owner or operator shall maintain a log of enhanced maintenance which shall include, at a minimum, inspection dates, the date of the maintenance activity, high-bleed pneumatic controller number, description of the maintenance performed, results and date of any corrective action taken, and the printed name and signature of the individual performing the maintenance. The log shall be updated on a monthly basis.

XVIII.E.3. Records of enhanced maintenance of pneumatic controllers shall be maintained for a minimum of three years and readily made available to the ~~division~~Division upon request.

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To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
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Subject: Join INCR and Responsible Investor in New York!  
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<jgoldiner@legal-aid.org>  
To: Lemuel Srolovic </o=lawnet/ou=first  
administrative group/cn=recipients/cn=lsrolovi>  
Cc:  
Bcc:  
Subject: Fw: Fwd: Transition  
Date: Thu Nov 21 2013 07:22:39 EST  
Attachments: image8c3641.JPG

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From: Davidson, Ellen  
Sent: Wednesday, November 20, 2013 03:44 PM  
To: Holder, Adriene; Goldiner, Judith  
Subject: Fwd: Transition

Begin forwarded message:

From: Jim Quent <jquent@mercuryllc.com>  
Date: November 20, 2013 at 3:26:20 PM EST  
To: "Davidson, Ellen" <EBDavidson@legal-aid.org>  
Subject: Transition  
Reply-To: Jim Quent <jquent@mercuryllc.com>

Jennifer Jones Austin, Co-Chair, Transition NYC (previously named)

Carl Weisbrod, Co-Chair, Transition NYC (previously named)

Thelma Golden, Director and Chief Curator, Studio Museum of Harlem

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Richard Buery, Jr., President and CEO, The Children's Aid Society

William Floyd, Head of External Affairs, Google, Inc.

Meyer (Sandy) Frucher, Vice Chairman, The NASDAQ OMX Group

Orin Kramer, Founder, Boston Provident LP

Vincent (Vinny) Alvarez, President, NYC Central Labor Council

Peter Madonia, COO, The Rockefeller Foundation

Ken Sunshine, Founder, Sunshine Sachs

Harold Ickes, Former White House Deputy Chief of Staff

Dr. Rafael Lantigua, Professor of Clinical Medicine, New York-Presbyterian/Columbia University Medical Center

John Banks, Vice President of Government Relations, Con Edison; Board Member, Metropolitan Transit Authority (MTA)

Douglas (Doug) Durst, Chairman, The Durst Organization

Derrick Cephas, Partner, Weil, Gotshal & Manges; Former CEO and President, Amalgamated Bank

Herb Sturz, Co-founder, Vera Institute of Justice

Jeremy Travis, President, John Jay College of Criminal Justice, City University of New York

Rabbi Michael Miller, Executive Vice President and CEO, Jewish Community Relations Council

Pastor Michael Walrond, Jr., Director of Ministers Division, National Action Network (NAN); Seventh Senior Pastor, First Corinthian Baptist Church

Udai Tambar, Executive Director, South Asian Youth Action (SAYA!)

David Jones, President and CEO, Community Service Society of New York (CSS)

Marvin Hellman, President, OHEL Childrens Home and Family Services

Rev. A.R. Bernard, Founder, Senior Pastor, and CEO, Christian Cultural Center

George Gresham, President, 1199SEIU United Healthcare Workers East

Dr. Steven Safyer, President and CEO, Montefiore Medical Center, Albert Einstein College of Medicine

Ken Lerer, Managing Director, Lerer Ventures; Former Chairman and Co-Founder, Huffington Post

Imam Khalid Latif, Executive Director and Chaplain, Islamic Center, New York University

Marian Fontana, Board Member, Lower Manhattan Development Corporation, Families Advisory Council

Tim Armstrong, Chairman and CEO, AOL, Inc.

Kevin Ryan, Founder and Chairman, Gilt

Pam Kwatra, President, Kripari Marketing; Executive Committee, Indian National Overseas Congress

Elsie Saint Louis, Executive Director, Haitian-Americans United for Progress, Inc.

Vanessa Leung, Deputy Director, Coalition for Asian American Children & Families

Paula Gavin, Executive Director, Fund for Public Advocacy

Kim Sweet, Executive Director, Advocates for Children of New York

Dr. Marcia Keizs, President, York College, The City University of New York

Jukay Hsu, Founder, Coalition for Queens

Arnie Segarra, Activist and Longtime NYC Public Servant

Elba Montalvo, Founder, President, and CEO, The Committee for Hispanic Children and Families, Inc.

Mindy Tarlow, Executive Director and CEO, Center for Employment Opportunities (CEO)

Hoong Yee Lee Krakauer, Executive Director, Queens Council on the Arts

.....

Jim Quent

Senior Vice President

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New York, NY | 10007

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:0700509461d784b198205006f19f6b1d9bfc83b8656aa446a6b65d4500d5b19f9185

Reason: It is an unsupported file type

From: Gregory Schultz <gschultz@riag.ri.gov>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: AEP - Request for mitigation funds  
Date: Thu Nov 21 2013 13:53:30 EST  
Attachments:

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Mike:

Do you have easy access to your 2008 letter that details the funding of the Buffalo GHHI? I am working the Providence GHHI and may very well be submitting a similar AEP funding proposal. If the letter is a pain to find, I don't need it.

Thanks either way.

Greg

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, November 12, 2013 11:49 AM  
To: Janet Henry (JJhenry@aep.com)  
Cc: Thea Schwartz(tschwartz@atg.state.vt.us); Lori D.(Lori.DiBella@ct.gov) DiBella; allen.brooks@doj.nh.gov; Jon Martin; MattZimmerman (MZimmerman@mde.state.md.us); Gregory Schultz; Myles Flint; 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); 'fcourtright@mde.state.md.us'; 'douglass.shallcross@state.ma.us'; 'nmarks@nrdc.org' (nmarks@nrdc.org); 'aettinger@elpc.org'; 'jmccmanus@aep.com'; 'jbkeane@aep.com'  
Subject: AEP - Request for mitigation funds

Janet, please see the attached request for additional mitigation funds under the consent decree. This reflects an additional request to the one made on Sept. 27, i.e., is not a cumulative one. Thanks and let me know if you have any questions.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594

michael.myers@ag.ny.gov

From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Oil, Coal and Power Companies Respond to Investors' Request That They Assess  
Climate Risks  
Date: Fri Nov 22 2013 13:06:52 EST  
Attachments:

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INCR a project of CeresINCR Bulletin- November 22, 2013

#### In the News

##### New Research Shows 90 Companies Caused 2/3 of Man-Made Global Warming Emissions

A new publication in the Climatic Change journal found that a select group of investor-owned companies such as BP, Chevron and Exxon, and government owned firms produced the majority of historical greenhouse gas emissions. All but seven of the 90 were energy companies. John Ashton, former UK chief climate change negotiator stated, " by highlighting the way in which a relatively small number of large companies are at the heart of the current carbon-intensive growth model, this report highlights that fundamental challenge."

[Read more...](#)

#### Tools & Materials

##### Didn't Get a Chance to Join? Listen to the Fiduciary Duty 21st Century Investor Webinar

Listen to this week's 21st Century Investor Blueprint webinar on how fiduciary duty informs sustainable investing. Guest speakers included Keith Johnson from Reinhard Boerner Van Deuren, Catherine LaMarr, General Counsel at the Office of the Connecticut Treasurer, and Ian Lanoff at Groom Law Group.

[Listen here](#).

To join upcoming 21CI working groups and calls on sustainable investing, contact Peter Ellsworth, Senior Manager, Investor Programs.

#### Events

##### Sustainable Stock Exchanges Working Group Call

Monday, November 25  
12:00 - 1:00 pm ET

Join INCR members and Ceres staff for the monthly INCR SSE Working Group call where members will discuss recent global events and how to move forward with the INCR listing standards proposal.

[Register here.](#)

For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

#### INCR Integrated Reporting Working Group Call

Monday, December 9  
12:30 - 2:00 pm ET

Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards.

[Register here.](#)

For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

#### RI Americas Conference 2013: Long-term, Sustainable, Fiduciary Investing

December 10th - 11th

Join Responsible Investor, INCR members and Ceres staff at the fifth annual RI Americas conference in New York City. The event will provide an in-depth legal view on the evolution of fiduciary duties, investment returns and market sustainability.

[Register here.](#)

#### Investors Demand Oil, Coal and Power Companies Assess Climate Change Risks - Companies Respond

Coal Power Plant 2 There is a growing urgency to diversify our energy sources and leave much of the world's remaining fossil fuel reserves in the ground in order to avoid catastrophic climate change impacts. Oil, coal, and electric power companies must recognize that it is in their best interest to plan for a low-carbon future and that it's a smart business strategy.

Climate change isn't just fossil fuel companies' problem; it is everyone's problem. But the decision by fossil fuel companies to invest \$674 billion last year in developing new, potentially unusable reserves - a number that dwarfs the \$281 billion in total global investment in clean energy in 2012, poses significant business, investment and economic risks.

INCR members are among those recognizing the need to transition from fossil fuels to cleaner energy sources. Nearly 60% of the Global 100 companies have set goals for renewable energy sourcing and greenhouse gas reductions. Companies are embracing cleaner energy not only because it's cost-effective and sustainable, but also because they understand that fossil fuel energy is increasingly risky and prone to volatile price swings.

Last month INCR members, along with global pension funds and money managers, publicly recognized the connection between the value of their financial assets and the decisions being made by fossil fuel executives. As part of this effort, 70 global investors with collective assets totaling \$3 trillion made the first ever joint request to the world's 45 largest oil, coal and power companies - including Exxon, BP, BHP Billiton and Rio Tinto- to assess the financial risks that carbon reserves and climate change pose to your business plans.

"We would like to understand [the company's] reserve exposure to the risks associated with current and

probable future policies for reducing greenhouse gas emissions by 80% by 2050," the investors wrote in their letter to oil and gas companies. "We would also like to understand what options there are for [the company] to manage these risks..."

The energy companies that received the letters have generally acknowledged that the investors' requests have raised legitimate issues. Just last week, Shell's CEO told Bloomberg: "It would be stupid for the oil and gas industry to say that renewables will not play a major role in the energy system of the next few decades today's investment levels into wind and into solar have a very rapid growth. Renewables will be developed."

Read more about the Carbon Asset Risk initiative in an article from Ceres' Mindy Lubber and Mark Fulton published in The Guardian.

To sign onto the Carbon Asset Risk letters and join the initiative, contact Ryan Salmon, Senior Manager, Oil and Gas Program.

#### Increased Interest and Traction in Green Bond Market

Over the past few months there has been increased investment in, and availability of, green bonds. These projects generally finance low carbon, clean energy infrastructure and projects that mitigate physical risks from climate change and fund adaptation measures. The recent issues of climate and green bonds are expected to continue over the next 12 months and beyond.

Zurich Insurance, which recently allocated \$1 billion to green bonds, is hoping this will encourage market demand and interest. The company's CIO, Cecilia Reyes stated Zurich wanted "to improve liquidity in the \$11 billion green-bond market, stimulate interest from other investors and encourage new issuers." Leading fund manager and INCR member BlackRock will run the portfolio.

To build a credible, large-scale global green bonds market, issuers must comply with standards and criteria that ensure the environmental integrity of the bonds and the underlying projects.

Recent green bond sales include:

- \*Bank of America's 3 year, \$500 million green bond
- \*Swedish company Vasakronan's \$1.3 billion green bond
- \*Zurich Insurance's allocation of \$1 billion to green bond investing
- \*SolarCity and Credit Suisse's \$54.4 million climate bond
- \*Norway's Kommunalbanken's \$5 million green bond

For more information about green bonds and low-carbon investing, contact Chris Davis, Director, Investor Programs.

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99 Chauncy Street  
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From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Join Us!  
Date: Mon Nov 25 2013 12:12:52 EST  
Attachments:

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Ceres

Register Button  
Webinar:  
INCR Integrated Reporting Working Group

December 9, 2013 12:30 - 2:00 pm ET

Speaker:

Ricky Cronin

Ricky Cronin  
Relationships Manager- North America,  
International Integrated Reporting Council  
Director- Accounting Advisory Services, KPMG

Integrated Reporting Framework Launches in December, Join Complimentary Webinar Discussion on Implementation and Next Steps

Please join us for an in-depth discussion of the International Integrated Reporting Council's (IIRC) new <IR> Framework, which is due to be released in early December 2013. Guest speaker Ricky Cronin, representing the IIRC, will walk investors through the new Framework, highlighting what is different from the consultation, and key issues that arose during the comment period. Members will have ample opportunity to ask the IIRC questions about the final Framework, including plans for its roll-out and use during 2014, how <IR> should be incorporated into existing company engagements, and what the responsibilities of investors are in using and promoting the Framework.

INCR's Integrated Reporting Working Group welcomes all INCR members to participate in this robust discussion of next steps and new reporting opportunities. Our guest speaker will also field questions on what investors should be looking for in an integrated report, what critiques investors currently have with the state of <IR> reporting, and he will discuss the Emerging Issues Database, which will feature examples of various <IR> practices and communications taking place in filings.

Register for the complimentary webinar discussion.

For more information on this event, please contact Tracey Rembert, Senior Manager of Investor Engagement and Coordinator of the Integrated Reporting Working Group, at 617-247-0700 x106.

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From: Geertsma, Meleah <mgeertsma@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Automatic reply: Oil and Gas NSPS  
Date: Mon Nov 25 2013 16:24:19 EST  
Attachments:

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I am out of the office and unable to respond to email on a regular basis. If this is an emergency, you can contact me at 202-290-7164. Otherwise, I will respond to your note as soon as I can.

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Fwd: ATTN Doc. No. EPA-HQ-OAR-2010-0929  
Date: Wed Nov 27 2013 14:02:17 EST  
Attachments: ATT00001.htm  
Subpart W CBI Comments\_26nov2013\_FINAL.PDF

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FYI

Begin forwarded message:

From: Peter Zalzal <pzalzal@edf.org>  
Date: November 27, 2013, 11:32:48 AM CST  
To: "Gunning.Paul@epa.gov" <Gunning.Paul@epa.gov>, "Karimjee.Anhar@epamail.epa.gov" <Karimjee.Anhar@epamail.epa.gov>, "Mark DeFigueiredo (DeFigueiredo.Mark@epamail.epa.gov)" <DeFigueiredo.Mark@epamail.epa.gov>  
Cc: Vickie Patton <vpatton@edf.org>, Tomas Carbonell <tcarbonell@edf.org>  
Subject: FW: ATTN Doc. No. EPA-HQ-OAR-2010-0929

Dear EPA Officials:

Attached please find comments on EPA's Proposed 2013 Revisions to Reporting and Recordkeeping Requirements, and Proposed Confidentiality Determinations under the Greenhouse Gas Reporting Program, 78 Fed. Reg. 55,994, that Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, and Earthjustice submitted yesterday.

Best wishes,

Peter Zalzal

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**Environmental Defense Fund \* Natural Resources Defense Council \*  
Clean Air Task Force \* Sierra Club \* Earthjustice**

**BY EMAIL AND REGULATIONS.GOV**

November 26, 2013

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Mailcode 6102T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Attention: Docket ID No. EPA-HQ-OAR-2010-0929**

**Re: Comments on Proposed 2013 Revisions to Reporting and Recordkeeping Requirements, and Proposed Confidentiality Determinations under the Greenhouse Gas Reporting Program, 78 Fed. Reg. 55,994**

Dear Administrator McCarthy:

Environmental Defense Fund, Natural Resources Defense Council, Clean Air Task Force, Sierra Club, and Earthjustice respectfully submit these comments on behalf of their millions of supporters and members who have an interest in accurate greenhouse gas (“GHG”) emissions measurements across all sectors of the U.S. economy. We are writing to support EPA’s proposal to publicly disclose “inputs to equations” data elements reported by the petroleum and natural gas sector under Subpart W of EPA’s Mandatory Reporting Rule.<sup>1</sup> We also respectfully urge the agency to collect and report 2010–2013 data elements as expeditiously as possible and prior to reporting year 2014. Below, we offer several specific comments on EPA’s proposed rule.

**I. THE CLEAN AIR ACT REQUIRES EPA TO DISCLOSE SUBPART W INPUTS DATA**

Section 114(c) of the Clean Air Act provides that EPA must disclose “emission data,”<sup>2</sup> which agency regulations broadly define to include “[i]nformation necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted,” or information necessary to determine the characteristics of any emissions which “under an applicable standard or limitation” a source may emit, or even “[a] general description of the location and/or nature of the source.”<sup>3</sup> Beyond certain very limited categories,<sup>4</sup> “emission data” is to be interpreted comprehensively, to fulfill the public purposes of the Act and regulations. Further, for information that is not “emission data” the Act requires:

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<sup>1</sup> 78 Fed. Reg. 55,994 (Sept. 11, 2013).

<sup>2</sup> 42 U.S.C. § 1714(c).

<sup>3</sup> 40 C.F.R. § 2.301(a)(2)(i).

<sup>4</sup> The regulations provide that this definition may be read narrowly only for data pertaining to research and development processes. *Id.* § 2.301(a)(2)(ii).

[a]ny records, reports, or information obtained under subsection (a) of this section 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 emission 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.<sup>5</sup>

Subpart W inputs to emission equations data elements meet EPA's regulatory definition of emission data, and therefore must be disclosed. EPA and the public must rely upon these data to determine emissions because reporters using equations are, by definition, not directly measuring emissions. The *only* emission data available to EPA are the inputs and verification data. As EPA explained, "once a facility selects a calculation method [using emissions equations], then the equation becomes the only way for determining such emissions," and so "these inputs to the equation are information 'necessary to determine' the calculated emissions."<sup>6</sup> EPA has acknowledged that inputs to emissions equations are emission data, and therefore it must disclose them to the public.<sup>7</sup>

## II. SUBPART W INPUTS ARE PUBLICLY AVAILABLE AND MUST BE DISCLOSED

In addition to the fact that Subpart W inputs data are "emissions data" and must be disclosed, the Act separately requires disclosure of these data because they are publicly available and not commercially sensitive.<sup>8</sup> Indeed, industry comments on the proposed deferral indicated most data elements were publicly available because "[s]tate oil and gas commissions publish significant amounts of information on oil and gas production operations."<sup>9</sup> The exclusion of such inputs from reporting and public disclosure would unnecessarily deny the public access to vital emission data and could hinder efforts to refine other data collection programs such as the Annual Inventory of Greenhouse Gas Emissions and Sinks.

We support EPA's proposed determination in this rulemaking to disclose Subpart W inputs because the data are publicly available and not commercially sensitive. Using a careful four-step process, the agency concluded that the Subpart W "inputs to equations" data elements are not confidential. In the proposed rule, EPA concluded that "for all of the industry segments within Subpart W, either the data are reported at a level of geographical aggregation that protects individual well information, or the markets in which the affected firms operate are structured in ways that disclosure of 'inputs to equations' data elements would not be likely to cause

<sup>5</sup> 42 U.S.C. § 1714(c).

<sup>6</sup> 75 Fed. Reg. 39,094, 39,109 (July 7, 2010).

<sup>7</sup> *See, e.g., id.* at 39,108 *et seq.*

<sup>8</sup> *See* 42 U.S.C. § 7414; *see also* Env'tl. Def. Fund et al., Comments Regarding Proposed Deferral of Greenhouse Gas Reporting and Call for Information (Docket ID Nos. EPA-HQ-OAR-2010-0929 and EPA-HQ-2010-0964) (Mar. 7, 2011), *available at* [http://www.eenews.net/assets/2011/03/08/document\\_gw\\_01.pdf](http://www.eenews.net/assets/2011/03/08/document_gw_01.pdf). In our comments we included a report by Susan Harvey, an oil and gas expert, that contained dozens of examples where industry already publicly discloses information it had sought to protect as confidential business information. *Id.* at 24.

<sup>9</sup> Env'tl. Prot. Agency, Public Comments and Responses for: Mandatory Greenhouse Gas Reporting Rule: Deferral Notice 174 (Aug. 2011) (comments of Karin Ritter, American Petroleum Institute).

competitive harm.”<sup>10</sup> We agree that the rule as currently structured will not cause competitive harm, and this lack of competitive harm provides separate legal justification for disclosing the data.

### III. Subpart W Inputs Provide Important Additional Transparency

EPA has expressed the critical importance of creating a transparent, public database of GHG emission data. In the final reporting rule, for instance, EPA explained that:

using the rich data set provided by this rulemaking, EPA, States and the public will be able to track emission trends from industries and facilities within industries over time, particularly in response to policies and potential regulations. The data collected by this rule will also improve the U.S. government’s ability to formulate climate policies, and to assess which industries might be affected, and how these industries might be affected by potential policies. Finally, EPA’s experience with other reporting programs is that such programs raise awareness of emissions among reporters and other stakeholders, and thus contribute to efforts to identify and implement emission reduction opportunities. These data can also be coupled with efforts at the local, State and Federal levels to assist corporations and facilities in determining their GHG footprints and identifying opportunities to reduce emissions (e.g., through energy audits or other forms of assistance).<sup>11</sup>

Indeed, in its proposal to disclose GHG emission data, EPA again strongly stated that “[p]ublic release of the information collected under Part 98 that are emission data or non-[confidential business information] is important because it ensures transparency and promotes public confidence in the data.”<sup>12</sup> EPA went on to emphasize that such information was vital to “policy makers, the public, and industry” as they all work to understand and control emissions.<sup>13</sup> The agency in short has, in line with its statutory mandates, made a strong commitment to public disclosure and public participation in developing and sharing reporting rule data.

Moreover, EPA affirmed the importance of Subpart W data to deepening understanding of emissions in the oil and gas sector and achieving needed reductions:

The data submitted under [Subpart W] will provide important information on the location and magnitude of GHG emissions from petroleum and natural gas systems and will allow petroleum and natural gas facilities to track their own emissions, compare them to similar facilities and aid in identifying cost effective opportunities to reduce emissions in the future . . . . [Through collection of Subpart W data] EPA will be in a better position to characterize (1) the extent of methane emissions from these sources that will remain after imposition of

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> 74 Fed. Reg. 56,260, 56,265 (Oct. 30, 2009).

<sup>12</sup> 75 Fed. Reg. at 39,099.

<sup>13</sup> *Id.*

controls required by [the NSPS]; and (2) whether additional measures are available and appropriate for addressing such emissions.<sup>14</sup>

We disagree that EPA lacks the necessary information to set performance standards for methane. The agency has a mandatory legal duty to address these harmful emissions and robust Subpart W data only strengthens the imperative for addressing these harmful emissions.

Finally, reporting Subpart W data will help to address a recent report from EPA's Office of Inspector General, which recommended that EPA "develop and implement a comprehensive strategy for improving air emission data for the oil and gas production sector."<sup>15</sup> The report notes that EPA considers Subpart W as its main GHG emission data collection strategy from the oil and natural gas industries.

#### **IV. We Urge EPA to Disclose the Data Expeditiously**

Because EPA did not identify disclosure concerns for Subpart W "inputs to equations," the current deferral of reporting for such inputs will expire on March 2015. EPA proposes to collect and report this data as part of the annual report for reporting year 2014, which if EPA follows past practice would be released in October 2015. Given EPA's carefully-considered determination that Subpart W inputs are publicly available and not commercially sensitive, and that these inputs are already being collected by industry for eventual reporting, we respectfully urge EPA to begin collecting and reporting these data prior to reporting year 2014. We respectfully recommend that the agency set an interim deadline, such as August 2014, for the first reports of Subpart W inputs to be submitted. This would allow the data to be released to the public with the 2013 reporting year data in the fall of 2014, likely a full year before the current schedule in the proposed rule. Having this data quickly is imperative as policymakers and companies are evaluating mitigation opportunities.

In the proposed rule, EPA claims that the deferred reporting deadline will "ease the burden for facilities" by delaying the reporting deadline for Subpart W inputs to emission equations data.<sup>16</sup> However, facilities already possess the relevant data elements and are required to have organized the relevant data elements into a form that is suitable for expeditious inspection and review,<sup>17</sup> and promptly reporting them will promote transparency. EPA also states that "[t]his proposed approach would prevent facilities from being required to revise, re-certify, and re-submit annual reports from each previous reporting year."<sup>18</sup> To avoid this issue, EPA could instead request that the data be reported as a supplement to the annual report for reporting year 2013.

Congress mandated the establishment of the GHG reporting program to ensure the public benefits from greater transparency and accountability in the scope and dimensions of GHG

<sup>14</sup> 77 Fed. Reg. 49,490, 49,513–14 (Aug. 16, 2012).

<sup>15</sup> EPA Office of Inspector General, EPA NEEDS TO IMPROVE AIR EMISSIONS DATA FOR THE OIL AND NATURAL GAS PRODUCTION SECTOR—REPORT 13-P-0161 (Feb. 20, 2013); *available at* <http://www.epa.gov/oig/reports/2013/20130220-13-P-0161.pdf>.

<sup>16</sup> 78 Fed. Reg. at 56,000.

<sup>17</sup> *See* 76 Fed. Reg. 53,057, 53,061 (Aug. 25, 2011) (citing 40 C.F.R. § 98.3(g)).

<sup>18</sup> *Id.*

emissions. State regulators, industry stakeholders, policymakers, and the public need the withheld data as soon as possible to deepen understanding of the emissions profile of the petroleum and natural gas sector and to assist in developing timely and effective technical and policy solutions. For instance, the inputs for which reporting is currently deferred include vital information on the number of emitting facilities and components deployed in the field. Without these inputs, it is difficult to assess whether differences in emissions reported by different facilities are attributable to inherent characteristics such as activity levels or component counts, or whether more site-specific factors are driving emissions. Release of Subpart W inputs will also help both EPA and the public verify the accuracy of emissions reports and build additional confidence in the reliability of the reporting system. Accurate and timely information on the sources of emissions from this sector will assist greatly in identifying and advocating for solutions—as Congress recognized when it directed EPA to develop the reporting system.

## V. CONCLUSION

Accurate reporting and verification of GHG emissions is vital. EPA has acknowledged the importance of public disclosure in “building public confidence in the quality of the data collected.”<sup>19</sup> Accordingly, we support EPA’s proposal to disclose Subpart W inputs to emission equations data, and we respectfully urge the agency to collect and report 2010–2013 data before reporting year 2014.

Sincerely,

Meleah Geertsma  
Benjamin Longstreth  
**Natural Resources Defense Council**  
2 N. Riverside Plaza, Suite 2250  
Chicago, IL 60606  
mgeerstma@nrdc.org  
blongstreth@nrdc.org

Brian Korpics  
Tomás Carbonell  
Peter Zalzal  
**Environmental Defense Fund**  
2060 Broadway, Suite 300  
Boulder, CO 80302  
bkorpics@edf.org  
tcarbonell@edf.org  
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Timothy Ballo  
**Earthjustice**  
1625 Massachusetts Avenue, NW, Suite 702  
Washington, DC 20036  
tballo@earthjustice.org

David McCabe  
Darin Schroeder  
**Clean Air Task Force**  
18 Tremont Street, Suite 530  
Boston, MA 02108  
dmccabe@catf.us  
dschroeder@catf.us

Joanne Spalding  
**Sierra Club**  
50 F St NW, Eighth Floor  
Washington, DC 20001  
joanne.spalding@sierraclub.org

---

<sup>19</sup> 74 Fed. Reg. at 56,349.

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: ATTN Doc. No. EPA-HQ-OAR-2010-0929  
Date: Wed Nov 27 2013 14:21:23 EST  
Attachments:

---

Thanks Vickie. Have a good Thanksgiving!

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Wednesday, November 27, 2013 2:02 PM  
To: Michael J. Myers  
Subject: Fwd: ATTN Doc. No. EPA-HQ-OAR-2010-0929

FYI

Begin forwarded message:

From: Peter Zalzal <pzalzal@edf.org>  
Date: November 27, 2013, 11:32:48 AM CST  
To: "Gunning.Paul@epa.gov" <Gunning.Paul@epa.gov>, "Karimjee.Anhar@epamail.epa.gov" <Karimjee.Anhar@epamail.epa.gov>, "Mark DeFigueiredo (DeFigueiredo.Mark@epamail.epa.gov)" <DeFigueiredo.Mark@epamail.epa.gov>  
Cc: Vickie Patton <vpatton@edf.org>, Tomas Carbonell <tcarbonell@edf.org>  
Subject: FW: ATTN Doc. No. EPA-HQ-OAR-2010-0929

Dear EPA Officials:

Attached please find comments on EPA's Proposed 2013 Revisions to Reporting and Recordkeeping Requirements, and Proposed Confidentiality Determinations under the Greenhouse Gas Reporting Program, 78 Fed. Reg. 55,994, that Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, and Earthjustice submitted yesterday.

Best wishes,

Peter Zalzal

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From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: FW: Environmental Defense Fund Methane GWP Letter  
Date: Wed Nov 27 2013 14:45:14 EST  
Attachments: EDF\_Methane GWP Letter\_27nov2013.pdf

---

Hi Mike, And this was transmitted today. I hope you have a joyful, wonderful Thanksgiving! Best wishes, Vickie

From: Peter Zalzal  
Sent: Wednesday, November 27, 2013 11:10 AM  
To: 'mccarthy.gina@epa.gov' (mccarthy.gina@epa.gov); 'McCabe.Janet@epamail.epa.gov' (McCabe.Janet@epamail.epa.gov)  
Cc: Goffman, Joseph (Goffman.Joseph@epa.gov); 'Tsirigotis.Peter@epamail.epa.gov' (Tsirigotis.Peter@epamail.epa.gov); 'Dunham.Sarah@epamail.epa.gov' (Dunham.Sarah@epamail.epa.gov); Gunning.Paul@epa.gov; 'page.steve@epa.gov' (page.steve@epa.gov); grundler.christopher@epa.gov; Vickie Patton; Tomas Carbonell  
Subject: Environmental Defense Fund Methane GWP Letter

Dear Administrator McCarthy and Acting Assistant Administrator McCabe:

Attached please find a letter from Environmental Defense Fund respectfully requesting that EPA incorporate updated global warming potential values for methane into the agency's scientific analyses and policy decisions, including the greenhouse gas reporting program, emission standards for the oil and natural gas sector, emissions standards for municipal solid waste landfills, and emissions standards from medium- and heavy-duty vehicles, among others.

Best wishes,

Peter Zalzal

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Document ID: 0.7.691.530641-000001

Owner: Vickie Patton <vpatton@edf.org>

Filename: EDF\_Methane GWP Letter\_27nov2013.pdf

Last Modified: Wed Nov 27 14:45:14 EST 2013

---



November 27, 2013

The Honorable Gina McCarthy, EPA Administrator  
U.S. Environmental Protection Agency  
Mail code: 4101M  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Janet McCabe, Acting Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
Mail code 6101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: Incorporating the Latest Scientific Findings Concerning Methane's Climate Impacts into EPA Scientific Analyses and Policies**

Dear Administrator McCarthy and Acting Assistant Administrator McCabe:

Environmental Defense Fund ("EDF") respectfully urges EPA to incorporate the latest scientific findings concerning methane's climate impacts into its scientific analyses and policy decisions. In particular, we urge EPA to ensure these agency actions reflect updates to the global warming potential ("GWP") value of methane and other greenhouse gases in the recently-released Intergovernmental Panel on Climate Change Fifth Assessment Report. *See* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *available at* [http://www.climatechange2013.org/images/uploads/WGIAR5\\_WGI12Doc2b\\_FinalDraft\\_All.pdf](http://www.climatechange2013.org/images/uploads/WGIAR5_WGI12Doc2b_FinalDraft_All.pdf).

The latest scientific consensus shows that methane is an even more potent climate forcer than previously understood. The Fifth Assessment Report concludes methane has a 20-year GWP of 84 and a 100-year GWP of 28 compared to previous scientific consensus that methane had a 20-year GWP of 72 and a 100-year GWP of 25. Moreover, when climate carbon-  
feedbacks are considered, the report concludes that methane has a 20-year GWP of 86 and a 100-year GWP of 34. In adjusting these GWP values, scientists concluded that failure to consider climate-carbon feedbacks meant that "GWPs presented in [the Fourth Assessment Report] may underestimate the relative impacts of non-CO2 gases." *Id.*

On June 25, the President called for our nation to work together in addressing harmful, climate-destabilizing pollution. Curbing methane emissions is an integral part of this overall Plan, which calls for an Interagency Methane Strategy that "will focus on assessing current

emissions data, addressing data gaps, identifying technologies and best practices for reducing emissions, and identifying existing authorities and incentive-based opportunities to reduce methane emissions.” EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 10 (2013).

In addition to this Interagency Strategy, EPA has a responsibility to undertake a number of scientific and policy actions for which accurate accounting of methane’s climate impacts will be crucial. These include EPA’s greenhouse gas reporting program, emission standards for the oil and natural gas sector, emissions standards for municipal solid waste landfills, and emissions standards from medium- and heavy-duty vehicles among others. To accurately account for methane’s climate impacts and to rigorously evaluate methane emissions reduction opportunities, we respectfully urge EPA to adopt the methane GWP values in the Fifth Assessment Report in these ongoing and upcoming actions.

Respectfully submitted,

Steven Hamburg  
Chief Scientist  
Environmental Defense Fund  
shamburg@edf.org

Peter Zalzal  
Staff Attorney  
Environmental Defense Fund  
pzalzal@edf.org

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Cc: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Bcc:  
Subject: FW: Environmental Defense Fund Methane GWP Letter  
Date: Wed Nov 27 2013 14:45:58 EST  
Attachments: EDF\_Methane GWP Letter\_27nov2013.pdf

---

FYI

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Wednesday, November 27, 2013 2:45 PM  
To: Michael J. Myers  
Subject: FW: Environmental Defense Fund Methane GWP Letter

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From: Peter Zalzal  
Sent: Wednesday, November 27, 2013 11:10 AM  
To: 'mccarthy.gina@epa.gov' (mccarthy.gina@epa.gov); 'McCabe.Janet@epamail.epa.gov' (McCabe.Janet@epamail.epa.gov)  
Cc: Goffman, Joseph (Goffman.Joseph@epa.gov); 'Tsirigotis.Peter@epamail.epa.gov' (Tsirigotis.Peter@epamail.epa.gov); 'Dunham.Sarah@epamail.epa.gov' (Dunham.Sarah@epamail.epa.gov); Gunning.Paul@epa.gov; 'page.steve@epa.gov' (page.steve@epa.gov); grundler.christopher@epa.gov; Vickie Patton; Tomas Carbonell  
Subject: Environmental Defense Fund Methane GWP Letter

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Best wishes,

Peter Zalzal

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Document ID: 0.7.691.172338-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Filename: EDF\_Methane GWP Letter\_27nov2013.pdf  
Last Modified: Wed Nov 27 14:45:58 EST 2013

---



November 27, 2013

The Honorable Gina McCarthy, EPA Administrator  
U.S. Environmental Protection Agency  
Mail code: 4101M  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Janet McCabe, Acting Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
Mail code 6101A  
1200 Pennsylvania Avenue, N.W.  
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Respectfully submitted,

Steven Hamburg  
Chief Scientist  
Environmental Defense Fund  
shamburg@edf.org

Peter Zalzal  
Staff Attorney  
Environmental Defense Fund  
pzalzal@edf.org

From: Doniger, David <ddoniger@nrdc.org>  
To: tballo@earthjustice.org  
<tballo@earthjustice.org>; Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Conf call on refineries  
Date: Mon Dec 02 2013 09:48:47 EST  
Attachments:

---

Anyone know why this call has been scheduled?  
David Doniger  
NRDC  
202 321-3435

Document ID: 0.7.691.531005

From: Doniger, David <ddoniger@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Automatic reply: Conf call on refineries  
Date: Mon Dec 02 2013 09:50:28 EST  
Attachments:

---

I will be away 11/27-11/30. Back Monday. I will be checking email sporadically. For urgent matters, call me at 202 321-3435.

From: Ann Weeks <aweeks@catf.us>  
To: Sanjay Narayan  
<sanjay.narayan@sierraclub.org>; Sean Donahue  
<sean@donahuegoldberg.com>; Neil Gormley  
<ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela  
Campos <pcampos@edf.org>; tschwartz@atg.state.vt.us  
<tschwartz@atg.state.vt.us>  
Cc:  
Bcc:  
Subject: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
Date: Mon Dec 02 2013 10:37:09 EST  
Attachments:

---

Hi all, I had a couple of responses over the weekend, and I hope this time is still open for everyone. Sean and Melissa will be available to have a conversation about the MATS oral argument, and a moot, potentially. Please use this number:

1-888-285-0307

Passcode: 8095285#

Thanks!

Ann Brewster Weeks

Clean Air Task Force

18 Tremont Street

Boston, MA 02108

617-624-0234 extension 156

617-359-4077 (cell)

Confidentiality Notice: if so labelled at the heading, this email contains material that is privileged and confidential. If you believe you have received this message in error, please inform me.

From: Goffman, Joseph <goffman.joseph@epa.gov>  
To: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>; Embrey, Patricia <embrey.patricia@epa.gov>; Stahle, Susan <stahle.susan@epa.gov>; Tsirigotis, Peter <tsirigotis.peter@epa.gov>; timothy.sullivan@doj.ca.gov <timothy.sullivan@doj.ca.gov>; David Doniger <ddoniger@nrdc.org>; Janill Richards <janill.richards@doj.ca.gov>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; DCRoomARN5415PolyPCTB/DC-ARN-OAR <dcroomarn5415polypctb@epa.gov>; Zenick, Elliott <zenick.elliott@epa.gov>; Johnson, Tanya <johnson.tanya@epa.gov>; Tammaro, Joanne <tammaro.joanne@epa.gov>  
Cc:  
Bcc:  
Subject: Conference Call on Refineries | WJC5415 | Conference: 1-866-299-3188 Participant  
Code: 202543201  
Date: Mon Dec 02 2013 12:04:04 EST  
Attachments:

---

Code is 2025643201#

Document ID: 0.7.691.465264

From: Doniger, David <ddoniger@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: Automatic reply: Meeting on Refineries | WJC5415 | Conference: 1-866-299-3188  
Participant Code: 202543201  
Date: Mon Dec 02 2013 12:06:32 EST  
Attachments:

---

I will be away 11/27-11/30. Back Monday. I will be checking email sporadically. For urgent matters, call me at 202 321-3435.

From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Join Complimentary Webinar Discussion on Integrated Reporting Framework:  
Implementation and Next Steps  
Date: Mon Dec 02 2013 13:28:50 EST  
Attachments:

---

To view this email as a web page, go here.

INCR a project of CeresEvents Calendar

Join Complimentary Webinar Discussion on Integrated Reporting Framework: Implementation and Next Steps

Monday, December 9  
12:30 - 2:00 pm ET

IRLogoPlease join INCR for an in-depth discussion of the International Integrated Reporting Council's (IIRC) new <IR> Framework, which is due to be released in early December 2013. Guest speaker Ricky Cronin, representing the IIRC, will walk investors through the new Framework, highlighting what is different from the consultation, and key issues that arose during the comment period. Members will have ample opportunity to ask the IIRC questions about the final Framework, including plans for its roll-out and use during 2014, how <IR> should be incorporated into existing company engagements, and what the responsibilities of investors are in using and promoting the Framework.

INCR's Integrated Reporting Working Group welcomes all INCR members to participate in this robust discussion of next steps and new reporting opportunities. Our guest speaker will also field questions on what investors should be looking for in an integrated report, what critiques investors currently have with the state of <IR> reporting, and he will discuss the Emerging Issues Database, which will feature examples of various <IR> practices and communications taking place in filings.

Register for the complimentary webinar discussion.

For more information on this event, please contact Tracey Rembert, Senior Manager of Investor Engagement and Coordinator of the Integrated Reporting Working Group.

Events Calendar

\*Tuesday, December 3, 1:00 - 2:00 pm ET - CDSB Webinar: Integrating Climate Change Information Into Mainstream Corporate Reports - This CDSB webinar will show how companies can place their climate change information into their annual financial reports using CDSB's Reporting Framework. You will hear perspectives from regulators, business, advisers, investors and non-financial reporting experts. Speakers include Lois Guthrie, Executive Director of CDSB and Jim Coburn of Ceres. Register here.

\*Wednesday, December 4, 2:00 - 3:00 pm ET - Shareholder Initiative on Climate and Sustainability (SICS) - The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change- related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge,

Senior Manager, Investor Programs.

\*Monday, December 9, 12:30 - 2:00 pm ET - INCR Integrated Reporting Working Group Call - Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

\*December 10th - 11th - RI Americas Conference 2013: Long-term, Sustainable, Fiduciary Investing - Join Responsible Investor and Ceres staff at the fifth annual RI Americas conference in New York City. The event will provide an in-depth legal view on the changing face of fiduciary duties, investment returns and market sustainability. Register here.

\*Tuesday, December 17, 1:00 - 2:00 pm ET - INCR Policy Working Group Call - Join this month's INCR Policy working group call to hear from guest speakers, Ceres staff and investor peers. The discussion will focus on upcoming engagements, investor opportunities and new regulations. To register and learn more, contact Brandon Smithwood, Senior Manager, Policy Program.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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99 Chauncy Street, 6th Floor

Boston, MA 02111

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

This email was sent by:

Ceres

99 Chauncy Street

Boston, MA 02111

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[Manage Subscriptions](#) | [Update Profile](#) | [One-Click Unsubscribe](#)

From: Ann Weeks <aweeks@catf.us>  
To: Ann Weeks <aweeks@catf.us>; Sanjay Narayan <sanjay.narayan@sierraclub.org>; Sean Donahue <sean@donahuegoldberg.com>; Neil Gormley <ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela Campos <pcampos@edf.org>; tschwartz@atg.state.vt.us <tschwartz@atg.state.vt.us>  
Cc: John Suttles <jsuttles@selcnc.org>  
Bcc:  
Subject: RE: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
Date: Mon Dec 02 2013 16:27:57 EST  
Attachments:

---

I am adding John Suttles to the list. Thanks all.

From: Ann Weeks [mailto:aweeks@catf.us]  
Sent: Monday, December 02, 2013 10:37 AM  
To: 'Sanjay Narayan'; 'Sean Donahue'; 'Neil Gormley'; 'Davis, Emily'; 'Michael J. Myers'; 'janill.richards@doj.ca.gov'; 'Pamela Campos'; 'tschwartz@atg.state.vt.us'  
Subject: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT

Hi all, I had a couple of responses over the weekend, and I hope this time is still open for everyone. Sean and Melissa will be available to have a conversation about the MATS oral argument, and a moot, potentially. Please use this number:

1-888-285-0307

Passcode: 8095285#

Thanks!

Ann Brewster Weeks

Clean Air Task Force

18 Tremont Street

Boston, MA 02108

617-624-0234 extension 156

617-359-4077 (cell)

Confidentiality Notice: if so labelled at the heading, this email contains material that is privileged and confidential. If you believe you have received this message in error, please inform me.

From: Sean Donahue <sean@donahuegoldberg.com>  
To: Ann Weeks <aweeks@catf.us>; Hoffer,  
Melissa (AGO) <melissa.hoffer@state.ma.us>  
Cc: Sanjay Narayan  
<sanjay.narayan@sierraclub.org>; Neil Gormley  
<ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela  
Campos <pcampos@edf.org>; Thea Schwartz  
<tschwartz@atg.state.vt.us>  
Bcc:  
Subject: Re: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
Date: Mon Dec 02 2013 17:13:23 EST  
Attachments:

---

Ann --

Very sorry about this, but I now realize my flight east leaves at 2:50 PM Eastern tomorrow, so I probably will not be available for much more than a half hour. Especially given the difficulty of scheduling things this week, though, I think we should go ahead if 2 Eastern works for others, and even a short discussion could be useful. For a longer, more moot-like session, any time Friday afternoon from 1 PM Eastern would work best for me. I'm happy to schedule a discussion on Monday 12/9 too.

Thanks,  
-Sean

On Mon, Dec 2, 2013 at 7:37 AM, Ann Weeks <aweeks@catf.us> wrote:

Hi all, I had a couple of responses over the weekend, and I hope this time is still open for everyone. Sean and Melissa will be available to have a conversation about the MATS oral argument, and a moot, potentially. Please use this number:

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Passcode: 8095285#

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--

Sean H. Donahue  
Donahue & Goldberg, LLP  
2000 L St., NW Suite 808  
Washington, DC 20036  
Tel: (202) 277-7085  
Fax: (202) 315-3582

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Thank you.

From: Ann Weeks <aweeks@catf.us>  
To: Sean Donahue  
<sean@donahuegoldberg.com>; Hoffer, Melissa (AGO)  
<melissa.hoffer@state.ma.us>  
Cc: Sanjay Narayan  
<sanjay.narayan@sierraclub.org>; Neil Gormley  
<ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela  
Campos <pcampos@edf.org>; Thea Schwartz  
<tschwartz@atg.state.vt.us>  
Bcc:  
Subject: please keep MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
Date: Mon Dec 02 2013 17:18:39 EST  
Attachments:

---

Let's keep tomorrow at 2 for as long as we have you. If we want a call Friday or Monday we'll discuss on tomorrow's call and I can schedule/set it up after that.

From: Sean Donahue [mailto:sean@donahuegoldberg.com]  
Sent: Monday, December 02, 2013 5:13 PM  
To: Ann Weeks; Hoffer, Melissa (AGO)  
Cc: Sanjay Narayan; Neil Gormley; Davis, Emily; Michael J. Myers; janill.richards@doj.ca.gov; Pamela Campos; Thea Schwartz  
Subject: Re: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT

Ann --

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Thanks,

-Sean

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Hi all, I had a couple of responses over the weekend, and I hope this time is still open for everyone. Sean and Melissa will be available to have a conversation about the MATS oral argument, and a moot, potentially. Please use this number:

1-888-285-0307

Passcode: 8095285#

Thanks!

Ann Brewster Weeks

Clean Air Task Force

18 Tremont Street

Boston, MA 02108

617-624-0234 extension 156

617-359-4077 (cell)

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--

Sean H. Donahue  
Donahue & Goldberg, LLP  
2000 L St., NW Suite 808  
Washington, DC 20036  
Tel: (202) 277-7085  
Fax: (202) 315-3582

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Cc: Sanjay Narayan <sanjay.narayan@sierraclub.org>; Neil Gormley <ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela Campos <pcampos@edf.org>; Thea Schwartz <tschwartz@atg.state.vt.us>  
Bcc:  
Subject: Reminder of call TUESDAY Dec. 3d - 2-2:30 PM EST. for MATS conversation/MOOT  
Date: Tue Dec 03 2013 12:48:09 EST  
Attachments:

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Agenda is connecting about the argument, while we have Sean, and decision about whether we need/want a later moot time.

1-888-285-0307

Passcode: 8095285#

From: Ann Weeks [mailto:aweeks@catf.us]  
Sent: Monday, December 02, 2013 5:19 PM  
To: 'Sean Donahue'; 'Hoffer, Melissa (AGO)'  
Cc: 'Sanjay Narayan'; 'Neil Gormley'; 'Davis, Emily'; 'Michael J. Myers'; 'janill.richards@doj.ca.gov'; 'Pamela Campos'; 'Thea Schwartz'  
Subject: please keep MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
Importance: High

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Sent: Monday, December 02, 2013 5:13 PM  
To: Ann Weeks; Hoffer, Melissa (AGO)  
Cc: Sanjay Narayan; Neil Gormley; Davis, Emily; Michael J. Myers; janill.richards@doj.ca.gov; Pamela Campos; Thea Schwartz  
Subject: Re: MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT

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To: Ann Weeks <aweeks@catf.us>; Sean Donahue <sean@donahuegoldberg.com>; Hoffer, Melissa (AGO) <melissa.hoffer@state.ma.us>  
Cc: Sanjay Narayan <sanjay.narayan@sierraclub.org>; Neil Gormley <ngormley@earthjustice.org>; Davis, Emily <edavis@nrdc.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; janill.richards@doj.ca.gov <janill.richards@doj.ca.gov>; Pamela Campos <pcampos@edf.org>; Thea Schwartz <tschwartz@atg.state.vt.us>  
Bcc:  
Subject: RE: Reminder of call TUESDAY Dec. 3d - 2-2:30 PM EST. for MATS conversation/MOOT  
Date: Tue Dec 03 2013 14:02:03 EST  
Attachments:

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The line is open

From: Ann Weeks [mailto:aweeks@catf.us]  
Sent: Tuesday, December 03, 2013 12:48 PM  
To: 'Ann Weeks'; 'Sean Donahue'; 'Hoffer, Melissa (AGO)'  
Cc: 'Sanjay Narayan'; 'Neil Gormley'; 'Davis, Emily'; 'Michael J. Myers'; janill.richards@doj.ca.gov; 'Pamela Campos'; 'Thea Schwartz'  
Subject: Reminder of call TUESDAY Dec. 3d - 2-2:30 PM EST. for MATS conversation/MOOT  
Importance: High

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Passcode: 8095285#

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Sent: Monday, December 02, 2013 5:19 PM  
To: 'Sean Donahue'; 'Hoffer, Melissa (AGO)'  
Cc: 'Sanjay Narayan'; 'Neil Gormley'; 'Davis, Emily'; 'Michael J. Myers'; 'janill.richards@doj.ca.gov'; 'Pamela Campos'; 'Thea Schwartz'  
Subject: please keep MATS orals - TUESDAY Dec. 3d 2-3 PM EST. for conversation/MOOT  
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To: Ann Weeks; Hoffer, Melissa (AGO)  
Cc: Sanjay Narayan; Neil Gormley; Davis, Emily; Michael J. Myers; janill.richards@doj.ca.gov; Pamela Campos; Thea Schwartz  
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Thank you.

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: tballo@earthjustice.org  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>;  
Jordan, Scott <jordan.scott@epa.gov>  
Cc:  
Bcc:  
Subject: wood stoves call  
Date: Wed Dec 04 2013 12:45:01 EST  
Attachments:

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When: Wednesday, December 18, 2013 3:30 PM-4:00 PM (GMT-05:00) Eastern Time (US & Canada).  
Where: 866-410-9426 code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

From: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>  
To: tballo@earthjustice.org <tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; Jordan, Scott <jordan.scott@epa.gov>; McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>  
Cc:  
Bcc:  
Subject: Copy: wood stoves call  
Date: Wed Dec 04 2013 12:45:14 EST  
Attachments:

StartTime: Wed Dec 18 15:30:00 Eastern Standard Time 2013  
EndTime: Wed Dec 18 16:00:00 Eastern Standard Time 2013  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Wed Dec 04 12:56:00 Eastern Standard Time 2013

When: Wednesday, December 18, 2013 3:30 PM-4:00 PM (GMT-05:00) Eastern Time (US & Canada).  
Where: 866-410-9426 code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Timothy  
Ballo <tballo@earthjustice.org>; Darin Schroeder  
<dschroeder@catf.us>; Joanne Spalding  
<joanne.spalding@sierraclub.org>; Andres Restrepo  
<andres.restrepo@sierraclub.org>; Ann Weeks <aweeks@catf.us>;  
Geertsma, Meleah <mgeertsma@nrdc.org>; David McCabe  
<dmccabe@catf.us>; Tomas Carbonell <tcarbonell@edf.org>;  
Doniger, David <ddoniger@nrdc.org>; Longstreth, Ben  
<blongstreth@nrdc.org>; cschneider@catf.us  
<cschneider@catf.us>; Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: Oil & Gas Follow-up  
Date: Wed Dec 04 2013 16:31:28 EST  
Attachments:

---

Call in number - 866-740-1260  
Access number - 4477216#

LC 2215#

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From: Peter Zalzal <pzalzal@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Timothy Ballo <tballo@earthjustice.org>; Darin Schroeder <dschroeder@catf.us>; Joanne Spalding <joanne.spalding@sierraclub.org>; Andres Restrepo <andres.restrepo@sierraclub.org>; Ann Weeks <aweeks@catf.us>; Geertsma, Meleah <mgeertsma@nrdc.org>; David McCabe <dmccabe@catf.us>; Tomas Carbonell <tcarbonell@edf.org>; Doniger, David <ddoniger@nrdc.org>; Longstreth, Ben <blongstreth@nrdc.org>; cschneider@catf.us <cschneider@catf.us>; Vickie Patton <vpatton@edf.org>; Peter Zalzal <pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: Copy: Oil & Gas Follow-up  
Date: Wed Dec 04 2013 16:31:39 EST  
Attachments:

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StartTime: Fri Dec 06 16:30:00 Eastern Standard Time 2013  
EndTime: Fri Dec 06 17:30:00 Eastern Standard Time 2013  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Wed Dec 04 17:12:00 Eastern Standard Time 2013

Call in number - 866-740-1260  
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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Peter Zalzal <pzalzal@edf.org>  
Cc:  
Bcc:  
Subject: Tentative: Oil & Gas Follow-up  
Date: Wed Dec 04 2013 17:12:13 EST  
Attachments:

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Longstreth, Ben <blongstreth@nrdc.org>;  
Abigail Dillen <adillen@earthjustice.org>; Martinez, Luis  
<lmartinez@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Win in RGGI case  
Date: Thu Dec 05 2013 16:14:28 EST  
Attachments: 3d Dep't RGGI Decision -- Thrun.pdf

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All—The Third Department affirmed Supreme Court's dismissal of the latest challenge to the RGGI program today. Morgan argued on behalf of the State in mid-October and did an excellent job. You may recall we won below on standing and laches grounds. The Appellate Division affirmed on different grounds: statute of limitations and mootness (see attached). Cheers!--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Wednesday, June 13, 2012 2:29 PM  
To: Michael J. Myers; 'Abigail Dillen'; Martinez, Luis  
Cc: Morgan Costello  
Subject: RE: Win in RGGI case

Congratulations! Great news. - Ben

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 13, 2012 2:24 PM  
To: 'Abigail Dillen'; Martinez, Luis; Longstreth, Ben  
Cc: Morgan Costello  
Subject: Win in RGGI case

All--Just wanted to pass along the good news that we received a favorable decision today granting our motion to dismiss the Thrun case. The judge found for us on standing and laches grounds. A copy of

the decision is attached. Thanks for your help in making the laches case, which the judge obviously found convincing. I expect the plaintiffs will appeal, so will keep you posted.--Mike

Michael J. Myers

Chief, Affirmative Litigation Section

Environmental Protection Bureau

New York State Attorney General

The Capitol

Albany, NY 12224

(518) 402-2594

Michael.myers@ag.ny.gov

Document ID: 0.7.691.173342-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Filename: 3d Dep't RGGI Decision -- Thrun.pdf  
Last Modified: Thu Dec 05 16:14:28 EST 2013

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State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 5, 2013

516556

LISA THRUN et al.,  
Appellants,  
v

MEMORANDUM AND ORDER

ANDREW M. CUOMO, as Governor  
of the State of New York,  
et al.,  
Respondents.

Calendar Date: October 17, 2013

Before: Peters, P.J., Rose, Lahtinen and Garry, JJ.

\_\_\_\_\_

Sam Kazman, Competitive Enterprise Institute, Washington, D.C. (Mark V. Smith of Smith Valliere, PLLC, New York City, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, Albany (Morgan Costello of counsel), for respondents.

\_\_\_\_\_

Peters, P.J.

Appeal from an order of the Supreme Court (McNamara, J.), entered June 13, 2012 in Albany County, which granted defendants' motion to dismiss the complaint.

In 2005, the Governors of seven states, including then-Governor of New York George Pataki, signed a nonbinding memorandum of understanding (hereinafter MOU) in which they agreed to propose for legislative or regulatory approval within their respective states a carbon dioxide cap-and-trade program to target emissions from electricity generating power plants, known

as the Regional Greenhouse Gas Initiative (hereinafter RGGI).<sup>1</sup> In 2008, defendant Department of Environmental Conservation (hereinafter DEC) and defendant New York State Energy Research and Development Authority (hereinafter NYSERDA) adopted final regulations implementing New York's participation in the RGGI program (see generally 6 NYCRR part 242; 21 NYCRR part 507). The DEC regulations require power plants generating 25 megawatts or more of electricity to obtain a permit from DEC which, in turn, obligates the regulated entities to purchase and hold sufficient carbon dioxide allowances to cover emissions for the past three-year control period (see 6 NYCRR 242-1.4 [a]; 242-1.5 [c] [6]; 242-3.1). The NYSERDA regulations authorize it to coordinate and implement the state's participation in the quarterly, multi-state auctions run by RGGI, Inc., a nonprofit corporation formed by the signatory states, through which the carbon dioxide allowances allocated for sale by DEC are sold to regulated entities (see 21 NYCRR 507.3; 507.6 [a], [b]). The auction proceeds are controlled by NYSERDA and used to "promote . . . programs for energy efficiency, renewable or non-carbon emitting technologies[] and innovative carbon emissions abatement technologies . . . and for reasonable administrative costs . . . associated with the [RGGI] [p]rogram" (21 NYCRR 507.4 [d]; see 21 NYCRR 507.3 [c]; 507.4 [a]-[d]).

In 2011, plaintiffs – three New York residents and electricity ratepayers – commenced this action seeking declaratory and injunctive relief against the enforcement of the RGGI program throughout the state. Plaintiffs alleged that the MOU was executed, and the regulations were promulgated, without legislative approval or statutory authorization and in violation of the NY Constitution and the separation of powers doctrine. Plaintiffs further asserted that the RGGI program imposes an unlawful tax upon ratepayers not authorized by the Legislature, and that the RGGI program, as implemented, is arbitrary and capricious. Lastly, plaintiffs claimed that the MOU constituted an interstate compact signed in violation of the US Constitution.

---

<sup>1</sup> Three additional states subsequently signed the MOU. In 2011, New Jersey, one of the original signatory states, withdrew its participation.

Defendants moved to dismiss the complaint on the grounds of standing, statute of limitations, mootness and/or laches. Supreme Court granted the motion and dismissed the complaint in its entirety, finding that plaintiffs lacked standing to challenge the RGGI regulations and that the doctrine of laches barred their claims. Plaintiffs now appeal and we affirm, albeit on different grounds.

We assume, without deciding, that plaintiffs have standing to bring this action (see Matter of Stray from the Heart, Inc. v Department of Health & Mental Hygiene of the City of N.Y., 20 NY3d 946, 948 [2012]; Matter of New York State Assn. of Criminal Defense Lawyers v Kaye, 96 NY2d 512, 516 [2001]; Matter of Hudson Prop. Owners' Coalition, Inc. v Slocum, 92 AD3d 1198, 1199 [2012]; see generally Matter of Hoston v New York State Dept. of Health, 203 AD2d 826, 827 [1994], lv denied 84 NY2d 803 [1994]). Nevertheless, the complaint must be dismissed in its entirety because certain claims are time-barred and the remaining claims have been rendered moot.

Although declaratory judgment actions are typically governed by a six-year statute of limitations (see CPLR 213 [1]), "a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form" (Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045 [2012]; see Gress v Brown, 20 NY3d 957, 959 [2012]; Solnick v Whalen, 49 NY2d 224, 231 [1980]; Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d 1088, 1088-1089 [2012]). "Where, as here, governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding" (Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d at 1089 [internal quotation marks and citation omitted]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194, 201 [1994]). "While it is well established that a challenge to the validity of legislation may not be brought under [CPLR] article 78, this principle does not apply to the quasi-legislative acts and decisions of administrative agencies," which are subject to a four-month statute of limitations (Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007];

see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d at 1045).

Here, plaintiffs' first three causes of action challenge the validity of the RGGI regulations promulgated by DEC and NYSERDA pursuant to the statutory authority granted to those respective administrative bodies pursuant to the Environmental Conservation Law and the Public Authorities Law. The enactment of such regulations was "quasi-legislative" and, as such, plaintiffs' challenges thereto were capable of being reviewed in the context of a CPLR article 78 proceeding (see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Town of Stony Point v State of N.Y. Dept. of Fin., Off. of Real Prop. Servs., 107 AD3d 1217, 1218 [2013]; Kent Acres Dev. Co., Ltd. v. City of New York, 41 AD3d 542, 549 [2007]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d 1100, 1101 [2006]; Matter of Purcell v Travis, 24 AD3d 824, 824 [2005], lv denied 7 NY3d 703 [2006]; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d 511, 511-512 [2003]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d 557, 560 [2000]). Although at times couched in terms of constitutional infirmity and illegality, the essence of plaintiffs' claims against DEC and NYSERDA is that the RGGI regulations are "arbitrary and capricious" and that the decision to promulgate such regulations was "affected by an error of law" (CPLR 7803 [3]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Marsh v New York State & Local Employees' Retirement Sys., 291 AD2d 713, 714 [2002]; Wechsler v State of New York, 284 AD2d 707, 709 [2001], lv denied 97 NY2d 607 [2001]; Matter of Aubin v State of New York, 282 AD2d 919, 921-922 [2001], lv denied 97 NY2d 606 [2001]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d at 560). Plaintiffs' challenges to the RGGI regulations are therefore subject to a four-month statute of limitations and, inasmuch as those regulations became effective more than 2½ years prior to the commencement of this action, their claims as against DEC and NYSERDA are time-barred (see CPLR 217 [1]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d at 1101; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d at 512).

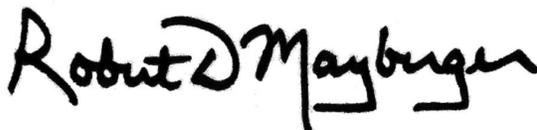
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In light of our holding, we need not address the parties' remaining contentions.

Rose, Lahtinen and Garry, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

FOIL 140072 006961

From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Abigail Dillen <adillen@earthjustice.org>; Martinez, Luis <lmartinez@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Win in RGGI case  
Date: Thu Dec 05 2013 16:23:25 EST  
Attachments:

---

Great work Mike and Morgan! - Ben

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, December 05, 2013 4:14 PM  
To: Longstreth, Ben; 'Abigail Dillen'; Martinez, Luis  
Cc: Morgan Costello  
Subject: RE: Win in RGGI case

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Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Wednesday, June 13, 2012 2:29 PM  
To: Michael J. Myers; 'Abigail Dillen'; Martinez, Luis  
Cc: Morgan Costello  
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Michael.myers@ag.ny.gov

From: Abigail Dillen <adillen@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
Longstreth, Ben <blongstreth@nrdc.org>; Martinez, Luis  
<lmartinez@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Win in RGGI case  
Date: Thu Dec 05 2013 16:27:12 EST  
Attachments: image001.gif

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That's fantastic! Congratulations! We are so grateful for all of your and Morgan's stellar work on this case.

Abigail Dillen

Vice President of Litigation, Climate and Energy

48 Wall Street, 19th Floor

New York, NY 10005

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Michael.myers@ag.ny.gov

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Owner: Abigail Dillen <adillen@earthjustice.org>

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:07004e87dfbd300546415caf1f4f81b168283e8445f675dd003a043ca9ec77ce90de

Reason: It is an unsupported file type

From: Martinez, Luis <lmartinez@nrdc.org>  
To: Abigail Dillen  
<adillen@earthjustice.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Longstreth, Ben  
<blongstreth@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Win in RGGI case  
Date: Thu Dec 05 2013 16:39:26 EST  
Attachments: image001.gif

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Great news indeed. Congratulations and thanks for the hard work!

Luis G. Martinez  
Senior Attorney- Energy and Transportation  
Natural Resources Defense Council  
lmartinez@nrdc.org  
828-278-9077

---

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Document ID: 0.7.691.173353-000001

Owner: Martinez, Luis <lmartinez@nrdc.org>

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:0700c76dee49193df262730f961c5faf2785bc1a2504ece294efc2bf5681d9c52d04

Reason: It is an unsupported file type

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton (vpatton@edf.org)  
<vpatton@edf.org>; joanne.spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>  
Cc:  
Bcc:  
Subject: RGGI decision  
Date: Thu Dec 05 2013 17:34:40 EST  
Attachments: 3d Dep't RGGI Decision -- Thrun.pdf

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Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
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michael.myers@ag.ny.gov

Document ID: 0.7.691.533313-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Filename: 3d Dep't RGGI Decision -- Thrun.pdf  
Last Modified: Thu Dec 05 17:34:40 EST 2013

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State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 5, 2013

516556

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LISA THRUN et al.,  
Appellants,  
v

MEMORANDUM AND ORDER

ANDREW M. CUOMO, as Governor  
of the State of New York,  
et al.,  
Respondents.

---

Calendar Date: October 17, 2013

Before: Peters, P.J., Rose, Lahtinen and Garry, JJ.

---

Sam Kazman, Competitive Enterprise Institute, Washington, D.C. (Mark V. Smith of Smith Valliere, PLLC, New York City, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, Albany (Morgan Costello of counsel), for respondents.

---

Peters, P.J.

Appeal from an order of the Supreme Court (McNamara, J.), entered June 13, 2012 in Albany County, which granted defendants' motion to dismiss the complaint.

In 2005, the Governors of seven states, including then-Governor of New York George Pataki, signed a nonbinding memorandum of understanding (hereinafter MOU) in which they agreed to propose for legislative or regulatory approval within their respective states a carbon dioxide cap-and-trade program to target emissions from electricity generating power plants, known

as the Regional Greenhouse Gas Initiative (hereinafter RGGI).<sup>1</sup> In 2008, defendant Department of Environmental Conservation (hereinafter DEC) and defendant New York State Energy Research and Development Authority (hereinafter NYSERDA) adopted final regulations implementing New York's participation in the RGGI program (see generally 6 NYCRR part 242; 21 NYCRR part 507). The DEC regulations require power plants generating 25 megawatts or more of electricity to obtain a permit from DEC which, in turn, obligates the regulated entities to purchase and hold sufficient carbon dioxide allowances to cover emissions for the past three-year control period (see 6 NYCRR 242-1.4 [a]; 242-1.5 [c] [6]; 242-3.1). The NYSERDA regulations authorize it to coordinate and implement the state's participation in the quarterly, multi-state auctions run by RGGI, Inc., a nonprofit corporation formed by the signatory states, through which the carbon dioxide allowances allocated for sale by DEC are sold to regulated entities (see 21 NYCRR 507.3; 507.6 [a], [b]). The auction proceeds are controlled by NYSERDA and used to "promote . . . programs for energy efficiency, renewable or non-carbon emitting technologies[] and innovative carbon emissions abatement technologies . . . and for reasonable administrative costs . . . associated with the [RGGI] [p]rogram" (21 NYCRR 507.4 [d]; see 21 NYCRR 507.3 [c]; 507.4 [a]-[d]).

In 2011, plaintiffs – three New York residents and electricity ratepayers – commenced this action seeking declaratory and injunctive relief against the enforcement of the RGGI program throughout the state. Plaintiffs alleged that the MOU was executed, and the regulations were promulgated, without legislative approval or statutory authorization and in violation of the NY Constitution and the separation of powers doctrine. Plaintiffs further asserted that the RGGI program imposes an unlawful tax upon ratepayers not authorized by the Legislature, and that the RGGI program, as implemented, is arbitrary and capricious. Lastly, plaintiffs claimed that the MOU constituted an interstate compact signed in violation of the US Constitution.

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<sup>1</sup> Three additional states subsequently signed the MOU. In 2011, New Jersey, one of the original signatory states, withdrew its participation.

Defendants moved to dismiss the complaint on the grounds of standing, statute of limitations, mootness and/or laches. Supreme Court granted the motion and dismissed the complaint in its entirety, finding that plaintiffs lacked standing to challenge the RGGI regulations and that the doctrine of laches barred their claims. Plaintiffs now appeal and we affirm, albeit on different grounds.

We assume, without deciding, that plaintiffs have standing to bring this action (see Matter of Stray from the Heart, Inc. v Department of Health & Mental Hygiene of the City of N.Y., 20 NY3d 946, 948 [2012]; Matter of New York State Assn. of Criminal Defense Lawyers v Kaye, 96 NY2d 512, 516 [2001]; Matter of Hudson Prop. Owners' Coalition, Inc. v Slocum, 92 AD3d 1198, 1199 [2012]; see generally Matter of Hoston v New York State Dept. of Health, 203 AD2d 826, 827 [1994], lv denied 84 NY2d 803 [1994]). Nevertheless, the complaint must be dismissed in its entirety because certain claims are time-barred and the remaining claims have been rendered moot.

Although declaratory judgment actions are typically governed by a six-year statute of limitations (see CPLR 213 [1]), "a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form" (Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045 [2012]; see Gress v Brown, 20 NY3d 957, 959 [2012]; Solnick v Whalen, 49 NY2d 224, 231 [1980]; Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d 1088, 1088-1089 [2012]). "Where, as here, governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding" (Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d at 1089 [internal quotation marks and citation omitted]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194, 201 [1994]). "While it is well established that a challenge to the validity of legislation may not be brought under [CPLR] article 78, this principle does not apply to the quasi-legislative acts and decisions of administrative agencies," which are subject to a four-month statute of limitations (Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007];

see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d at 1045).

Here, plaintiffs' first three causes of action challenge the validity of the RGGI regulations promulgated by DEC and NYSERDA pursuant to the statutory authority granted to those respective administrative bodies pursuant to the Environmental Conservation Law and the Public Authorities Law. The enactment of such regulations was "quasi-legislative" and, as such, plaintiffs' challenges thereto were capable of being reviewed in the context of a CPLR article 78 proceeding (see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Town of Stony Point v State of N.Y. Dept. of Fin., Off. of Real Prop. Servs., 107 AD3d 1217, 1218 [2013]; Kent Acres Dev. Co., Ltd. v. City of New York, 41 AD3d 542, 549 [2007]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d 1100, 1101 [2006]; Matter of Purcell v Travis, 24 AD3d 824, 824 [2005], lv denied 7 NY3d 703 [2006]; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d 511, 511-512 [2003]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d 557, 560 [2000]). Although at times couched in terms of constitutional infirmity and illegality, the essence of plaintiffs' claims against DEC and NYSERDA is that the RGGI regulations are "arbitrary and capricious" and that the decision to promulgate such regulations was "affected by an error of law" (CPLR 7803 [3]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Marsh v New York State & Local Employees' Retirement Sys., 291 AD2d 713, 714 [2002]; Wechsler v State of New York, 284 AD2d 707, 709 [2001], lv denied 97 NY2d 607 [2001]; Matter of Aubin v State of New York, 282 AD2d 919, 921-922 [2001], lv denied 97 NY2d 606 [2001]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d at 560). Plaintiffs' challenges to the RGGI regulations are therefore subject to a four-month statute of limitations and, inasmuch as those regulations became effective more than 2½ years prior to the commencement of this action, their claims as against DEC and NYSERDA are time-barred (see CPLR 217 [1]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d at 1101; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d at 512).

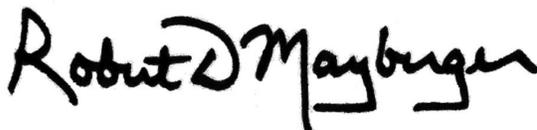
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In light of our holding, we need not address the parties' remaining contentions.

Rose, Lahtinen and Garry, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

From: Kennedy, Kit <kkennedy@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: 3d Dept Win in RGGI case  
Date: Thu Dec 05 2013 21:22:10 EST  
Attachments: 3d Dep't RGGI Decision -- Thrun.pdf

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Congrats Mike and Morgan – way to go!

Hope all is well, Kit

Document ID: 0.7.691.173364-000001

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Filename: 3d Dep't RGGI Decision -- Thrun.pdf  
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Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 5, 2013

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Appeal from an order of the Supreme Court (McNamara, J.), entered June 13, 2012 in Albany County, which granted defendants' motion to dismiss the complaint.

In 2005, the Governors of seven states, including then-Governor of New York George Pataki, signed a nonbinding memorandum of understanding (hereinafter MOU) in which they agreed to propose for legislative or regulatory approval within their respective states a carbon dioxide cap-and-trade program to target emissions from electricity generating power plants, known

as the Regional Greenhouse Gas Initiative (hereinafter RGGI).<sup>1</sup> In 2008, defendant Department of Environmental Conservation (hereinafter DEC) and defendant New York State Energy Research and Development Authority (hereinafter NYSERDA) adopted final regulations implementing New York's participation in the RGGI program (see generally 6 NYCRR part 242; 21 NYCRR part 507). The DEC regulations require power plants generating 25 megawatts or more of electricity to obtain a permit from DEC which, in turn, obligates the regulated entities to purchase and hold sufficient carbon dioxide allowances to cover emissions for the past three-year control period (see 6 NYCRR 242-1.4 [a]; 242-1.5 [c] [6]; 242-3.1). The NYSERDA regulations authorize it to coordinate and implement the state's participation in the quarterly, multi-state auctions run by RGGI, Inc., a nonprofit corporation formed by the signatory states, through which the carbon dioxide allowances allocated for sale by DEC are sold to regulated entities (see 21 NYCRR 507.3; 507.6 [a], [b]). The auction proceeds are controlled by NYSERDA and used to "promote . . . programs for energy efficiency, renewable or non-carbon emitting technologies[] and innovative carbon emissions abatement technologies . . . and for reasonable administrative costs . . . associated with the [RGGI] [p]rogram" (21 NYCRR 507.4 [d]; see 21 NYCRR 507.3 [c]; 507.4 [a]-[d]).

In 2011, plaintiffs – three New York residents and electricity ratepayers – commenced this action seeking declaratory and injunctive relief against the enforcement of the RGGI program throughout the state. Plaintiffs alleged that the MOU was executed, and the regulations were promulgated, without legislative approval or statutory authorization and in violation of the NY Constitution and the separation of powers doctrine. Plaintiffs further asserted that the RGGI program imposes an unlawful tax upon ratepayers not authorized by the Legislature, and that the RGGI program, as implemented, is arbitrary and capricious. Lastly, plaintiffs claimed that the MOU constituted an interstate compact signed in violation of the US Constitution.

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<sup>1</sup> Three additional states subsequently signed the MOU. In 2011, New Jersey, one of the original signatory states, withdrew its participation.

Defendants moved to dismiss the complaint on the grounds of standing, statute of limitations, mootness and/or laches. Supreme Court granted the motion and dismissed the complaint in its entirety, finding that plaintiffs lacked standing to challenge the RGGI regulations and that the doctrine of laches barred their claims. Plaintiffs now appeal and we affirm, albeit on different grounds.

We assume, without deciding, that plaintiffs have standing to bring this action (see Matter of Stray from the Heart, Inc. v Department of Health & Mental Hygiene of the City of N.Y., 20 NY3d 946, 948 [2012]; Matter of New York State Assn. of Criminal Defense Lawyers v Kaye, 96 NY2d 512, 516 [2001]; Matter of Hudson Prop. Owners' Coalition, Inc. v Slocum, 92 AD3d 1198, 1199 [2012]; see generally Matter of Hoston v New York State Dept. of Health, 203 AD2d 826, 827 [1994], lv denied 84 NY2d 803 [1994]). Nevertheless, the complaint must be dismissed in its entirety because certain claims are time-barred and the remaining claims have been rendered moot.

Although declaratory judgment actions are typically governed by a six-year statute of limitations (see CPLR 213 [1]), "a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form" (Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045 [2012]; see Gress v Brown, 20 NY3d 957, 959 [2012]; Solnick v Whalen, 49 NY2d 224, 231 [1980]; Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d 1088, 1088-1089 [2012]). "Where, as here, governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding" (Spinney at Pond View, LLC v Town Bd. of the Town of Schodack, 99 AD3d at 1089 [internal quotation marks and citation omitted]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194, 201 [1994]). "While it is well established that a challenge to the validity of legislation may not be brought under [CPLR] article 78, this principle does not apply to the quasi-legislative acts and decisions of administrative agencies," which are subject to a four-month statute of limitations (Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007];

see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d at 1045).

Here, plaintiffs' first three causes of action challenge the validity of the RGGI regulations promulgated by DEC and NYSERDA pursuant to the statutory authority granted to those respective administrative bodies pursuant to the Environmental Conservation Law and the Public Authorities Law. The enactment of such regulations was "quasi-legislative" and, as such, plaintiffs' challenges thereto were capable of being reviewed in the context of a CPLR article 78 proceeding (see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Matter of Town of Stony Point v State of N.Y. Dept. of Fin., Off. of Real Prop. Servs., 107 AD3d 1217, 1218 [2013]; Kent Acres Dev. Co., Ltd. v. City of New York, 41 AD3d 542, 549 [2007]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d 1100, 1101 [2006]; Matter of Purcell v Travis, 24 AD3d 824, 824 [2005], lv denied 7 NY3d 703 [2006]; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d 511, 511-512 [2003]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d 557, 560 [2000]). Although at times couched in terms of constitutional infirmity and illegality, the essence of plaintiffs' claims against DEC and NYSERDA is that the RGGI regulations are "arbitrary and capricious" and that the decision to promulgate such regulations was "affected by an error of law" (CPLR 7803 [3]; see New York City Health & Hosps. Corp. v McBarnette, 84 NY2d at 205; Marsh v New York State & Local Employees' Retirement Sys., 291 AD2d 713, 714 [2002]; Wechsler v State of New York, 284 AD2d 707, 709 [2001], lv denied 97 NY2d 607 [2001]; Matter of Aubin v State of New York, 282 AD2d 919, 921-922 [2001], lv denied 97 NY2d 606 [2001]; Matter of Federation of Mental Health Ctrs. v DeBuono, 275 AD2d at 560). Plaintiffs' challenges to the RGGI regulations are therefore subject to a four-month statute of limitations and, inasmuch as those regulations became effective more than 2½ years prior to the commencement of this action, their claims as against DEC and NYSERDA are time-barred (see CPLR 217 [1]; Via Health Home Care, Inc. v New York State Dept. of Health, 33 AD3d at 1101; Matter of Peckham Materials Corp. v Westchester County, 303 AD2d at 512).

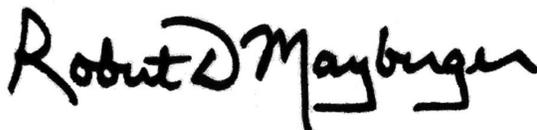
While plaintiffs' challenges to Governor Pataki's authority to enter into the MOU are not subject to the four-month statute of limitations (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 815 [2003], cert denied 540 US 1017 [2003]), such claims must be dismissed as moot. By signing the MOU, Pataki did not obligate New York to participate in the RGGI program, but merely agreed to propose a carbon dioxide emissions cap-and-trade program in New York. It is the regulations implementing RGGI in New York – not the MOU – that form the legal basis for the state's participation in the RGGI program (see generally 6 NYCRR part 242; 21 NYCRR part 507). As the MOU did not actually effectuate the RGGI program or the state's participation in it, invalidating the MOU will not have the effect of repealing the regulations or otherwise affect their legality (cf. Saratoga County Chamber of Commerce v Pataki, 100 NY2d at 812). A declaration as to the validity or invalidity of the MOU would, therefore, have no effect on the rights of the parties (see id.; see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 713-714 [1980]). Furthermore, we are unpersuaded that the exception to the mootness doctrine is applicable under the circumstances presented here (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d at 811-812; Matter of Schulz v State of New York, 182 AD2d 3, 5 [1992], appeal dismissed 80 NY2d 924 [1992], lv denied 80 NY2d 761 [1992]; see generally Matter of Hearst Corp. v Clyne, 50 NY2d at 714-715).

In light of our holding, we need not address the parties' remaining contentions.

Rose, Lahtinen and Garry, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Kennedy, Kit <kkennedy@nrdc.org>;  
Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: RE: 3d Dept Win in RGGI case  
Date: Thu Dec 05 2013 21:52:03 EST  
Attachments:

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Thanks Kit!

From: Kennedy, Kit [mailto:kkennedy@nrdc.org]  
Sent: Thursday, December 05, 2013 9:22 PM  
To: Michael J. Myers; Morgan Costello  
Subject: 3d Dept Win in RGGI case

Congrats Mike and Morgan – way to go!

Hope all is well, Kit

From: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Kennedy, Kit <kkennedy@nrdc.org>  
Cc:  
Bcc:  
Subject: RE: 3d Dept Win in RGGI case  
Date: Fri Dec 06 2013 08:36:45 EST  
Attachments:

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Thanks!

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The Capitol  
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morgan.costello@ag.ny.gov

From: Michael J. Myers  
Sent: Thursday, December 05, 2013 9:52 PM  
To: 'Kennedy, Kit'; Morgan Costello  
Subject: RE: 3d Dept Win in RGGI case

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<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
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Cc:  
Bcc:  
Subject: Investors Press Palm Oil Industry to Stop Fueling Deforestation & Driving Climate  
Change  
Date: Fri Dec 06 2013 10:38:52 EST  
Attachments:

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INCR a project of CeresINCR Bulletin- December 6, 2013

In the News

INCR Members Outline Investment Case for Clean Energy

The Detroit Times published an op-ed by INCR member and Ceres Board member Bill Somplatsky-Jarman of the Presbyterian Church stressing the need to increase clean energy investments and work with utilities to diversify and improve their generation mix. "Decisions about building new fossil-fired plants don't just affect public health and our climate. They can hurt investors."

[Read more...](#)

Tools & Materials

INCR is on Twitter

Follow us and stay connected about climate related news, INCR initiatives and Ceres projects.

Twitter Handle: @INCRNews

Events

INCR Integrated Reporting Working Group Call

Monday, December 9

12:30 - 2:00 pm ET

Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards.

[Register here.](#)

For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

RI Americas Conference 2013: Long-term, Sustainable, Fiduciary Investing

December 10th - 11th

Join Responsible Investor, INCR members and Ceres staff at the fifth annual RI Americas conference in New York City. The event will provide an in-depth legal view on the evolution of fiduciary duties, investment returns and market sustainability.

Register here.

#### INCR Policy Working Group Call

Tuesday, December 17  
1:00 - 2:00 pm ET

Join this month's INCR Policy working group call to hear from guest speakers, Ceres staff and investor peers. The discussion will focus on upcoming engagements, investor opportunities and new regulations. To register and learn more, contact Brandon Smithwood, Senior Manager, Policy Program.

#### Investors Press Palm Oil Industry to Stop Fueling Deforestation and Driving Climate Change

PalmOilPlantations More than 40 institutional investors urged major players in the global palm oil industry to adopt policies that would ensure palm oil development does not contribute to deforestation, development on peatlands or human rights violations. The coalition of investors, including INCR members representing approximately \$270 billion in assets under management, sent letters to 40 major palm oil producers, financiers and buyers/users including Wilmar, Golden Agri Resources, Unilever, and HSBC urging them to support a new set of principles committing them to sustainable policies and practices.

The request comes just weeks after the palm oil industry faced renewed public scrutiny over continued illegal deforestation in national parks, and rampant human rights violations including child and forced labor.

"Fueling deforestation is bad business for any company seeking to position itself as a responsible, sophisticated global player," noted Lucia von Reusner, Shareholder Advocate for Green Century Capital Management, an INCR member who coordinated the letters.

Approximately 85% of palm oil is currently grown in Indonesia and Malaysia, and is a leading driver of deforestation and biodiversity loss in those nations. Due to high levels of largely driven palm oil deforestation and conversion of carbon-rich peatlands, Indonesia was ranked by the World Bank as the third largest greenhouse gas emitter globally. The palm oil industry is also listed as one of the most notorious for using child and forced labor, according to a recent U.S. Department of Labor report.

"The palm oil industry is at a crossroads," said Rob Berridge, Director of Shareholder Engagement at Ceres. "The investors we work with are asking the industry to eschew forced labor, habitat destruction and accelerating greenhouse gas emissions in favor of developing and operating palm plantations responsibly. The more damaging path is not sustainable and puts shareholder value at risk."

Companies that use or finance palm oil - such as Unilever, Kellogg, Dunkin Donuts, and HSBC - are facing high-profile consumer campaigns for incentivizing deforestation and habitat destruction of endangered species including orangutans. Many of these companies have subsequently faced questions from shareholders concerned about steps being taken to reduce the brand risks associated with purchasing unsustainable palm oil.

To learn more about the letters and company feedback, contact Leslie Samuelrich, President or Lucia von Reusner, Shareholder Advocate of Green Century Capital Management.

For more information and to engage companies on forestry and palm oil issues, contact Rob Berridge, Director, Shareholder Initiative on Climate and Sustainability.

## Webinar Explores How to Integrate Climate Change Information in Mainstream Corporate Reporting

This week, the Climate Disclosure Standards Board (CDSB) held a webinar, Integrating Climate Change Information into Mainstream Corporate Reports. Attendees learned about the advantages to companies-both internally and externally-from improving assessment and disclosure of climate change strategies, risks and opportunities.

Jim Coburn, Senior Manager of Ceres' Disclosure Program, discussed investor perspectives on material sustainability issues and investors' use of climate change related information. Ben Richards, from Radley Yeldar, addressed effective climate change storytelling, including best practice examples of U.S. and international reporting. Other panelists, including Lois Guthrie and Patrick Crawford of CDSB showcased how the CDSB reporting framework complements voluntary climate reporting and provides a systematic, clear framework for reporting in mainstream filings.

Amy Pawlicki of AICPA, provided an accounting perspective. She focused on current report preparation practices, evolving practices, and common preparation challenges, such as challenges in applying traditional report preparation practices to sustainability information. Ben Thompson of Autodesk provided a corporate perspective, discussing the integrated reporting trend, alignment of sustainability with the CFO's processes and language, and keeping a focus on material issues.

Download the slides and listen to the webinar.

### Ceres participates in NASDAQ OMX closing bell ceremony

Ceres joined the Sustainable Stock Exchanges (SSE) initiative November 27 at the NASDAQ stock exchange closing bell. The ceremony highlighted three recently-released reports by Sustainalytics, CK Capital and EIRIS.

NASDAQ OMX, after dialogue with INCR members, has been working with Ceres to encourage a global listing standard on sustainability disclosure. NASDAQ OMX also joined the SSE initiative as a Partner Exchange.

View the video and pictures of the event.

Learn more about Ceres' work on stock exchanges, including the INCR Listing Standards Proposal: Sustainability Disclosure Listing Standard for Global Stock Exchanges.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Today! Join Complimentary Webinar Discussion on Integrated Reporting Framework:  
Implementation and Next Steps  
Date: Mon Dec 09 2013 10:52:54 EST  
Attachments:

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INCR a project of CeresEvents Calendar

Join Complimentary Webinar Discussion on Integrated Reporting Framework: Implementation and Next Steps

TODAY Monday, December 9  
12:30 - 2:00 pm ET

IRLogoPlease join INCR for an in-depth discussion of the International Integrated Reporting Council's (IIRC) new <IR> Framework, which is due to be released in early December 2013. Guest speaker Ricky Cronin, representing the IIRC, will walk investors through the new Framework, highlighting what is different from the consultation, and key issues that arose during the comment period. Members will have ample opportunity to ask the IIRC questions about the final Framework, including plans for its roll-out and use during 2014, how <IR> should be incorporated into existing company engagements, and what the responsibilities of investors are in using and promoting the Framework.

INCR's Integrated Reporting Working Group welcomes all INCR members to participate in this robust discussion of next steps and new reporting opportunities. Our guest speaker will also field questions on what investors should be looking for in an integrated report, what critiques investors currently have with the state of <IR> reporting, and he will discuss the Emerging Issues Database, which will feature examples of various <IR> practices and communications taking place in filings.

Register for the complimentary webinar discussion.

For more information on this event, please contact Tracey Rembert, Senior Manager of Investor Engagement and Coordinator of the Integrated Reporting Working Group.

Events Calendar

\*Monday, December 9, 12:30 - 2:00 pm ET - INCR Integrated Reporting Working Group Call - Join INCR members and guest speakers for the Integrated Reporting Working Group call focused on harmonization with industry standards. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

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Nos. 12-1146 and consolidated cases

**In the Supreme Court of the United States**

UTILITY AIR REGULATORY GROUP, ET AL., PETITIONERS

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE STATE PETITIONERS**

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### **QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

(I)

## II

### **PARTIES TO THE PROCEEDING**

The Court has consolidated No. 12-1269 with Nos. 12-1146, 12-1248, 12-1254, 12-1268, and 12-1272. Petitioners in No. 12-1269, petitioners below, are the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality.

Respondents in this Court, respondents below, are the U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa P. Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

The following parties are considered respondents in No. 12-1269 under Supreme Court Rule 12.6, and are grouped according to their respective positions in the court below:

#### *Petitioners*

Alliance for Natural Climate Change Science and William Orr; Alpha Natural Resources, Inc.; American Chemistry Council; American Farm Bureau Federation; American Forest & Paper Association, Inc.; American Frozen Food Institute; American Fuel and Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; U.S. Representative Michele Bachmann; Haley Barbour, Governor of Mississippi; U.S. Representative Marsha Blackburn; U.S.

## III

Representative Kevin Brady; Brick Industry Association; U.S. Representative Paul Broun; U.S. Representative Dan Burton; Center for Biological Diversity; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Competitive Enterprise Institute; Corn Refiners Association; U.S. Representative Nathan Deal; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Freedomworks; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel Corporation; U.S. Representative Phil Gingrey; Glass Association of North America; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association-North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; U.S. Representative Steve King; U.S. Representative Jack Kingston; Landmark Legal Foundation; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; U.S. Representative John Linder; Massey Energy Company; Michigan Manufacturers Association; Mississippi Manufacturers Association; Missouri Joint Municipal Electric Utility Commission; National Association of Home Builders; National

IV

Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Businesses; National Mining Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Portland Cement Association; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; Rosebud Mining Company; Science and Environmental Policy Project; U.S. Representative John Shadegg; U.S. Representative John Shimkus; South Carolina Public Service Authority; Southeast Trailer Mart Inc.; Southeastern Legal Foundation, Inc.; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Texas Agriculture Commission; Texas Attorney General Greg Abbott; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas General Land Office; Texas Governor Rick Perry; Texas Public Utilities Commission; Texas Public Utility Commission Chairman Barry Smitherman; Texas Railroad Commission; Utility Air Regulatory Group; Commonwealth of Virginia ex rel. Attorney General Kenneth T. Cuccinelli; West Virginia Manufacturers Association; Western States Petroleum Association; U.S. Representative Lynn Westmoreland; Wisconsin Manufacturers and Commerce;

V

*Respondent*

National Highway Traffic Safety Administration;

*Intervenors for Petitioners*

State of Alaska; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Haley Barbour, Governor for the State of Mississippi; Chamber of Commerce of the United States of America; Colorado Association of Commerce & Industry; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Kansas Chamber of Commerce and Industry; State of Kentucky; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Farms, LLC; Langdale Ford Company; Langdale Fuel Company; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Electrical Manufacturers Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Manufacturers Association; Pennsylvania Manufacturers Association; Portland Cement Association; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry;

VI

State of Utah; Virginia Manufacturers Association; West Virginia Manufacturers Association; Western States Petroleum Association; Wisconsin Manufacturers and Commerce;

*Intervenors for Respondents*

Alliance of Automobile Manufacturers; American Farm Bureau Federation; State of Arizona; Brick Industry Association; State of California; Center for Biological Diversity; State of Connecticut; Conservation Law Foundation; State of Delaware; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; State of Illinois; Indiana Wildlife Federation; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; Michigan Environmental Council; State of Minnesota; National Environmental Development Association's Clean Air Project; National Mining Association; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; State of New Hampshire; State of New Mexico; State of New York; City of New York; State of North Carolina; Ohio Environmental Council; State of Oregon; Peabody Energy Company; State of Rhode Island; Sierra Club; South Coast Air Quality Management District; Utility Air Regulatory Group; State of Vermont; State of Washington; Wetlands Watch; Wild Virginia.

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## **BRIEF FOR THE STATE PETITIONERS**

### **OPINIONS BELOW**

The opinion of the D.C. Circuit (J.A. 191-267) is reported at 684 F.3d 102. The D.C. Circuit's orders denying panel rehearing and rehearing en banc (J.A. 139-90) are unreported.

### **JURISDICTION**

The D.C. Circuit entered judgment on June 26, 2012, and denied timely petitions for rehearing en banc on December 20, 2012. On March 8, 2013, the Chief Justice extended the time for filing a certiorari petition to and including April 19, 2013. The petition was filed on April 19, 2013 and granted on October 15, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

### **STATUTES AND REGULATIONS INVOLVED**

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7407 *et seq.*, are reproduced at Pet. App. 591a-619a. Relevant EPA rules are reproduced at J.A. 268-682, 1399-418.

### **STATEMENT**

State Petitioners incorporate by reference the statement provided by the American Chemistry Counsel in No. 12-1248.

### **SUMMARY OF ARGUMENT**

EPA is seeking to improve upon rather than implement the Clean Air Act. After declaring that it would begin regulating greenhouse-gas emissions

(1)

from stationary sources, EPA replaced unambiguous numerical permitting thresholds in the PSD and Title V programs with numbers and metrics of EPA's own creation, and then applied those agency-created criteria *solely* to greenhouse-gas emissions. EPA cannot use the "absurdity doctrine" as an excuse for departing from the Act's rigid, unambiguous permitting requirements, as the entire point of legislating by rule is to tolerate suboptimal policies in exchange for constraining an agency's discretion and forcing it to seek legislation (and therefore congressional input) before embarking on novel regulatory regimes.

EPA is correct to acknowledge the absurdity of applying the Act's 100/250 tons-per-year permitting requirements to CO<sub>2</sub> and other greenhouse gases, but the absurdity is caused entirely by EPA's questionable conclusion that greenhouse gases qualify as air pollutants subject to regulation under the PSD and Title V programs. An agency cannot construe *ambiguous* statutory language to *create* an absurdity, and then construe *unambiguous* statutory language to *avoid* that absurdity. The far-reaching and near-ridiculous regulatory burdens required by EPA's decision to regulate greenhouse-gas emissions under the PSD and Title V programs prove that the Act never delegated to EPA the authority to regulate greenhouse-gas emissions as "air pollutants" under those programs.

**ARGUMENT****I. THE CLEAN AIR ACT CANNOT BE CONSTRUED TO AUTHORIZE EPA TO REGULATE GREENHOUSE-GAS EMISSIONS UNDER THE PSD AND TITLE V PROGRAMS.**

The statutory permitting thresholds established in the PSD and Title V programs require facilities to obtain permits if they emit more than 100 tons per year (or in some cases, more than 250 tons per year) of “any air pollutant.” 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a). These numerical thresholds are set far too low to accommodate rational regulation of greenhouse-gas emissions. As EPA has acknowledged, applying the 100/250 tons-per-year (tpy) thresholds to CO<sub>2</sub> and other greenhouse gases “would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program.” 75 Fed. Reg. 31,514, 31,533 (June 3, 2010) (“Tailoring Rule”) (J.A. 355). This not only would expand the number of “major” sources subject to permitting requirements from 15,000 to more than 6,000,000, but it would also increase annual permitting costs from \$12,000,000 to \$1,500,000,000, and boost the number of man-hours required to administer these programs from 151,000 to 19,700,000. *See id.*, J.A. 381-88. Countless numbers of buildings, including churches and schools, would be subjected to EPA permitting requirements based on the CO<sub>2</sub> emissions from their water heaters.

The Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions under either the PSD or Title V programs when the unambiguous statutory requirements would compel such preposterous consequences. The low, mass-based permitting thresholds established by the PSD and Title V provisions simply do not fit with a world in which EPA treats greenhouse-gas emissions as air pollutants for purposes of those programs. EPA must therefore obtain more specific authorization from Congress before asserting a prerogative to regulate greenhouse-gas emissions under either the PSD or Title V programs.

EPA cannot salvage its efforts to regulate greenhouse-gas emissions under these programs by pointing to ambiguities in the Act's definition of "air pollutant" or other provisions and insisting on *Chevron* deference. See, e.g., 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) ("Timing Rule") (J.A. 721-22) ("Because the term 'regulation' is susceptible to more than one meaning, there is ambiguity in the phrase 'each pollutant subject to regulation under the Act' that is used in both sections 165(a)(4) and 169(3) of the CAA."). In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court refused to extend *Chevron* deference to FDA's decision to assert jurisdiction over tobacco products—even though those products fell squarely within the statutory definitions of "drugs" and "devices"—because the statutes governing FDA would have required the agency to ban cigarettes from interstate commerce.

Given that this outcome was incompatible with any semblance of rational regulation, the Court concluded that Congress could not have delegated to FDA the power to decide whether to regulate tobacco products. *Brown & Williamson* controls here and should lead the Court to disapprove EPA's attempt to regulate stationary-source greenhouse-gas emissions.

The facts of *Brown & Williamson* are remarkably similar to this case. The Food, Drug, and Cosmetic Act (FDCA) established FDA and authorized it to regulate drugs, among other items. The FDCA defined "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). For many years, FDA declined to regulate tobacco products, even though the nicotine in those products is "intended to affect the structure or any function of the body." But in 1996 FDA changed tracks, declaring that nicotine qualified as a "drug" and asserting jurisdiction over tobacco products.

But once FDA asserted jurisdiction over tobacco products, the FDCA required the agency to remove all tobacco products from the market. The statute required preapproval of any new drug, with limited exceptions, and required FDA to disapprove any new drug not safe and effective for its intended purpose. *Id.* § 355(d)(1)-(2), (4)-(5). The statute also prohibited "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded," *id.* § 331(a), and defined

“misbranded” to include drugs or devices “dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,” *id.* § 352(j).

FDA was understandably reluctant to take this drastic step. Following these unambiguous statutory requirements would have produced, in EPA parlance, an “absurd result,” a regulatory regime so heavy-handed as to fall outside the bounds of reasonable policymaking. So rather than enforcing a nationwide ban on tobacco products, FDA crafted an intermediate regulatory regime, one that merely restricted the marketing of tobacco products to children. *Brown & Williamson*, 529 U.S. at 127-29. Much like the Tailoring Rule that EPA promulgated to avoid the drastic consequences of its decision to regulate greenhouse gases, FDA’s tobacco-advertising rule similarly spurned an unambiguous statutory command in an effort to soften the impact of its decision to regulate tobacco as a drug.

The Court, however, vacated FDA’s rule in its entirety, refusing to allow the agency to chart its own regulatory course when an unambiguous statutory provision required the agency to ban all “dangerous” drugs or devices within its jurisdiction. And because the statute would produce this absurdity of banning all cigarettes from the market, the Court concluded that FDA could not assert jurisdiction over tobacco products in the first place—even though nicotine fell squarely within the FDCA’s definition of “drug.” The

Court explained: “[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160.

*Brown & Williamson* should lead the Court to similarly disapprove EPA’s attempts to regulate greenhouse-gas emissions under the PSD and Title V programs. EPA’s decision to regulate stationary-source greenhouse-gas emissions, like FDA’s attempt to assert jurisdiction over tobacco, would produce irrationally onerous regulatory burdens that can be avoided only by rewriting unambiguous statutory language. And EPA’s actions, like FDA’s failed tobacco effort, involve a novel assertion of agency power that does not fit with the regulatory regime envisioned by the decades-old governing statute. Finally, it is unlikely that Congress would have “intended to delegate” to EPA the power to regulate stationary-source greenhouse-gas emissions unilaterally, and render decisions of such “economic and political significance,” especially when the numerical thresholds in the PSD and Title V provisions would render such a project unworkable. *Id.* at 160. Just as the Court required FDA to obtain legislation from Congress extending its regulatory authority to tobacco, so too should it require EPA to seek legislation from Congress authorizing it to regulate greenhouse-gas emissions under the PSD and Title V programs.

The unambiguous (and low) mass-based numerical thresholds in sections 7479(1) and 7602(j)

foreclose any inference that the Act implicitly delegates to EPA the power to decide whether to treat greenhouse-gas emissions as air pollutants under the PSD and Title V programs. The inability to regulate these emissions rationally while simultaneously remaining faithful to the rigid, agency-constraining numerical thresholds in the Act demonstrates that greenhouse-gas regulation does not fit with the PSD and Title V provisions.

**II. IF THIS COURT CONCLUDES THAT THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE STATIONARY-SOURCE GREENHOUSE-GAS EMISSIONS, THEN EPA MUST ENFORCE THE STATUTORY PERMITTING THRESHOLDS AND SEEK CORRECTIVE LEGISLATION FROM CONGRESS.**

If the Court nevertheless concludes that the Act authorizes or requires EPA to regulate greenhouse-gas emissions from stationary sources, then it should vacate the Tailoring Rule and require EPA to enforce the statute's unambiguous permitting requirements. If EPA thinks the statutory permitting thresholds in the PSD and Title V programs are set too low to allow for rational regulation, then EPA must seek corrective legislation from Congress, rather than replace the statute's numerical, mass-based permitting thresholds with numbers and metrics of EPA's own choosing. Neither the unwillingness of Congress to enact this legislation, nor the unwillingness of the Executive Branch to spend its political capital to obtain this legislation, can justify

an agency's flagrant disregard of unambiguous statutory language.\*

EPA's Tailoring Rule is one of the most brazen power grabs ever attempted by an administrative agency. Rather than apply the unambiguous permitting requirements that the Act establishes for *all* air pollutants regulated under the PSD and Title V programs, EPA's Tailoring Rule invents its own permitting thresholds for CO<sub>2</sub> and other greenhouse-gas emissions, and sets them at approximately *750 to 1000 times* the threshold levels specified in the statute. J.A. 310-19. If that were not enough, EPA's Tailoring Rule also departs from the mass-based approach to significance levels established in the text of the Act, as it measures the threshold quantities of greenhouse-gas emissions according to their heat-trapping potential. J.A. 305-10, 340-49. This flouts the rule-based thresholds that the Act established to constrain EPA's discretion.

EPA concedes the incontestable, admitting that its Tailoring Rule "do[es] not accord with a literal reading of the statutory provisions for PSD applicability." J.A. 448. Yet EPA tries to defend its Tailoring Rule by noting that obeying the statutory language "would create undue costs for sources and

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\* The court of appeals refused to address the legality of the Tailoring Rule by holding that the petitioners lacked standing to challenge it, but this conclusion is mistaken for the reasons explained in State Petitioners' certiorari petition. Pet. 22-28, *Texas v. EPA*, No. 12-1269 (U.S. Apr. 19, 2013).

impossible administrative burdens for permitting authorities,” J.A. 418, and attempts to create a legal veneer for its unilateral rewriting of the Act by invoking “congressional intent,” the “absurdity doctrine,” and *Chevron* deference. None of this can justify an agency’s decision to countermand unambiguous statutory language and expand its discretion by converting statutory rules into standards.

**A. EPA Cannot Subordinate The Clean Air Act’s Unambiguous, Rule-Bound Numerical Thresholds To Actual Or Imagined “Congressional Intent.”**

In defending its insouciance toward the enacted text of the Act, EPA makes an audacious claim: that “clear” congressional intent can trump unambiguous statutory language and liberate agencies to convert statutory rules into agency-empowering standards. EPA writes: “[I]f congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent.” J.A. 285.

That is nonsense. Even the clearest expressions of “congressional intent” cannot license an agency to convert the Act’s rule-bound numerical thresholds into standards that empower EPA administrators to weigh costs against benefits. This much is clear from *INS v. Chadha*, 462 U.S. 919 (1983). Once Congress confers discretionary powers on an agency

administrator, it cannot revoke that discretion by deploying a one- or two-house “legislative veto” over the agency’s decisions. *Id.* at 954-55. A two-house legislative veto is as clear a manifestation of “congressional intent” as one can imagine, yet even these “clear” congressional intentions cannot control an agency’s decisionmaking—unless they are codified in a statute that successfully runs the bicameralism-and-presentment process.

In like manner, once agency discretion is *restricted* by statute, it cannot be loosened by unenacted congressional wishes. Suppose that each house of Congress approved a nonbinding resolution urging EPA to ignore the Act’s statutory thresholds for all air pollutants and replace them with thresholds chosen by the EPA Administrator. One would think this should qualify as a “clear” manifestation of congressional intent—and it is far more clear than anything that EPA has offered in its Tailoring Rule. Yet no one would maintain that these unenacted aspirations could liberate EPA from an unambiguous statutory constraint. Surely less reliable indicators of congressional intent—such as opinion polls of current or former legislators, or facile and unsupported assertions of “congressional intent”—cannot be invoked to displace unambiguous, agency-controlling statutory language either.

EPA’s Tailoring Rule treats enacted statutory language not as law, but as mere evidence of what the law might be. The “real” law, according to EPA, is “congressional intent,” and statutory text serves as

little more than a guide to agencies as they attempt to discover or construct how “Congress” would want them to deal with problems. *See, e.g.*, J.A. 285 (“*To determine congressional intent*, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, *in most cases*, the agency must implement those requirements by their terms.”) (emphases added); J.A. 409 (“If the literal meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must implement it.”).

EPA’s efforts to equate the law with “congressional intent” rather than enacted text of federal statutes is irreconcilable with the jurisprudence of this Court. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (holding that arguments based on legislative “intent” have no relevance when interpreting unambiguous statutes); *Penn. Dep’t of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (assuming that “Congress did not ‘envisio[n] that the [statute] would be applied to state prisoners,” but holding that “in the context of an unambiguous statutory text that is irrelevant” (citation omitted)); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”).

EPA's intentionalism is also irreconcilable with modern understandings of how the legislative process functions. First, this Court has recognized that legislation embodies compromises between competing interests, and that abstract speculations about congressional "intent" and "purpose" can unravel bargains memorialized in the enacted language. See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-19 (1980). The Act's provisions reflect compromises along many different dimensions. Most obviously, its provisions trade off the goals of providing clean air against the need to avoid excessive regulatory burdens. Congress "intended" to pursue each of these competing goals, yet *how much* an agency should pursue clean air and *how much* it should seek to avoid onerous regulation can be determined only by following the enacted statutory language. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.").

Second, the Act, like all statutes, must decide whether to pursue these goals by establishing statutory rules ("drive no faster than 55 miles per hour") or standards ("drive at a speed reasonable under the circumstances"). Legislating by rule has many virtues but also drawbacks. On the plus side,

statutory rules can promote predictability and planning, avoid arbitrary treatment of regulated entities, and reduce decision costs for those who implement the law. *See, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). But statutory rules can be crude; they are sometimes insensitive to context, or over- or under-inclusive in relation to their underlying goals. Standards, by contrast, confer discretion on future decisionmakers to avoid suboptimal outcomes in particular cases, but this type of regime comes at the price of increased decision costs, the potential for arbitrary or unpredictable decisions, and (perhaps) increased error costs if future decisionmakers are untrustworthy. Rules and standards also allocate power between the legislature and the agencies and courts that implement the law. Standards delegate power to future decisionmakers such as agencies and courts, while statutory rules withhold discretion from these institutions and force them to seek legislative approval before deviating from the codified regime. *See, e.g.,* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992). How to calibrate these tradeoffs between rules and standards is an essential component of the legislative compromise necessary to produce statutes such as the Clean Air Act. But allowing agencies or courts to invoke abstract notions of “congressional intent” empowers those institutions to convert statutory rules into standards and withhold from Congress the prerogative of

legislating by rule. See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (declaring that courts and agencies are “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes”).

Third, this Court has recognized that Congress, as a multi-member body, is incapable of having “intentions” or “purposes.” See *Barnhart*, 534 U.S. at 461; *Dimension Fin.*, 474 U.S. at 374; *Mohasco*, 447 U.S. at 818-19; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body . . . .”); KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); Kenneth A. Shepsle, *Congress Is a “They,” Not An “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992); *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) (“Congress is a ‘they’ and not an ‘it’; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity).”). Legislative outcomes can be manipulated by agenda control and logrolling, clouding any efforts to discover congressional “intentions” from the voting records of its members. See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (“[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little

more than wild guesses.”). Legislatures simply produce outcomes, which must be enforced by courts and agencies.

In all events, even if one accepts “congressional intent” as a coherent concept, EPA’s empirical claims regarding “congressional intent” are demonstrably false. There is no “clear” congressional intent from the legislators who enacted the Act or the 1977 amendments because the issues of global warming and greenhouse-gas emissions were not salient at the time of enactment. That means we not only do not know, but we cannot even reconstruct, how the Congresses of 1970 or 1977 would have wanted EPA to deal with this problem. As for the Congress that enacted the 1990 Clean Air Act Amendments, that Congress *rejected* several legislative proposals to regulate greenhouse-gas emissions, a fact that EPA conveniently ignores throughout its Timing and Tailoring Rules. *See, e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989). The statute’s rigidity demonstrates that the legislatures that enacted the Clean Air Act’s provisions expected EPA to come to Congress to seek statutory amendments and authorization to regulate newfound hazards such as global warming. And if the present-day Congress “intends” for EPA to disregard the numerical thresholds in the Act, as EPA suggests, then EPA should have no trouble securing corrective legislation from Congress.

**B. EPA Cannot Disregard The Clean Air Act's Unambiguous, Agency-Constraining Numerical Thresholds By Invoking The "Absurdity Doctrine."**

EPA's efforts to defend the Tailoring Rule by invoking the "absurdity doctrine" fail for several reasons.

First, agencies cannot rely on "absurd results" as an excuse to convert unambiguous statutory rules into standards. *Every* rule will produce suboptimal or even absurd results at the margins. Yet the entire point of legislating by rule is to tolerate these less-than-ideal outcomes in exchange for the benefits of cabining agency discretion, minimizing decision costs, and preserving the legislature's power vis-à-vis the agency. EPA's theory of "absurd results" would empower agencies to smuggle cost-benefit analysis into *any* statutory mandate, even when the statute expressly rejects this type of utilitarian calculus. *See* J.A. 356 ("For both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities."). And it would disable Congress from using statutory rules as a means of forcing agencies to obtain congressional authorization and input before regulating novel and unforeseen environmental problems.

Second, EPA's Tailoring Rule wrongly conflates the canon of constitutional avoidance with a generalized prerogative of agencies to avoid "absurd

results” by converting statutory rules into standards. Many of the authorities that EPA cites involve cases in which the Court bent enacted statutory language to avoid an actual or potential *constitutional violation*. See J.A. 393-95 (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-45 (2002); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Pub. Citizen v. DOJ*, 491 U.S. 440, 453-54 (1989)). Yet there is a great distance between the constitutional-avoidance canon and the absurdity doctrine applied by EPA. The avoidance doctrine is narrow; it applies only when the enacted statutory language would violate the Constitution or present a serious constitutional question. It is rooted in principles of constitutional supremacy and promotes judicial restraint by enabling courts to avoid unnecessary constitutional pronouncements. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445-46 (1988); see also *Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring). EPA’s notions of “absurdity” extend far beyond these situations, allowing agencies or courts to depart from unambiguous statutory language merely to avoid a suboptimal policy outcome, even when a straightforward textual interpretation would comply with all constitutional requirements. No matter how undesirable as a matter of policy, there is nothing

unconstitutional, or even constitutionally questionable, about imposing onerous regulatory burdens on buildings that emit greenhouse gases when the text of the Act establishes unambiguous numerical permitting thresholds.

Indeed, in this case the canon of constitutional avoidance *compels* EPA to adhere to the Act's specific numerical thresholds. As explained in Part II.C, EPA's decision to depart from these statutory rules empowers EPA to choose its own numerical thresholds without an "intelligible principle" provided by Congress. And even if one thinks that EPA's actions can be salvaged under the Constitution, it cannot be denied that EPA's unilateral revision of these numerical guidelines at least presents serious constitutional questions under the Court's nondelegation precedents. EPA's atextual interpretation aggravates rather than alleviates constitutional problems, by seizing discretionary powers without an "intelligible principle" provided by Congress. The Tailoring Rule's attempt to rely on the Court's constitutional-avoidance cases boomerangs.

Finally, even if one accepted the legitimacy of EPA's generalized "absurdity doctrine," it *still* would not justify EPA's unilateral departure from the Act's numerical thresholds. It would indeed be absurd to apply the Act's numerical thresholds to greenhouse-gas emissions, but it hardly follows that EPA may "cure" the absurdity by disregarding unambiguous statutory text. The proper means of avoiding this

absurdity is not by replacing the unambiguous numerical thresholds in the Act with arbitrary targets of EPA's own choosing, but by concluding that stationary-source greenhouse-gas emissions cannot qualify as "air pollutants" subject to regulation under the PSD and Title V programs. Nothing in the Act *compels* EPA to include greenhouse gases within the ambit of air pollutants regulated by the PSD and Title V programs; the relevant statutory provisions can be construed to exclude greenhouse-gas emissions from stationary sources, as the other petitioners explain in their briefs. When an agency can avoid an "absurd" result by adopting a plausible construction of statutory language, it cannot decline to follow that course and insist on curing the absurdity by disregarding *unambiguous* statutory language.

**C. EPA's Permitting Requirements For Stationary Sources That Emit Greenhouse Gases Violate The Constitution By Seizing Discretionary Powers Where No "Intelligible Principle" Has Been Provided By Statute.**

EPA's agency-created permitting requirements violate not only the Act, but also the Constitution. Agencies are allowed only to administer the laws; they may not exercise legislative powers that Article I vests exclusively in Congress. It is of course inevitable that agencies will exercise discretion when they implement federal statutes. Congress is not omniscient and cannot establish mechanical rules for every conceivable scenario that may arise. But the

Constitution requires federal statutes to authorize agency discretion *and* provide an “intelligible principle” to guide that discretion. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Any agency that exercises discretionary powers absent an “intelligible principle” from Congress has crossed the line into constitutionally forbidden lawmaking.

EPA’s decision to replace the Act’s numerical thresholds with targets of its own creation is not and cannot be based on any intelligible principle provided by Congress. The Act envisions that EPA will either comply with the numerical thresholds or seek corrective legislation from Congress; as a result, it does not supply any intelligible principle for the improvisation project that EPA has undertaken in the Tailoring Rule. So even if EPA could conjure up a non-arbitrary justification for choosing 75,000 tpy CO<sub>2e</sub> and 100,000 tpy CO<sub>2e</sub> as the “new” threshold levels for greenhouse-gas emissions, it cannot link these decisions to any guideline provided in a federal statute, and it therefore cannot characterize its regulatory regime as anything but agency legislation.

EPA declares in its Tailoring Rule that future phase-ins will apply PSD and Title V “at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point.” J.A. 310. Putting aside whether this can qualify as “intelligible,” this reflects at most an effort *by EPA* to supply itself with a guiding

principle for the new threshold levels that it will choose. But *Whitman* squelches the notion that agency-supplied guidelines can satisfy the constitutional demand that *Congress* provide an intelligible principle to guide agency discretion. See 531 U.S. at 473. EPA's decision to establish new threshold levels for greenhouse-gas emissions is not governed by a congressionally supplied intelligible principle, and should be vacated as an unconstitutional exercise of legislative power.

**D. EPA's Tailoring Rule Arrogates Powers That Congress Reserved To Itself In The Clean Air Act.**

When Congress enacted and amended the Act, it chose to establish and retain specific numerical thresholds in the statute rather than instruct EPA to promulgate "reasonable" or "sensible" threshold levels for individual air pollutants. By doing this, Congress established that the threshold levels of pollutants would be governed by a rule rather than a standard. One reason legislatures establish rules is to reduce decision costs for those who implement the law, even though this may incur error costs by binding agency administrators to a crude statutory regime. But statutory rules serve another important function: They allocate power between the legislature and the agency that implements the legislative command.

When a federal statute delegates broad discretionary powers to an agency, it becomes more difficult for Congress to influence the agency's future

decisionmaking. Had the Act simply instructed EPA to “regulate air pollution in the public interest,” then EPA would have free rein to regulate greenhouse-gas emissions (or any future air pollution) without seeking permission or input from Congress. But by establishing rigid numerical thresholds in the text of the Act, Congress sought to hamstring EPA from *unilaterally* attacking some new and unforeseen problem of air pollution while relegating Congress to the sidelines. The decision to allocate power in this manner is an essential component of the bargaining that produced the Act and its amendments; for EPA to disregard this choice reflects nothing more than a raw power grab and a denigration of congressional prerogatives.

EPA apparently does not fancy the prospect of waiting for Congress to amend these numerical thresholds through legislation. Any efforts to obtain corrective legislation will require bargaining and concessions from both Congress and the Administration. EPA might not get everything that it wants, and the President will have to spend political capital that he might wish to preserve for other matters. How much easier to rewrite unilaterally the Act’s numerical thresholds and avoid the bother of negotiating with the people’s elected representatives. Yet the temptation to stray from the allocations of power memorialized in statutes is precisely why the Act provides for judicial review of agency action. If this Court decides that EPA has the statutory authority to regulate greenhouse-gas

emissions from stationary sources, it should disapprove the Tailoring Rule and force EPA to bargain with Congress over these matters.

**III. MASSACHUSETTS V. EPA SHOULD BE RECONSIDERED OR OVERRULED IF IT COMPELS EPA TO REGULATE STATIONARY-SOURCE GREENHOUSE-GAS EMISSIONS.**

Before 2007, EPA held that greenhouse gases did not qualify as “air pollutants” under the Act, which defines “air pollutant” as

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.

42 U.S.C. § 7602(g). EPA explained that it had traditionally construed the term “air pollution agent” as limited to pollutants “that occur primarily at ground level or near the surface of the earth . . . not higher in the atmosphere.” 68 Fed. Reg. 52,922, 52,926-27 (Sept. 8, 2003) (J.A. 1350); *see also id.* at J.A. 1350 (noting that greenhouse gases such as CO<sub>2</sub> are “fairly consistent in concentration throughout the world’s atmosphere up to approximately the lower stratosphere”). This view led EPA to refrain from regulating greenhouse-gas emissions under *any* of the Act’s provisions—not only the stationary-source regulations in the PSD and Title V programs, but also the motor-vehicle regulations in Title II.

*Massachusetts v. EPA*, 549 U.S. 497 (2007), held that EPA could no longer refuse to regulate *motor-vehicle* greenhouse-gas emissions simply by insisting that greenhouse gases fail to qualify as “air pollutants.” *Id.* at 528-32. This holding rested on two propositions. First, this Court observed that the four greenhouse gases emitted by motor vehicles— “[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons”—qualify as “physical [and] chemical . . . substances[s] which [are] emitted into . . . the ambient air” within the meaning of section 7602(g). *Id.* at 529. Second, this Court distinguished *Brown & Williamson* by noting that EPA regulation of motor-vehicle greenhouse-gas emissions “would lead to no . . . extreme measures.” *Id.* at 531. *Massachusetts* never considered whether EPA could or should regulate *stationary-source* greenhouse gases as air pollutants under the PSD and Title V programs, where the Act’s rigid permitting thresholds would produce burdens that exceed any semblance of rational regulation.

*Massachusetts*’s holding need not and should not be extended to stationary-source greenhouse-gas emissions. *Massachusetts*’s decision to regard motor-vehicle greenhouse-gas emissions as “air pollutants” under section 7602(g) rested in part on the absence of preposterous consequences. *Id.* Here, by contrast, EPA itself recognizes that including stationary-source greenhouse-gas emissions within the meaning of “air pollutant” will produce ridiculous outcomes, and for this reason the agency refuses to obey the

unambiguous permitting thresholds specified in the PSD and Title V provisions. *See* Part II, *supra*. And the *Massachusetts* Court never had the opportunity to consider the implications of defining the term “air pollutant” to include greenhouse-gas emissions from stationary sources, as not one of the twenty-nine briefs submitted by the parties and their amici informed the Court of the absurdities that would arise from extending the PSD and Title V permitting requirements to every building that emits more than 100 (or 250) tpy of CO<sub>2</sub>. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that when an issue “was not . . . raised in briefs or argument nor discussed in the opinion of the Court[,] . . . the case is not a binding precedent on this point”).

None of this would matter if the statutory definition of “air pollutant” were clear enough to *compel* EPA to regulate stationary-source greenhouse gases. But it isn’t; the phrase “air pollution agent” leaves wiggle room, *see Massachusetts*, 549 U.S. at 555-60 (Scalia, J., dissenting), and there is nothing paradoxical about interpreting section 7602(g)’s definition of “air pollutant” to include greenhouse-gas emissions from motor vehicles but not stationary sources, given the implausibility of regulating greenhouse-gas emissions in a manner consistent with PSD and Title V permitting regimes. The briefs submitted by the Industry Petitioners offer several ways for the Court to interpret the Act in a manner that excludes

greenhouse-gas emissions from the PSD and Title V programs, or that prevents greenhouse-gas emissions from triggering the permitting requirements of those programs.

EPA claims that it can interpret the Act to require the regulation of stationary-source greenhouse-gas emissions, and then avoid the absurd consequences of extending the PSD and Title V permitting requirements to greenhouse gases by replacing the unambiguous numerical thresholds specified in the Act with numbers and metrics of its own choosing. EPA's analysis is backward. Agencies can rewrite unambiguous statutory language in the name of avoiding "absurdity," if at all, only when no other permissible construction of the statute is available to avoid that absurdity. Indeed, EPA's analysis reflects a perverse brand of agency self-aggrandizement: The more mischief an agency causes by its interpretations of a statute, the more power it will have to rewrite the unambiguous provisions of a statute. To find *any* possible construction of the Act that avoids extending the PSD and Title V permitting regimes to greenhouse gases is to *require* a ruling that disapproves EPA's interpretation of the statute.

If this Court concludes that *Massachusetts* compels EPA to regulate greenhouse-gas emissions under the PSD and Title V programs, then the State Petitioners respectfully request that this Court reconsider *Massachusetts's* holding that CO<sub>2</sub> and other greenhouse gases unambiguously qualify as

“air pollutant[s]” within the meaning of the Act. Even EPA recognizes that the term “air pollutant” cannot possibly extend to “all airborne compounds of whatever stripe,” nor can it extend to all “physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.” *Massachusetts*, 549 U.S. at 529 (majority opinion) (internal quotation marks omitted). EPA insists that the term “air pollutant” extends only to “physical, chemical [or] biological” substances *subject to regulation under the Clean Air Act*—even though this limiting construction finds no support from *Massachusetts*, which equated the term “air pollutant” with “all airborne compounds of whatever stripe,” and further insisted that this construction of “air pollutant” was *compelled* and could not be narrowed by EPA. *See id.* at 529; *see also id.* at 558 n.2 (Scalia, J., dissenting).

The problems with *Massachusetts’s* interpretation of “air pollutant” are made painfully apparent by this case. With CO<sub>2</sub> as an “air pollutant,” every building that emits more than 100 or 250 tpy of CO<sub>2</sub> becomes subject to permitting requirements, a result that imposes extreme and unacceptable regulatory burdens on EPA and the more than 6,000,000 buildings that would suddenly become required to obtain permits. *See Part I, supra.* EPA deems these results so absurd that it refuses to apply the Act as written. *See J.A.* 280-88, 459-68. EPA also does not agree with *Massachusetts’s* all-encompassing definition of “air pollutant” because it refused to deem stationary-source greenhouse-gas emissions

“air pollutant[s]” under the statute until after it had promulgated its Endangerment Finding and the Tailpipe Rule. *See* J.A. 709.

Stare decisis is “not an inexorable command,” *see Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991), and this Court has not hesitated to reconsider or overrule cases that have proven “unworkable” or “legitimately vulnerable to serious reconsideration,” *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). *Massachusetts’s* holding that CO<sub>2</sub> and other greenhouse gases “unambiguous[ly]” qualify as “air pollutant[s]” under the Act should be reconsidered in light of the preposterous results that are produced under the PSD and Title V programs.

\* \* \*

Fusing the law-making power with the law-execution power contradicts the Constitution’s most fundamental principles of limited government and separation of powers. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring); THE FEDERALIST NO. 47 (Madison). Yet EPA believes it can disregard unambiguous, agency-constraining statutory rules and unilaterally establish a new regulatory regime to deal with novel environmental challenges. Few propositions could be more subversive of the rule of law, or the notion that agency power must be authorized rather than assumed. A ruling that approves this agency-created regulatory regime will allow EPA to become a law unto itself.

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**CONCLUSION**

The judgment of the court of appeals should be reversed.

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In The  
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\_\_\_\_\_  
Utility Air Regulatory Group,

Petitioner,

v.

Environmental Protection Agency,

Respondent.

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Nos. 12-1146 and Consolidated Cases

IN THE  
**Supreme Court of the United States**

UTILITY AIR REGULATORY GROUP,  
*Petitioner,*  
v.  
ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

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I HEREBY CERTIFY that on December 9, 2013, three (3) copies of the BRIEF OF PETITIONER UTILITY AIR REGULATORY GROUP in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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**Nos. 12-1146 and Consolidated Cases**

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IN THE  
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UTILITY AIR REGULATORY GROUP,  
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v.

ENVIRONMENTAL PROTECTION AGENCY,  
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**On Writs of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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**BRIEF OF PETITIONER  
UTILITY AIR REGULATORY GROUP**

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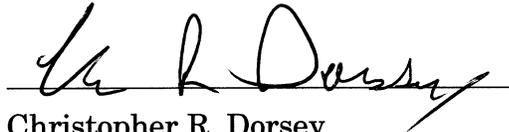
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NOS. 12-1146 AND CONSOLIDATED CASES

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IN THE

*Supreme Court of the United States*

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UTILITY AIR REGULATORY GROUP,  
*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
*Respondent.*

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**On Writs of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

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**BRIEF OF PETITIONER  
UTILITY AIR REGULATORY GROUP**

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December 9, 2013

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**PETITION FOR CERTIORARI FILED MARCH 20, 2013  
CERTIORARI GRANTED OCTOBER 15, 2013**

### QUESTION PRESENTED

After this Court decided *Massachusetts v. EPA*, 549 U.S. 497 (2007), the United States Environmental Protection Agency (EPA) determined that its promulgation of motor vehicle greenhouse gas (GHG) emission standards under Title II of the Clean Air Act (CAA), 42 U.S.C. § 7521(a)(1), compelled regulation of carbon dioxide and other GHGs under the CAA's Title I Prevention of Significant Deterioration (PSD) and Title V stationary-source permitting programs. EPA adopted the Timing Rule and the Tailoring Rule, which added GHGs to the pollutants covered by the PSD and Title V programs even though (i) including GHGs would vastly expand the PSD and Title V programs in a way that contradicts Congress's intent, and (ii) GHGs such as carbon dioxide do not deteriorate ambient air quality (*i.e.*, the outside air that people breathe). The court of appeals held that the CAA and *Massachusetts* compelled inclusion of GHGs in these programs and, based on that holding, dismissed on standing grounds all petitions to review EPA's GHG permitting rules. The question presented is:

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

**PARTIES TO THE PROCEEDING**

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

**Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010)**  
**(the “Timing Rule”):**

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7<sup>th</sup> District; Dana Rohrabacher, U.S. Representative, California 46<sup>th</sup> District; John Shimkus, U.S. Representative, Illinois 19<sup>th</sup> District; Phil Gingrey, U.S. Representative, Georgia 11<sup>th</sup> District; Lynn Westmoreland, U.S. Representative, Georgia

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3<sup>rd</sup> District; Tom Price, U.S. Representative, Georgia 6<sup>th</sup> District; Paul Broun, U.S. Representative, Georgia 10<sup>th</sup> District; Steve King, U.S. Representative, Iowa 5<sup>th</sup> District; Nathan Deal, U.S. Representative, Georgia 9<sup>th</sup> District; Jack Kingston, U.S. Representative, Georgia 1<sup>st</sup> District; Michele Bachmann, U.S. Representative, Minnesota 6<sup>th</sup> District; Kevin Brady, U.S. Representative, Texas 8<sup>th</sup> District; John Shadegg, U.S. Representative, Arizona 3<sup>rd</sup> District; Marsha Blackburn, U.S. Representative, Tennessee 7<sup>th</sup> District; Dan Burton, U.S. Representative, Indiana 5<sup>th</sup> District; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum

Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

4. Petitioner-intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Louisiana Department of Environmental Quality; Michigan Manufacturers Association; National Association Manufacturers; National Association of Home Builders; National Oilseed Processors Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondent-intervenors below (with respect to certain petitions for review), who are respondents (or, in some cases, nominal respondents) on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Commonwealth of Massachusetts; Conservation Law

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Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association's Clean Air Project; National Mining Association; Peabody Energy Company; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Utility Air Regulatory Group; Wild Virginia.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

**Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) (the "Tailoring Rule"):**

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7<sup>th</sup> District; Dana Rohrabacher, U.S. Repre-

representative, California 46<sup>th</sup> District; John Shimkus, U.S. Representative, Illinois 19<sup>th</sup> District; Phil Gingrey, U.S. Representative, Georgia 11<sup>th</sup> District; Lynn Westmoreland, U.S. Representative, Georgia 3<sup>rd</sup> District; Tom Price, U.S. Representative, Georgia 6<sup>th</sup> District; Paul Broun, U.S. Representative, Georgia 10<sup>th</sup> District; Steve King, U.S. Representative, Iowa 5<sup>th</sup> District; Jack Kingston, U.S. Representative, Georgia 1<sup>st</sup> District; Michele Bachmann, U.S. Representative, Minnesota 6<sup>th</sup> District; Kevin Brady, U.S. Representative, Texas 8<sup>th</sup> District; John Shadegg, U.S. Representative, Arizona 3<sup>rd</sup> District; Marsha Blackburn, U.S. Representative, Tennessee 7<sup>th</sup> District; Dan Burton, U.S. Representative, Indiana 5<sup>th</sup> District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers’ Working Group on Green-

house Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Missouri Joint Municipal Electric Utility Commission; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Oilseed Processors Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Association of Home Builders; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioner-intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Corn Refiners As-

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sociation; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Oilseed Processors Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondent-intervenors below (with respect to certain petitions for review), who are respondents (or, in some cases, nominal respondents) on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Clean Air Implementation Project; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; National Environmental Development Association's Clean Air Project; National Mining Association; Natural Resources Council of Maine, Inc.; Natural Resources Defense Council; Peabody Energy Company; Sierra Club; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Utility Air Regulatory Group; and Wild Virginia.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection

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Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

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## **CORPORATE DISCLOSURE STATEMENT**

The Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric utilities and 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.

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## OPINIONS BELOW

The court of appeals' opinion is reported at 684 F.3d 102 and reproduced in the Joint Appendix (JA) at 191-267. Its orders denying panel and en banc rehearing are at JA 139-90. The Timing Rule is reproduced at JA 705-92, and the Tailoring Rule is at JA 268-682.

## JURISDICTION

The court of appeals entered judgment dismissing the Timing and Tailoring Rule cases on June 26, 2012. Pet. App. (No. 12-1146) 5a. Timely petitions for panel or en banc rehearing were denied on December 20, 2012. JA 141. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. (No. 12-1146) 664a-680a. Relevant regulations implementing the CAA are reproduced at Pet. App. (No. 12-1146) 681a-692a.

## STATEMENT OF THE CASE

This case concerns the decision of a panel of the lower court that, upon promulgation by the United States Environmental Protection Agency (EPA) of motor vehicle emission standards for greenhouse gases (GHGs) under Title II of the CAA, EPA was compelled by (1) this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), applying the CAA's general definition of "air pollutant" to Title II of the CAA, and (2) the use of the term "air pollutant" in the

CAA's Prevention of Significant (PSD) and Title V provisions, to regulate stationary sources' GHG emissions under the Title I and Title V permitting programs.<sup>1</sup> At issue is whether this determination by EPA that stationary source regulation is statutorily compelled is a permissible reading of the CAA.

Pollutants like sulfuric acid, benzene, sulfur dioxide, and nitrogen dioxide are regulated under the Act because they contribute to local or regional concentrations in the ambient air that pose risks to public health or welfare. By contrast, as EPA explained, GHG concentrations "tend to be relatively uniform around the world," JA 1091, causing climate change effects that cannot be related to specific sources' emissions. Although EPA identified health and welfare effects from global GHG concentrations, EPA also recognized that "[c]urrent and projected levels of ambient concentrations" of GHGs themselves are not responsible for direct adverse effects locally and regionally. *Id.* at 1145.

The "basket" of substances constituting GHGs is dominated by one – carbon dioxide.<sup>2</sup> Carbon dioxide is a colorless gas that, like nitrogen and oxygen, is a natural component of the outside air people breathe.

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<sup>1</sup> Although this brief focuses on Title I PSD requirements, defining Title V "air pollutants" to include GHGs is also problematic; the arguments presented here regarding "major source" coverage generally also apply to Title V.

<sup>2</sup> EPA defines "GHGs" as consisting of six pollutants. Each is assigned a numerical value based on its "Global Warming Potential," measured relative to carbon dioxide, which is called "carbon dioxide equivalent." JA 290.

Ground-level ambient concentrations of carbon dioxide are uniform over large geographic areas and do not change measurably due to new carbon dioxide emissions from industrial and other sources. Exposure to carbon dioxide in ambient air is necessary to sustain life and is harmless to humans, animals, and property. See IPCC Special Report, Carbon Dioxide Capture and Storage, Annex 1, at 385 (2005), *available at* [http://www.ipcc.ch/pdf/special-reports/srccs/srccs\\_wholereport.pdf](http://www.ipcc.ch/pdf/special-reports/srccs/srccs_wholereport.pdf).

Congress limited coverage of the Title I PSD and Title V permit programs to “major” sources, which Congress defined in reference to annual emissions of “any air pollutant” – 100 tons per year (tpy) for Title V, 42 U.S.C. §§ 7602(j), 7661(2)(B), and 100 or 250 tpy for PSD depending upon the type of source, *id.* § 7479(1). If these tpy thresholds are applied to carbon dioxide emissions, the coverage of these programs will no longer be limited to “major” sources. Carbon dioxide emissions result from combustion and are emitted from stationary sources in amounts that are orders of magnitude greater than other CAA-regulated combustion byproducts. A source that, for example, emits 250 tpy of sulfur dioxide or particulate matter is, invariably, a large industrial facility. On the other hand, sources emitting 250 tpy of carbon dioxide include hospitals, schools, apartment buildings, shopping centers, and innumerable other small non-industrial sources. JA 283-84.

1. The modern CAA was enacted in 1970 and significantly amended in 1977 and 1990, as Congress turned its attention to new problems and devised different approaches to existing problems. The Act con-

tains six distinct titles (Subchapters I through VI of 42 U.S.C. Chapter 85); each establishes different programs to address different pollution problems in different geographic areas for different types of sources.

Title II addresses emission standards for mobile sources, including motor vehicles. Title I establishes a variety of programs governing stationary source emissions, including programs addressing national ambient air quality standards (NAAQS), control technology standards, air toxics regulation, and visibility protection. Congress revised Title I in 1977, adding, *inter alia*, a PSD preconstruction permit program for large industrial sources. In 1990, Congress added Title V to create an operating permit program for large stationary sources. Title III contains the CAA's "general provisions," including the Act's general definition of "air pollutant" addressed in *Massachusetts*. 42 U.S.C. § 7602(g).

2. The starting point for Title I stationary source regulation is the NAAQS program. *Id.* §§ 7408, 7409; *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976) (NAAQS program is the "heart" of the CAA). As specified by § 7409(b), EPA establishes NAAQS by defining maximum health- and welfare-protective concentrations of specific pollutants (so-called "criteria pollutants") in the "ambient air" – ground-level outdoor air to which people are exposed and which they breathe. *Train v. Natural Res. Def. Council*, 421 U.S. 60, 65 (1975) ("ambient air[]" ... is the statute's term for the outdoor air used by the general public"); 40 C.F.R. § 50.1(e) ("Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.").

After EPA promulgates a NAAQS, States have primary responsibility to ensure the ambient air within their borders attains and maintains the NAAQS. A State does this by adopting emission limitations and other measures in a state implementation plan (SIP) that it submits to EPA for review and approval. 42 U.S.C. §§ 7407, 7410. The CAA assigns responsibility for achieving NAAQS on a geographic basis. *Id.* § 7407(a). For each NAAQS, each state is divided into defined geographic areas that are designated, based on measured ambient air quality concentrations, as (1) “attainment” (meaning ambient air quality in the area is as good as or better than the NAAQS), (2) “nonattainment” (the area’s ambient air quality is worse than the NAAQS), or (3) “unclassifiable.” A geographic area may be in attainment with one NAAQS but nonattainment (or unclassifiable) for another.

3. The PSD program arose from litigation after EPA’s approval in 1972 of the first SIPs. In *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 257 (D.D.C.), *aff’d per curiam*, 4 Env’t Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), *aff’d per curiam by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the court ordered EPA to disapprove any SIP that allowed “attainment” ambient air quality in an area to “deteriorate” to the level of a NAAQS.

In 1974, EPA implemented that decision by promulgating the initial PSD rules. 39 Fed. Reg. 42,510, 42,514-17 (Dec. 5, 1974). Those rules sought to “prevent significant deterioration” of local ambient air quality in attainment areas by requiring permits before construction of named types of large industrial

sources (or modifications of such sources) could occur.<sup>3</sup> Deterioration of local air quality would be avoided by requiring that these large industrial facilities (i) not cause ambient air quality impacts above specified numerical “increments” for sulfur dioxide and particulate matter, and (ii) use “best available control technology” (BACT) for these pollutants.

4. In 1977, Congress enacted a PSD program based largely on EPA’s 1974 rules. See *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 470-74 (2004). Like the 1974 rules, the statutory PSD program required preconstruction permits for construction or modification of major sources. The new statutory program covered only “major emitting facilit[ies].” 42 U.S.C. § 7479(1). For 28 listed categories of industrial facilities, sources were “major emitting facilit[ies]” if they “emit, or have the potential to emit, [100 tpy] or more of any air pollutant.” *Id.* Recognizing that other large industrial facilities, outside the 28 categories, could have emissions that deteriorate local ambient air quality, Congress provided such a facility would be a “major emitting facility” if it had “the potential to emit [250 tpy] or more of any air pollutant.” *Id.*

In 1978, EPA promulgated regulations to implement the statutory PSD program. JA 1496-536. Resolving challenges to those regulations, the D.C. Circuit in *Alabama Power Co. v. Costle*, 636 F.2d 323

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<sup>3</sup> Eighteen specifically identified categories of large industrial sources were subject to review under EPA’s 1974 rules. 39 Fed. Reg. at 42,516.

(D.C. Cir. 1979), addressed Congress's intent for the PSD program.

Regarding "major emitting facility," the court explained the statutory definition was "not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of *any* air pollutant." *Id.* at 352. The court observed that:

Once a source has been so identified, it may become subject to [the] substantial administrative burdens and stringent technological control requirements [imposed by § 7475 (discussed further below)] for each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act. As [is] apparent from consideration of the ramifications of this definition, Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.

*Id.* at 352-53.

The "100 ton-per-annum threshold" applicable to the "28 categories of facilities" listed in § 7479(1), the court said, indicates "Congress was concerned with large industrial enterprises – major actual emitters

of air pollution” and intended to exclude from the statute’s major emitting facility definition “small industrial facilities within these categories [that] might actually and potentially emit less than the threshold amount.” *Id.* at 354. Emphasizing this point, the court said it had “no reason to believe that Congress intended [the term “major emitting facility”] to define such obviously minor sources” as “the heating plant operating in a large high school or in a small community college,” as “‘major’ for the purposes of the PSD provision.”<sup>4</sup> *Id.*

5. The PSD program’s exclusive focus on pollutants that can deteriorate ambient air quality in geographically-defined areas is evident in the 1977 statutory text. For example, Congress directed that “each applicable implementation plan shall contain emission limitations and such other measures *as may be necessary*, as determined under regulations promulgated under this part, to prevent *significant deterioration of air quality* in each [area] ... designated

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<sup>4</sup> Although the text of § 7479(1) plainly defines “major emitting facility” in reference to a source that emits the applicable threshold amount of “any air pollutant,” EPA’s 1978 regulations defined the equivalent regulatory term “Major stationary source” to mean sources within the 28 statutorily-identified industrial categories that “emit, or have the potential to emit, 100 [tpy] or more of any air pollutant *regulated under the Clean Air Act.*” JA 1508 (emphasis added). EPA added the same limiting language to the 250-tpy threshold. Because no one objected to the limiting words “regulated under the Clean Air Act” added in EPA’s definition, the *Alabama Power* court had no occasion to consider whether this EPA addition conformed to congressional intent.

pursuant to section 7407 ... as attainment or unclassifiable.” 42 U.S.C. § 7471 (emphases added).

For “major emitting facilities” beginning construction after the 1977 CAA Amendments’ enactment, Congress established in § 7475 requirements for pre-construction permitting. To receive a permit, a proposed facility’s owner or operator must demonstrate

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 ..., (B) [NAAQS] *in any air quality control region*, or (C) any other applicable emission standard or standard of performance under [the Act].

*Id.* § 7475(a)(3) (emphases added).

To evaluate the significance of air quality deterioration, the owner or operator must “conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or [are] having, on *air quality in any area which may be affected* by emissions from such source.” *Id.* § 7475(a)(7) (emphasis added). Each proposed “major emitting facility” is subject to “an analysis ... 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 [Act]* which will be emitted from such facility.” *Id.* § 7475(e)(1) (emphases added). This analysis must address

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 [Act]* which will be emitted from, or which results from the construction or operation of, 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*.

*Id.* § 7475(e)(3)(B) (emphases added).

In parallel to the air quality monitoring and analysis of “each pollutant subject to regulation” that the facility would emit, *id.* § 7475(e)(1), a PSD permit must contain emission limitations based on BACT for each such pollutant, *id.* § 7475(a)(4). Although the CAA does not define “each pollutant subject to regulation,” *Alabama Power* rejected an argument, based on language in § 7476, that Congress intended that only sulfur dioxide and particulate matter be deemed “subject to regulation.” 636 F.2d at 405-06. The D.C. Circuit found that “[t]hrough Congress could have decided to delay the applicability of PSD for [other] pollutants until all studies and regulations required by [§ 7476] have been completed, Congress apparently chose not to do so....” *Id.* at 406. The court noted that “[w]hat legislative history there is on this point” indicated the BACT requirement “should be applicable to all pollutants emitted from any new major emitting facility so that the maximum degree of emission reduction would be achieved *in order to*

*minimize potential deterioration.”* *Id.* at 406-07 & n.81 (emphasis added) (quoting 123 Cong. Rec. S9162, S9170 (daily ed. June 8, 1977) (statement of Sen. Muskie)).

6. In 1999, several groups petitioned EPA to regulate motor vehicles’ GHG emissions under Title II of the Act, 42 U.S.C. § 7521(a)(1). See 66 Fed. Reg. 7486 (Jan. 23, 2001). EPA denied the petition on the ground that GHGs are not an “air pollutant” under the general definitional provision in Title III of the Act (42 U.S.C. § 7602(g)). JA 1332-378.

On review, this Court rejected EPA’s argument that the Act’s broad general definition of “air pollutant” excluded GHGs, stating that “[o]n its face, the [§ 7602(g)] definition embraces all airborne compounds of whatever stripe.” *Massachusetts*, 549 U.S. at 529. The Court concluded Title II embraced this capacious definition: “The broad language of [§ 7521(a)(1)] reflects an intentional effort to confer the flexibility necessary,” *id.* at 532, to authorize regulation of all vehicle emissions that “contribute to[] air pollution which may ... endanger public health or welfare,” 42 U.S.C. § 7521(a)(1), including vehicles’ GHG emissions if those emissions contribute to an “endangerment.”

7. After this Court decided *Massachusetts*, EPA determined that motor vehicles’ GHG emissions throughout the nation “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” pursuant to § 7521(a)(1). JA 793, 821. EPA did not find, could not find, and was not called on to find that those emissions deteriorate ambient air quality; rather, it

found GHGs disperse throughout the global atmosphere and affect climate globally. *Id.* at 861-69. Following its Endangerment Finding, EPA promulgated the Motor Vehicle Rule, regulating vehicles' GHG emissions under § 7521(a). *Id.* at 683-704.

8. In 2009, EPA explained that “[c]urrently, EPA does not consider GHG emissions to be ‘regulated ... pollutants’ under the [Title I] PSD program.... EPA is in the process of reviewing its approach to PSD applicability...” 74 Fed. Reg. 55,292, 55,299 (Oct. 27, 2009) (proposed Tailoring Rule). Subsequently, EPA’s Timing Rule addressed when GHGs would become “subject to regulation” for PSD purposes, JA 771, and “conclude[d] only that ... GHGs would not be considered ‘subject to regulation’ ... earlier than January 2, 2011,” the Motor Vehicle Rule’s effective date, *id.* at 772.

In its companion Tailoring Rule, EPA determined that, under *Massachusetts’s* holding that GHGs are within § 7602(g)’s “air pollutant” definition, once the Motor Vehicle Rule took effect and resulted in GHGs becoming “subject to regulation” under Title II, regulation of *stationary* sources’ GHG emissions was compelled by operation of law under the Title I PSD and Title V programs. *Id.* at 283-84. According to EPA, “[o]ur legal basis for this rule is our interpretation of the PSD and title V applicability provisions,” *id.* at 280, *i.e.*, “that GHG sources would become subject to the PSD and title V permitting programs upon finalization” of the Motor Vehicle Rule, EPA, Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA’s Response to Public Comments at 34 (May 2010), *available at* <http://>

[www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA-HQ-OAR-2009-0517-19181;fp=true;ns=true](http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA-HQ-OAR-2009-0517-19181;fp=true;ns=true) (Response to Comments).

At the same time, EPA acknowledged that treating GHGs covered by the PSD and Title V programs the same as previously regulated pollutants would expand those programs to myriad sources Congress *never* intended to regulate. See, *e.g.*, JA 355-56, 486-87; 74 Fed. Reg. at 55,304 (“Congress, focused as it was [in 1977] on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources.”). According to EPA, expanding the programs to cover smaller sources emitting GHGs over these thresholds would not be “consistent with other provisions of the PSD and title V requirements, and [would be] inconsistent with – and, indeed, undermine – congressional purposes for the PSD and title V provisions.” JA 418-19. EPA concluded that “applying PSD requirements literally to GHG sources ... would result in a program that would have been unrecognizable to the Congress that designed PSD.” *Id.* at 454-55; see also *id.* at 485 (same conclusion for Title V).

The Tailoring Rule was EPA’s response to what it viewed as a conflict between (i) the unambiguous 100- and 250-tpy applicability thresholds that Congress used to define “major emitting facility” and (ii) clear congressional intent *not* to apply PSD to tens of thousands, and Title V to millions, of small sources. EPA resolved this perceived conflict by amending 40 C.F.R. § 51.166 to limit PSD coverage by initially defining the GHGs regulated under PSD as those GHGs

emitted in amounts at or above 100,000 tpy of carbon dioxide equivalent for new construction (and at or above 75,000 tpy of carbon dioxide equivalent for modifications). *Id.* at 674. Similarly, GHGs regulated under Title V were defined as those emitted in amounts at or above 100,000 tpy of carbon dioxide equivalent.<sup>5</sup> *Id.* at 677-78. Because EPA construed the Act to require that GHGs be regulated the same as other § 7602(g) air pollutants, notwithstanding that such regulation would contradict Congress's intent in defining "major" sources under PSD and Title V, EPA decided it would, on a step-by-step basis, "consider in future rulemaking how closely to the statutory thresholds [it] will be able to implement the PSD and title V programs." *Id.* at 289.

9. In promulgating the Tailoring Rule, EPA rejected rulemaking comments arguing that (i) *Massachusetts* did not require EPA to interpret "air pollutant," as used in the Act's PSD provisions, to include GHGs where their inclusion would be inconsistent with Congress's understanding of "major emitting facility," and (ii) EPA was prohibited from undertaking, step-by-step, a program that contradicts this congressional intent. See Response to Comments at 34-43. A panel of the lower court agreed with EPA that inclusion of GHGs was dictated by "binding Supreme Court precedent." JA 145.

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<sup>5</sup> The Tailoring Rule defines GHGs emitted below its 75,000-tpy and 100,000-tpy PSD thresholds and 100,000-tpy Title V threshold as not constituting air pollutants "subject to regulation" under the PSD and Title V programs, respectively. JA 673.

The D.C. Circuit denied petitions for rehearing en banc. Judges Brown and Kavanaugh dissented in separate opinions. Concurring in denial of rehearing, the panel judges reiterated their conclusion that, based on its reading of *Massachusetts*, “the panel’s interpretation of the statute is the only plausible one.” *Id.* at 144.

### SUMMARY OF ARGUMENT

This Court in *Massachusetts* held that the CAA’s general definition of “air pollutant” is sufficiently “sweeping” to encompass GHGs and that, under the language of § 7521(a) in Title II of the Act, EPA would have to prescribe standards for motor vehicles’ GHG emissions if it found those emissions “endanger public health or welfare.” *Massachusetts*, 549 U.S. at 528, 532-33. Nothing in *Massachusetts* supports the conclusion, however, that EPA’s Title II endangerment finding and Title II motor-vehicle regulation compelled regulation of stationary sources’ GHG emissions under very different Title I PSD and Title V programs.

Although GHGs fit within § 7602(g)’s general definition, they are not an air pollutant Congress intended to be regulated under PSD and Title V. In the PSD and Title V provisions, Congress defined “major emitting facility” so that only a certain type of source – large industrial facilities, relatively few in number – would be subject to those programs. The PSD definition covers stationary sources within 28 specific categories of industrial facilities that emit, or could emit, 100 tpy or more of “any air pollutant” and other stationary sources that emit 250 tpy or more of “any air pollutant.” The Title V definition covers station-

ary sources that emit 100 tpy or more of “any air pollutant.” Thousands of small, non-industrial sources, such as apartment buildings and schools, emit carbon dioxide in amounts well above 250 tpy, and millions of small sources emit carbon dioxide in amounts above the 100 tpy Title V threshold. To give effect to Congress’s intent, therefore, carbon dioxide and other GHGs cannot be pollutants regulated under PSD and Title V.

Further, whatever “endangerment” carbon dioxide may present due to effects of global climate change, carbon dioxide *does not deteriorate ambient air quality* – the quality of the air people breathe. The CAA’s PSD provisions address exclusively the review, analysis, monitoring, and control of “air pollutants” that deteriorate ambient air quality in specifically defined geographic areas. Carbon dioxide does not fit within those provisions.

### ARGUMENT

The CAA is an expansive statute that addresses different pollution problems using different regulatory responses. In a statute with distinct titles and numerous specialized programs, the general definition of “air pollutant” must be broad enough to reflect the entire range of substances that might be regulated under any of those diverse programs. Accordingly, the definition of “air pollutant” in § 7602(g) establishes, as *Massachusetts* holds, the outer bounds of what airborne substances are *potentially* eligible for regulation under any given CAA program.

Regarding regulation of motor vehicle emissions under Title II, the Act directs EPA to “prescribe ...

standards applicable to the emission of any air pollutant from ... new motor vehicles” where EPA determines those “air pollutant” emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a) (emphasis added). Thus, any “air pollutant” the motor-vehicle emissions of which EPA concludes present an “endangerment” must be regulated under Title II standards for vehicles throughout the nation.

Regarding regulation of stationary source emissions under Title I, Congress provided different criteria for determining what pollutants to regulate under different programs. For example, “[f]or the purpose of establishing” NAAQS, EPA must develop “a list which includes each air pollutant ... [the] emissions of which ... cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* § 7408(a)(1). But, unlike Title II endangerment findings, this Title I endangerment finding is not the end of the process of identifying pollutants that can be regulated. Rather, under the NAAQS provisions, EPA’s regulatory attention focuses on a specific type of endangerment: Only those listed pollutants that have “effects on public health or welfare ... *from the presence of such pollutant in the ambient air, in varying quantities,*” may become air quality “criteria” pollutants for which NAAQS are established. *Id.* § 7408(a)(2) (emphasis added). NAAQS, in turn, must be based on EPA-defined “air quality criteria.” *Id.* §§ 7408(a)(2), 7409(b).

For hazardous air pollutants, under § 7412, EPA must regulate “air pollutants” that Congress listed in

§ 7412(b)(1). EPA must “periodically review” this list and, “where appropriate,” revise it to add those air pollutants EPA determines “present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects ... or adverse environmental effects.” *Id.* § 7412(b)(2).

In Title I, Part C, *i.e.*, the Act’s PSD provisions, Congress directed that PSD requirements apply to “major emitting facilit[ies],” defined to include listed industrial facilities and “any other [stationary] source[s]” that emit above a specified numerical amount of “any air pollutant.” *Id.* § 7479(1). Such facilities’ emissions are to be regulated “as may be necessary ... to prevent significant deterioration of air quality” in geographically-defined air quality control regions. *Id.* § 7471. Part C is directed at protecting ambient air, the air people breathe, from the type of “deleterious pollutants that befoul our nation’s air.” *Alabama Power*, 636 F.2d at 353.

*Massachusetts* addressed whether § 7521(a)(1) “authorizes EPA to regulate [GHG] emissions from new motor vehicles in the event that it forms a ‘judgment’ that such emissions contribute to climate change” that “endanger[s] public health or welfare.” 549 U.S. at 528. No party in *Massachusetts* argued, or had reason to argue, that, if the “air pollutant” definition in § 7602(g) covered GHGs, those substances could not – in conformance with congressional intent – be considered air pollutants under § 7521(a)(1). Thus, after finding the § 7602(g) definition “embraces all airborne compounds of whatever stripe,” *id.* at 529, the Court had no reason to consider a less expansive interpretation in the Title II context, see,

*e.g., id.* at 531 (“EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles” or any “extreme” or “counterintuitive” results that would flow from such regulation).

The Court acknowledged that the “Congresses that drafted § [7521(a)(1) in Title II] might not have appreciated the possibility that burning fossil fuels could lead to global warming.” *Id.* at 532. But by authorizing regulation of vehicles’ air pollutant emissions that “endanger,” those Congresses “underst[oo]d that without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete.” *Id.* “The broad language of § [7521(a)(1)],” the Court found, “reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.” *Id.*

Is the language of the CAA’s PSD and Title V provisions equally “broad,” “reflect[ing]” comparable congressional intent that GHGs be regulated under those programs? No. As explained below, it is clear on the face of the CAA that substances such as GHGs – while they may be air pollutants within the meaning of § 7602(g) – were never intended by Congress to be regulated as air pollutants under the PSD and Title V programs.

**I. GHGs Cannot Be a Pollutant Under the CAA’s PSD and Title V Programs Because Innumerable Small, Non-Industrial Sources Would Be “Major Emitting Facilities” Contrary to Congressional Intent.**

The “broad language” engaged in *Massachusetts* provides that EPA “shall ... prescribe” by regulation “standards applicable to the emission of any air pollutant from *any class or classes of new motor vehicles or new motor vehicle engines*, which ... cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1) (emphasis added). This language finds no corollary in the corresponding provisions of Title I and Title V that identify the emission sources that are subject to PSD and Title V requirements.

The Title II standards apply without qualification where the endangerment criterion is met for “any air pollutant” emitted from “any ... new motor vehicles.” In contrast, Congress provided that the Part C PSD requirements apply not to “any” stationary source but only to those that are “major emitting facilities” – a relatively small number of large industrial sources defined as facilities with actual or potential emissions of “any air pollutant” that equal or exceed 100 tpy (in specifically listed industrial categories) and 250 tpy (for sources in other, unlisted industrial categories).<sup>6</sup> *Id.* § 7479(1).

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<sup>6</sup> Congress similarly limited Title V major sources to large industrial sources, 42 U.S.C. §§ 7602(j), 7661(2)(B), and the argu-  
(Continued . . .)

In using the term “major emitting facility,” Congress intended “to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission[s]” that deteriorate ambient air. *Alabama Power*, 636 F.2d at 353. Only such large industrial facilities were to be subject to the Act’s PSD provisions. See JA 453 (“Congress ... designed the thresholds *deliberately* to limit the program’s scope.” (emphasis added)).

If the 250-tpy threshold for “any air pollutant” identified, in Congress’s contemplation, the “large industrial enterprises,” not otherwise listed, to which PSD is to apply, *Alabama Power*, 636 F.2d at 354, it necessarily follows that Congress *never* intended that GHGs be regulated under the PSD program. Myriad small sources, *not* “industrial” in nature, emit GHGs in amounts well above 250 tpy. Regulating GHGs as an “air pollutant” under Part C would drag such sources into the PSD program as “major emitting facilities,” contradicting Congress’s expectation and intent. *Id.* (Congress did not “intend[] to define such obviously minor sources [as a high school heating plant] as ‘major’ for the purposes of the PSD provision.”).

EPA understood this when it promulgated the Tailoring Rule. JA 453 (“Congress intended to limit the PSD program to large industrial sources because

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ments presented in this section regarding PSD also apply to Title V. See *supra* note 1.

it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements.”); *id.* at 454 (describing PSD provisions’ legislative history and noting “[t]he DC Circuit had occasion, in *Alabama Power*, to acknowledge this legislative history”).

As EPA observed, “Congress intended that PSD be limited to a *relatively small number of large industrial sources*[.]” and it was “not too much to say that applying PSD requirements literally to GHG sources ... would result in a program that *would have been unrecognizable to the Congress that designed PSD.*” *Id.* at 454-55 (emphases added); *id.* at 449 (“the great majority of these new sources [that would be regulated by applying PSD to GHGs] will be small commercial or residential sources,” a result “contrary to congressional intent for the PSD program”); *id.* at 485 (Title V).

Yet, in contravention of congressional intent, EPA promulgated a rule that does “apply[] PSD requirements literally to GHG sources,” *id.* at 454, with a twist – a rule that establishes a 100,000-tpy carbon dioxide equivalent “major source” threshold for GHGs as compared to the 100- and 250-tpy statutory thresholds. And, *curious and curiouser*, EPA “expect[s] to ... lower[] thresholds, as appropriate, in the future,” expanding GHG regulation “one-step-at-a-time,” *id.* at 555, 556-57, by bringing into the PSD program sources EPA concedes Congress never intended be regulated under that program.

EPA contended it was compelled to do this because *Massachusetts* held GHGs were an “air pollu-

tant” under § 7602(g) and because GHGs were “subject to regulation” under Title II as an “endangering” pollutant. The court below agreed. Given “both the statute’s plain language and ... *Massachusetts*,” the D.C. Circuit said, it had “little trouble concluding that the phrase ‘any air pollutant’ includes *all* regulated air pollutants, including [GHGs],” for purposes of PSD and Title V. *Id.* at 237. *Massachusetts*, which did not consider GHG regulation under PSD or Title V, does not support the D.C. Circuit’s conclusion that it had “little trouble” reaching.

In an expansive statute like the CAA, a general definition of a term such as “air pollutant” must be sufficiently capacious to reflect the entire range of substances that might be regulated under any one or more of several diverse programs established by the statute. Thus, § 7602(g) sets the outer bounds of the air pollutants that are potentially eligible for regulation under the various CAA programs; it does not define the precise meaning or delineate the exact scope of that term for each CAA individual program.

Throughout the CAA’s history, EPA has carefully limited Title I programs only to those substances within the § 7602(g) “air pollutant” definition that Congress intended be regulated under each individual program. For example, although § 7411 provides that new source performance standards (NSPS) apply whenever a source undertakes a “physical change ... which increases the amount of *any* air pollutant emitted,” 42 U.S.C. § 7411(a)(4) (emphasis added), EPA by regulation narrowed the universe of air pollutants that trigger NSPS to those “[air] pollutant[s] to which a standard applies” under 40 C.F.R. part 60.

40 C.F.R. § 60.14(a). And although § 7491 defines “major stationary source[s]” to which the CAA visibility protection program applies as sources “with the potential to emit 250 tons or more of *any* pollutant,” 42 U.S.C. § 7491(g)(7) (emphasis added), EPA by regulation limited the pollutants in this program to “visibility impair[ing]” pollutants, see, *e.g.*, 40 C.F.R. pt. 51, app. Y, § III.A.2. And in the rulemaking at issue here, although EPA read *Massachusetts* to compel PSD and Title V regulation of *all* GHGs, EPA limited regulation only to GHGs emitted at or above the 100,000- or 75,000-tpy carbon dioxide equivalent levels. JA 674, 677-78.

EPA’s historic approach of identifying which of the § 7602(g) air pollutants are subject to individual CAA programs not only makes sense, it comports with fundamental principles of statutory construction. “Of necessity, Congress selects different regulatory regimes to address different problems.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011). The same term appearing in different statutory programs can (indeed, must) be given different regulatory meanings where congressional intent differs. See *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990). “A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

Here, it is evident in the statutory definition of “major emitting facility” that Congress did not intend that GHGs be an “air pollutant” under the PSD program. Accordingly, it is of no moment that GHGs are

regulated under the Title II motor vehicle program. That regulatory action, under that program, could not trigger PSD permitting requirements for tens of thousands (and Title V requirements for millions) of small, non-industrial stationary sources under programs that cover only a very limited number of large industrial facilities. EPA acted unlawfully in promulgating rules that are predicated on that misunderstanding of the Act.

**II. Congress Intended that Only “Air Pollutants” that Deteriorate Ambient Air Quality Be Regulated Under the PSD Program.**

The broad language of § 7521(a)(1) that the Court in *Massachusetts* read as “reflect[ing] an intentional effort” by Congress to bestow “flexibility” on EPA to regulate GHGs, 549 U.S. at 532, was language calling for standards that limit emissions that “endanger public health or welfare.” The Act’s PSD provisions, in contrast, contain no directive to, or authorization for, EPA to regulate emissions that “endanger public health or welfare.” Rather, the PSD provisions require EPA to adopt regulations to implement a program focused exclusively on “air pollutants” that deteriorate ambient air quality – *i.e.*, the air people breathe – in specific, geographic air quality control areas or “region[s].” 42 U.S.C. § 7471; see *id.* §§ 7407(a), (d), 7475, 7479(1).

As discussed above, the global effects of carbon dioxide are not effects caused by carbon dioxide deteriorating ambient air quality in the geographic areas PSD is directed at protecting. To the contrary, from the perspective of the quality of the ambient air, carbon dioxide is effectively indistinguishable from ni-

trogen and oxygen. See *supra* pp. 2-3. Regulation of carbon dioxide as an “air pollutant” under the PSD program, therefore, is contrary to congressional intent and thus unlawful. Cf. 73 Fed. Reg. 44,354, 44,408 (July 30, 2008) (“The global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions [like PSD] that are designed to protect local and regional air quality....”).

Under § 7471, “each applicable [SIP] shall contain emission limitations and such other measures as may be necessary ... to prevent significant deterioration of *air quality* in each” of the areas within a state designated pursuant to § 7407. 42 U.S.C. § 7471 (emphasis added). Further, § 7475(e) directs EPA to promulgate regulations governing an analysis, based on air quality monitoring information, of the impacts on “ambient air quality at the *proposed site* and in *areas which may be affected* by emissions from” a proposed new facility with respect to “*each pollutant subject to regulation* under [the Act] which will be emitted from such facility.” *Id.* § 7475(e)(1) (emphases added).

In § 7475(e), Congress expressly directs that the PSD preconstruction analysis be based on “continuous air quality monitoring” to ascertain expected effects, both at the proposed facility site and “in areas which may be affected by emissions ... [of] each pollutant subject to regulation under [the Act]” that the facility will emit. *Id.* § 7475(e)(1), (2). The “continuous ... monitoring” of ambient concentrations of carbon dioxide in the vicinity of a proposed source will reveal concentrations indistinguishable from ambient levels elsewhere, thus providing no meaningful information on ambient air quality that might be dete-

riorated by that source's emissions. Exclusion of carbon dioxide from the "pollutants" covered by the PSD program follows, therefore, from the very nature of the air quality analysis Congress required under that program for "pollutant[s] subject to regulation."

Any other conclusion would mean the statute demands an absurd result. If "each pollutant subject to regulation" includes GHGs, then the global nature of GHG emissions would require, under § 7475(e), a permit applicant to evaluate every area in the United States – Hawaii and Alaska included.<sup>7</sup> In other words, § 7475(e) would have to be construed to require each proposed major emitting facility first to collect meaningless "continuous [GHG] air quality monitoring data" for every designated area because every area "may be affected by emissions from such facility." *Id.* § 7475(e)(1), (2). Then, this meaningless data would go into the analysis required for each designated area in the nation. The results of this exercise would be wholly useless. As EPA has acknowledged, "because GHG emissions from single sources are small relative to aggregate emissions, and GHGs, once emitted from a given source, become well mixed in the global atmosphere," there are no "tools ... for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source."<sup>8</sup>

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<sup>7</sup> The entire land mass of the United States has been divided into areas that have been designated under § 7407. 40 C.F.R. §§ 81.11-81.356.

<sup>8</sup> Letter from R.J. Meyers, EPA, to H.D. Hall, U.S. Fish and Wildlife Service, & J. Lecky, National Marine Fisheries Service, at 4 (Oct. 3, 2008), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0472-11543>.

Yet, the entire *point* of PSD preconstruction analysis is to “evaluat[e] ... end-point impacts attributable to the emissions ... from a single source.”

Furthermore, under § 7475(a)(4), a proposed “major emitting facility” must be “subject to [BACT] for each pollutant subject to regulation under [the CAA which is] emitted from, or which results from, such facility.” As with the § 7475(e) use of “each pollutant subject to regulation,” that term in § 7475(a)(4) must be read to refer *only* to those pollutants that deteriorate ambient air quality. See, *e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (“a legislative body generally uses a particular word with a consistent meaning in a given context”). Giving the same term in the same section of the statute a reading that would include only pollutants that deteriorate ambient air quality comports with congressional intent, as the *Alabama Power* court found. 636 F.2d at 406-07 n.81 (The BACT requirement in § 7475(a)(4) covers more than criteria pollutants “in order to minimize potential deterioration.”) (quoting legislative history).

In short, Congress made clear on the face of the PSD program’s provisions that that program is directed *not* to regulation of emissions of air pollutants that may endanger public health or welfare due to their uniform presence throughout the global atmosphere. Rather, that program is to provide for such regulation “as may be necessary ... to prevent significant deterioration” of the quality of the air that people breathe (*i.e.*, ambient air) in defined geographic areas affected by new emissions. 42 U.S.C. § 7471.

The court below, addressing none of this, instead relied heavily on the “Congressional declaration of purpose” for the PSD sections that “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 [EPA] Administrator’s judgment may reasonably be anticipated to occur from air pollution.’” JA 240 (ellipsis in original) (quoting 42 U.S.C. § 7470(1)). Because the CAA “provides that ‘[a]ll language referring to effects on welfare includes ... effects on ... weather ... and climate,’” it must follow, according to the court, that “one express purpose of the [PSD] program is to protect against the harms caused by greenhouse gases.” *Id.* (first ellipsis added) (quoting 42 U.S.C. § 7602(h)).

But this does not follow at all. Much as the Act provides an expansive general definition of “air pollutant” to embrace, but not to define the scope of, a range of programs, the Act defines “effects on welfare” broadly to be able to serve various programs within the Act addressing different kinds of pollution problems. That “effects on welfare” includes “weather” and “climate” effects does not mean *the PSD program* can be viewed as one that must address pollutants contributing to global “climate” impacts. As the PSD provisions show, welfare effects in the PSD program must be construed to refer to effects caused by air pollutants that deteriorate the quality of the air people breathe. Accordingly, the PSD programmatic provisions may, consistent with the PSD purposes section, address effects on “weather” and “climate” such as smog – a local or regional fog-like meteorolog-

ical condition produced through photochemical transformation of pollutants in the ambient air.<sup>9</sup> See Christa McAuliffe Planetarium, *The Straight Line on Bad Ozone*, at 1 (undated), *available at* [www.starhop.com/library/pdf/studyguide/high/Ozone-21.pdf](http://www.starhop.com/library/pdf/studyguide/high/Ozone-21.pdf). The PSD purposes section cannot be used to stretch those programmatic provisions to cover global climate effects when it is a program established to address local and regional pollution.<sup>10</sup>

\* \* \*

As discussed above, the statutory definition of “major emitting facility,” by its terms, identifies a source that emits above certain specified amounts of “any air pollutant.” The court below, after observing

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<sup>9</sup> Only in the past two decades or so did references to “climate” and “weather” come to suggest anything more than regional meteorological conditions. Those terms were included in the definition of “effects on welfare” when the Act was amended in 1970 and first appeared in 1967 in a provision addressing sustained weather patterns in particular regions of the United States. Pub. L. No. 90-148, § 2, 81 Stat. 485, 490 (1967) (directing Secretary of Health, Education, and Welfare to “define,” for the Act’s purposes, “atmospheric areas of the Nation on the basis of those conditions, including ... climate, meteorology, and topography, which affect the interchange and diffusion of pollutants in the atmosphere”); Pub. L. No. 91-604, § 15(a)(1), 84 Stat. 1676, 1710 (1970).

<sup>10</sup> A reference to “climate,” like a reference to “endangerment,” does not resolve whether the reference is to local, regional, or global effects. For example, in § 7603 (“Emergency powers”), the term “endangerment” refers to acute, local threats, while in § 7521 (“Emission standards for new motor vehicles or new motor vehicle engines”), “endangerment” may cover everything from local to global effects.

that “the literal statutory definition” of “major emitting facility” “nowhere requires that ‘any air pollutant’ be a *regulated* pollutant,” opined that “‘any regulated air pollutant’ is the only logical reading of the statute.” JA 237. According to the court:

[I]f “any air pollutant” ... was read to encompass ... nonregulated air pollutants, sources could ... 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.* at 238 (quoting 42 U.S.C. § 7521(a)(1)) (emphasis added).

So much confusion encapsulated in so few words: This tortured statutory analysis reflects the critical flaw in the reasoning of the court below. Congress indeed did not intend that the stationary source thresholds be used to subject to PSD emissions determined to be “harmless.” It intended those thresholds to define a limited population of large industrial facilities. Congress also did not intend that pollutants regulated under the PSD program would include every “air pollutant” that “endanger[s] public health or welfare” but would not *deteriorate ambient air quality* – the sole focus and congressionally sanctioned purpose of regulation under Title I, Part C.

GHGs such as carbon dioxide are, as this Court concluded, air pollutants under § 7602(g)'s general definition. They may be "air pollutants" that EPA found to "endanger public health or welfare" under Title II. But they are not – and EPA does not dispute that they are not – "air pollutants" that deteriorate ambient air quality, and it is the "deterioration" of ambient air quality – not "endangerment" – that is the criterion for regulating a substance under PSD. Consequently, EPA's interpretation that, under the CAA's terms, regulation of motor vehicle GHG emissions under Title II compelled the application of Title I PSD permitting requirements to stationary sources' GHG emissions is an impermissible construction of the Act.

### CONCLUSION

The judgment should be reversed and the case remanded for the court of appeals to grant the Utility Air Regulatory Group's petitions for review and to set aside EPA's determination that GHG emissions are regulated under the PSD and Title V programs.

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case nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272

Date: Mon Dec 09 2013 22:19:44 EST

Attachments: 12-1272 ts Chamber of Commerce + Alaska + Am Farm Bureau Federation.pdf  
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All:

Attached is a PDF of the Opening Brief of Petitioners Chamber of Commerce of the United States of  
America, State of Alaska, and American Farm Bureau Federation, filed today at the Supreme Court.

Regards,

Bill Burgess

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**No. 12-1272 (consolidated with  
Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)**

**In the Supreme Court of the United States**

CHAMBER OF COMMERCE OF THE UNITED STATES  
OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,

*Petitioners,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**OPENING BRIEF OF PETITIONERS  
CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION**

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**QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

**RULE 24.1(b) STATEMENT**

Petitioners in Case No. 12-1272 are the Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation. The Chamber of Commerce of the United States of America was petitioner or petitioner-intervenor as to all of the challenged agency actions addressed by the consolidated judgment below. The State of Alaska and the American Farm Bureau Federation were petitioners and/or petitioner-intervenors in cases addressed by the consolidated judgment below.

This case has been consolidated with Case Nos. 12-1146, 12-1248, 12-1254, 12-1268, and 12-1269, which arise out of the same proceedings in the court of appeals. Petitioners in those cases are: Utility Air Regulatory Group (*No. 12-1146*); American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association; Portland Cement Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin

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Manufacturers and Commerce (*No. 12-1248*); Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation and Glass Packaging Institute (*No. 12-1254*); Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Joe Barton; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Timber Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and Science and Environmental Policy Project (*No. 12-1268*); and the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality (*No. 12-1269*).

Respondents herein, who were also respondents in the cases below, are the Environmental Protection Agency and the Administrator of the Environmental Protection Agency. Lisa P. Jackson held the office of

Administrator until February 15, 2013. Gina McCarthy currently holds that office.

Other parties who were petitioners in the cases addressed by the consolidated judgment below are the following: Greg Abbott, Attorney General of Texas; Alpha Natural Resources, Inc.; Haley Barbour, Governor of the State of Mississippi; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Great Northern Project Development, L.P.; Industrial Minerals Association—North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Landmark Legal Foundation; Mark R. Levin; Louisiana Department of Environmental Quality; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Mining Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Rick Perry, Governor of Texas; Rosebud Mining Co.; South Carolina Public Service Authority; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; and Texas Railroad Commission.

Intervenors for petitioners in cases addressed by the consolidated judgment below—other than petitioners herein—include Alpha Natural Resources, Inc.; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of

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Commerce; Associated Industries of Arkansas; Brick Industry Association; Coalition for Responsible Regulation, Inc.; Colorado Association of Commerce & Industry; Commonwealth of Kentucky; Corn Refiners Association; Glass Association of North America; Governor of Mississippi Haley Barbour; Great Northern Project Development, L.P.; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association North America; Kansas Chamber of Commerce and Industry; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Louisiana Department of Environmental Quality; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Manufacturers; National Association of Home Builders; National Cattlemen’s Beef Association; National Electrical Manufacturers Association; National Environmental Development Association’s Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Coal Association; Ohio Manufacturers Association; Peabody Energy Company; Pennsylvania Manufacturers Association; Portland Cement Association; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Virginia Manufacturers Association; Western States

Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

Intervenors for in cases addressed by the consolidated judgment below include Alliance of Automobile Manufacturers; Association of Global Automakers; Center for Biological Diversity; City of New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; Indiana Wildlife Federation; Michigan Environmental Council; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

#### **RULE 29.6 STATEMENT**

No petitioner has a parent company, and no publicly-held corporation has a 10% or greater ownership interest in any petitioner.

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## INTRODUCTION

This case is about the Environmental Protection Agency's determination to regulate greenhouse gas (GHG) emissions under the Clean Air Act (CAA) no matter how much the agency had to distort and even rewrite statutory provisions to do so. In fact, EPA conceded in the rulemaking and in this litigation that extending the CAA's Prevention of Significant Deterioration (PSD) program to cover GHGs produces "absurd" results that Congress never intended. Nonetheless, misreading *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA pressed ahead and promulgated what may be the costliest, most intrusive regulatory program the nation has yet seen. But *Massachusetts* did not address stationary sources in general or the PSD program in particular and hence could not have authorized the rules EPA promulgated below.

The PSD program requires permits to build new facilities or refurbish old ones. The text, structure, purposes, and history of the program show it was designed to apply to emissions of conventional pollutants like lead and carbon monoxide—pollutants that concentrate in local areas and affect health and welfare via direct exposures, such as through inhalation or ingestion. The statutory PSD apparatus simply does not work when applied to substances like GHGs that disperse globally and produce harms unrelated to pollutant exposures. Indeed, EPA's own statements, both in the rulemakings below and subsequent regulatory guidance, make clear that PSD controls can be applied to GHGs only by nullifying many of the program's key statutory elements.

Congress, for instance, set the PSD program's coverage provisions so that its cumbersome and

expensive permitting requirements would apply exclusively to large sources of conventional pollution, like steel mills and power plants. As applied to GHGs, however, the coverage provisions sweep in very small sources, like churches, bakeries, even large private homes. By EPA's admission, Congress never intended such a thing. Nonetheless, the agency plunged ahead and extended the program to encompass GHG emissions.

To justify this programmatic mismatch, EPA deployed the "absurd results" canon and claimed authority to rewrite the statute's numerical provisions defining which pollution sources are subject to PSD requirements. But that is not how the absurdity doctrine works. Once it recognized that the PSD program produced absurd results if extended to include GHGs, EPA should have drawn the obvious conclusion—GHGs are not the type of "pollutant" to which PSD applies. Because EPA overstepped the bounds of its authority, the Court should reverse the D.C. Circuit decision below.

### **OPINIONS AND ORDERS BELOW**

The opinion of the D.C. Circuit is reported at 684 F.3d 102 and reproduced in the Joint Appendix at 191-267. The order denying rehearing en banc is available at 2012 WL 6621785 and reproduced in the Joint Appendix at 139-190.

### **JURISDICTION**

The court of appeals rendered its decision on June 26, 2012, and denied petitions for rehearing on December 20, 2012. On October 15, 2013, the Court granted six petitions for writs of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

Relevant statutes are reproduced in the Statutory Addendum.

## STATEMENT OF THE CASE

In construing the Clean Air Act to justify these regulations, EPA reached an interpretive endpoint that, in its words, is “so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish” that the statute’s language should not be followed. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009). EPA recognized that, under its interpretation, PSD permitting requirements designed for utility and heavy industrial sources would now apply to millions of smaller facilities, including multi-family dwellings and even some large private homes. See *id.* at 55,338.

When faced with the extreme measures and absurd results caused by its preferred policy, EPA rewrote the tons-per-year (tpy) emissions thresholds defining which sources are subject to PSD permitting. As Judges Kavanaugh and Brown observed in separate dissents from the denial of rehearing en banc, this “is not the proper way to interpret a statute.” JA174 (Kavanaugh, J., dissenting); see also JA156-57 (Brown, J., dissenting). “Instead of ‘reading new words into the statute’ to avoid absurd results ... the statute should be interpreted so that ‘no absurdity arises in the first place.’” JA174 (Kavanaugh, J., dissenting) (quoting *Kloeckner v. Solis*, 133 S. Ct. 596, 606-07 (2012)).

1. The Clean Air Act is organized into six titles, none of which expressly addresses controls on GHG emissions or prevention of global climate change:

“Air Pollution Prevention and Control” (Title I, 42 U.S.C. §§ 7401-7515); “Emission Standards for Moving Sources” (Title II, 42 U.S.C. §§ 7521-7590); “General Provisions” (Title III, 42 U.S.C. §§ 7601-7627); “Acid Deposition Control” (Title IV, 42 U.S.C. §§ 7651-7651o); “Permits” (Title V, 42 U.S.C. §§ 7661-7661f); and “Stratospheric Ozone Protection” (Title VI, 42 U.S.C. §§ 7671-7671q); see also 68 Fed. Reg. 52,922, 52,925-29 (Sept. 8, 2003) (JA1341-63) (EPA overview of legislative history as it relates to GHGs). Section 103(g) does mention the most prevalent GHG, carbon dioxide. 42 U.S.C. § 7403(g). Section 103(g) authorizes “nonregulatory strategies and technologies,” and it specifically forbids its use “to authorize the imposition on any person of air pollution control requirements.” *Id.* Neither GHGs in general nor carbon dioxide in particular are mentioned in the Act’s PSD provisions.

GHGs differ in kind from conventional pollutants. See 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,399-401 (JA1083-95). Their concentrations and effects are global in character, in contrast to conventional pollutants, which concentrate in particular areas or regions. See 74 Fed. Reg. at 66,517 (JA871-72); 73 Fed. Reg. at 44,399-401 (JA1083-95). Unlike conventional pollutants, GHGs do not affect health and welfare through direct exposures, such as through inhalation or ingestion. See 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009) (Proposed Endangerment Rule) (“[A]mbient concentrations of carbon dioxide and the other greenhouse gases, whether at current levels or at projected ambient levels ... do not cause direct adverse health effects such as respiratory or toxic effects.”); EPA, *Technical Support Document for Final Endangerment Rule*, Regulatory Docket ID No. EPA-

HQ-OAR-2009-0171-11645, at 21 (Dec. 7, 2009) (available at [http://www.epa.gov/climatechange/Downloads/endangerment/Endangerment\\_TSD.pdf](http://www.epa.gov/climatechange/Downloads/endangerment/Endangerment_TSD.pdf)) (similar). And GHGs, particularly carbon dioxide, are emitted in much greater amounts than conventional pollutants, see 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,407, and from many more sources—including humans. See 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,376 (JA1041).

The issue of potentially regulating GHGs under the CAA initially arose under the Act's Title II, which focuses on emissions from mobile sources. See 68 Fed. Reg. at 52,922 (JA1332). This issue eventually reached the Court in *Massachusetts*, which held that GHGs are “air pollutants” for purposes of the Act-wide definition in Section 302(g), without addressing the Act's stationary-source provisions. In reaching this conclusion, *Massachusetts* distinguished *FDA v. Brown & Williamson Corp.*, 529 U.S. 120 (2000), reasoning that a ruling favoring the *Massachusetts* petitioners would not “lead to ... extreme measures.” 549 U.S. at 531.

In the proceedings on remand from *Massachusetts*, EPA regulated GHG emissions from new motor vehicles and went on to claim authority to regulate GHG emissions from stationary sources.

**2.** Two programs for regulating stationary-source GHG emissions are at issue in this case: Prevention of Significant Deterioration (PSD) of Title I, part C of the CAA (42 U.S.C. §§ 7470 et seq.), and the permitting provisions of Title V (42 U.S.C. §§ 7661 et seq.). Both programs impose permitting requirements on “major” emitting facilities—stationary sources with the potential to emit specific threshold amounts of “any air pollutant.”

The PSD program forbids the construction of “major emitting facilit[ies]” unless a permit is obtained from a state or federal permitting authority and a series of requirements are met. For purposes of the PSD program, “major emitting facility” means stationary sources that “emit, or have the potential to emit” either 100 tpy or 250 tpy of “any air pollutant.” 42 U.S.C. § 7479(1). Twenty-eight enumerated categories of industrial sources—for example, “iron and steel mill plants” and “primary lead smelters”—qualify as “major emitting facilities” if they have the potential to emit over 100 tpy of “any air pollutant.” *Id.* All other stationary sources qualify if they have potential to emit over 250 tpy of “any air pollutant.” *Id.*

Title V requires stationary sources to obtain state-issued operating permits to establish compliance with the PSD requirements, among others, if they have the potential to emit at least 100 tpy of “any air pollutant.” *Id.* § 7602(j).

3. The PSD program is closely related to maintenance of national ambient air quality standards (NAAQS). Under the NAAQS program, EPA designates certain pollutants as “criteria” pollutants and sets maximum allowable concentrations for regions throughout the nation. 42 U.S.C. §§ 7407, 7409. EPA thus far has designated only six substances as criteria pollutants—carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. All six harm human health and welfare through direct exposure by inhalation, ingestion, and the like; none is a greenhouse gas. See 40 C.F.R. pt. 50; 75 Fed. Reg. at 31,520 (JA298) (“There is no NAAQS for CO<sub>2</sub>.”); EPA, *National Ambient Air Quality Standards (NAAQS)*,

at <http://www.epa.gov/air/criteria.html> (Dec. 14, 2012); EPA, *What Are the Six Common Air Pollutants?*, at <http://www.epa.gov/air/urbanair/> (Apr. 20, 2012); see also EPA, *Health*, at <http://www.epa.gov/airquality/carbonmonoxide/health.html> (last visited Dec. 6, 2013) (describing exposure-related effects of carbon monoxide); EPA, *Health*, at <http://www.epa.gov/airquality/lead/health.html> (last visited Dec. 6, 2013) (same for lead). By contrast, carbon dioxide, the most ubiquitous greenhouse gas, see, e.g., 73 Fed. Reg. at 44,429, does not harm human health or welfare through direct exposure. See 74 Fed. Reg. at 18,901. People and animals exhale carbon dioxide when they breathe, and plants need carbon dioxide to live. See 73 Fed. Reg. at 44,376 (JA1047).

To ensure compliance with the NAAQS, EPA must determine whether a region is in “attainment” (the NAAQS is met), “nonattainment” (the NAAQS remains unmet), or “unclassifiable” (EPA cannot determine whether the NAAQS is met). 42 U.S.C. § 7407(d)(1)(A). The PSD program applies to areas that are in “attainment” or are “unclassifiable,” *id.* § 7471, and requires permits before major emitting facilities are built or modified in those regions, *id.* § 7475(a). To obtain a permit, a regulated facility must, among other things, install the “best available control technology [BACT] for each pollutant subject to regulation under [the CAA].” *Id.* § 7475(a)(4).

4. On remand from *Massachusetts*, EPA opened a single regulatory docket in July 2008, and issued an Advance Notice of Proposed Rulemaking (ANPR) to address GHG emissions from all sources, including both mobile and stationary sources. See 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (JA975, JA979-80).

The ANPR flagged the prospect that application of the PSD and Title V programs to carbon emissions would lead to “absurd” results. 73 Fed. Reg. at 44,503 (JA1272-73), 44,512 (JA1311-12).

In a preface to the ANPR, the EPA Administrator observed that it had “become clear” that EPA regulation of GHGs from motor vehicles under section 202(a)(1) could trigger “regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals,” resulting in “an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.” 73 Fed. Reg. at 44,355 (JA979). The Administrator found that the CAA was “ill-suited for the task of regulating global greenhouse gases.” *Id.* (JA980).

Other federal agencies reinforced EPA’s concerns about absurd consequences. The Department of Energy expressed concern about “an enormously elaborate, complex, burdensome and expensive regulatory regime that would not be assured of significantly mitigating global atmospheric GHG concentrations and global climate change.” *Id.* at 44,365 (JA1004). The Department of Transportation was wary “that attempting to regulate [GHGs] under the [CAA] will harm the U.S. economy while failing to actually reduce global emissions.” *Id.* at 44,362 (JA988). And the Department of Commerce expressed concerns that GHG emission controls “would impose significant costs on U.S. workers, consumers, and producers and harm U.S. competitiveness without necessarily producing meaningful reductions in global GHG emissions.” *Id.* at 44,371 (JA1029).

Departing from the ANPR's single-docket approach, on April 17, 2009, EPA issued a standalone Proposed Endangerment Ruling as to six GHGs, 74 Fed. Reg. 18,886, including the four at issue in *Massachusetts* plus two others that are emitted only by stationary sources. This proposal was soon followed by a final rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (JA793), that was followed in rapid succession by three more final rules, the so-called "Timing Rule" or "Triggering Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010) (JA705), the "Tailpipe Rule," 75 Fed. Reg. 25,324 (May 7, 2010) (JA683), and the "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010) (JA268).

EPA determined in the Triggering Rule that once it had regulated GHG emissions from motor vehicles, it also had to regulate GHG emissions from stationary sources under the PSD program. EPA declared that "once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable." 75 Fed. Reg. at 17,020 (April 2, 2010) (JA778). EPA did likewise for the Title V program. See *id.* at 17,023 (JA788). Further, EPA stated that "[u]nder the current interpretation of the PSD applicability provision, EPA's recent promulgation" of regulations governing GHG emissions from new motor vehicles "will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011." 75 Fed. Reg. at 31,554 (JA449).

In applying the PSD coverage provisions to GHGs, EPA rejected the broadest meaning of "air pollutant" and restricted the term to encompass only "*regulated* air pollutants." Hence, according to EPA,

the PSD and Title V programs would be triggered for stationary sources as of the day that controls mandated by the Tailpipe Rule took effect. See 75 Fed. Reg. 17,004 (JA705). EPA rejected commenters' suggestions that it read "any air pollutant" restrictively to exclude GHGs and include only regulated conventional air pollutants. See *EPA's Response to Public Comments*, Regulatory Docket ID No. EPA-HQ-OAR-2009-0597-0128, at 147 (Mar. 29, 2010) ("Nine industry and commerce commenters ... suggest that EPA clarify in the PSD Interpretive Memo that the term 'Pollutants Subject to Regulation' exclude GHGs.").

5. In the "Tailoring Rule," EPA again acknowledged that applying the PSD and Title V programs to GHGs would produce effects so extreme as to be "absurd." 75 Fed. Reg. at 31,596 (JA631-32), 74 Fed. Reg. 55,292, 55,306-11 (Oct. 27, 2009). In EPA's words, "[a]pplying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish with the PSD requirements—that it should be avoided under the 'absurd results' doctrine." *Id.* at 55,310. In 2009, the PSD program applied to only 280 stationary sources, while Title V reached 14,700 sources—primarily large industrial facilities and power plants. 74 Fed. Reg. at 55,301, 55,302. But because GHGs, especially carbon dioxide, are emitted in far greater amounts, and from many more sources than all other "air pollutants" previously regulated, applying PSD to GHGs would mean that the program would apply to "41,000 new and modified facilities per year," *id.* at 55,301, while the Title V program would apply, for the first time, to "more than six million sources of GHGs," *id.* at

55,302. Not only would such regulation add untold billions in compliance costs and permitting expenses, EPA concluded it could produce permitting delays of up to ten years. See 75 Fed. Reg. at 31,563-64 (JA485-94).

Confronted with the conundrum of how to address absurd results flowing from its preferred policy, EPA rewrote the numerical coverage thresholds set by Congress instead of construing the statute to exclude GHGs from the PSD program. In particular, EPA temporarily exempted some but not all emitters of some but not all pollutants that the statutory text, as construed by the agency, would otherwise cover. See 75 Fed. Reg. at 31,514 (JA268). While Congress determined that the PSD and Title V programs would apply to facilities discharging more than 100/250 tpy, the agency mandated that, to fit the programs to GHGs, they would apply only to sources emitting GHGs in amounts more than 75,000 or 100,000 tpy—two EPA-created thresholds. *Id.*; see also *id.* at 31,516, 31,533 (JA281-82, JA355).

EPA asserted authority to ratchet down the agency-created thresholds over time on grounds it claimed were both “intertwined” with and “independent” of the absurdity doctrine. *Id.* at 31,514 (JA391). Specifically, EPA relied on an “administrative necessity” doctrine, which it contended allows an agency to decline to “follow the literal requirements” of a statute that “is impossible for the agency to administer.” *Id.* at 31,543-44 (JA401-02). And EPA relied on a newly invented doctrine that it contended confers expansive agency authority to “implement statutory mandates one step at a time.” *Id.* at 31,544 (JA403). In this fashion, EPA claimed discretion to regulate more parties by

further changing the coverage thresholds in future years.

6. More than seventy business groups, public policy groups, and States challenged EPA's rulemakings. In a *per curiam* opinion, a D.C. Circuit panel rejected these challenges and held that EPA's reasoning in support of the decision to "trigger" the PSD program had appropriately led the agency to deviate from "the literal statutory definition of air pollutant." JA237.

The panel denied rehearing, and the court denied rehearing en banc, with Judge Kavanaugh and Judge Brown dissenting separately. Both Judge Brown and Judge Kavanaugh viewed skeptically EPA's response to the acknowledged "absurd results" of its interpretation, deeming it a kind of "abuse" used "to preempt legislative prerogatives." JA158-59 (Brown, J., dissenting); see also JA189-90 (Kavanaugh, J., dissenting). Judge Kavanaugh noted that "an unusual twist" in this case is that "EPA openly acknowledged unreasonableness—indeed, the absurdity—caused by its interpretation of the statute." JA173. Yet, "EPA surprisingly did not choose the seemingly obvious option" of revisiting its construction of "any air pollutant" and adopting a narrower construction that would eliminate the absurdity. *Id.* In Judge Kavanaugh's view, EPA's absurdity-causing interpretation of "any air pollutant" is "the most critical point in this case," even though the panel failed to address it. JA187. According to Judge Kavanaugh, "EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that." JA187. Judge Brown separately emphasized that "[a]lthough the *Massachusetts* Court

distinguished *Brown & Williamson*, it did so only in the context of tailpipe emissions. Its reasoning did not extend to Title V and the PSD program.” JA163. “Congress simply did not intend for EPA to convert the ‘Clean Air Act’ to the ‘Warm Air Act’ writ large.” JA166.

7. Nine petitions for certiorari followed, six of which the Court granted.

### SUMMARY OF THE ARGUMENT

Through the so-called “Triggering Rule,” EPA expanded the PSD program’s ambit to encompass millions of new stationary sources, all the way down to neighborhood restaurants and even some homes. But by EPA’s own admission, the fit between the PSD program and GHG regulation is so poor as to produce absurd results, which EPA decided to address through statutory “tailoring.” Surely, the fact EPA needed to perform such a thing as statutory “tailoring” should have set off alarms that its interpretive enterprise had badly gone awry.

Regardless of how the Clean Air Act’s mobile-source provisions might work, the Act’s PSD provisions, properly construed, cannot and do not work if extended to encompass GHGs. Indeed, the only way to shoehorn GHGs into the PSD program is by nullifying many core statutory requirements. (See Section I, *infra*.) Moreover, even if EPA’s statute-nullifying PSD interpretation were the only one available (which it is not), proper application of the absurdity doctrine would still compel the conclusion that PSD regulation of GHGs falls beyond EPA’s statutory authority. (See Section II, *infra*.)

## ARGUMENT

EPA offered various justifications for rewriting the PSD program's emission thresholds while it dramatically expanded its regulatory authority. But the occasion for rewriting statutory provisions would never have arisen if the agency had properly construed the PSD provisions and properly applied the absurdity doctrine. Moreover, if the Court holds the PSD program cannot extend to GHGs, then by the same reasoning Title V cannot extend to GHGs. Because whether Title V properly applies to GHGs presents a parallel question to whether the PSD program applies, we do not address it separately.

Against this backdrop, we focus solely on the PSD program and absurdity doctrine. We focus in particular on the two dispositive questions—whether EPA properly concluded that the PSD statutory provisions extend to encompass GHGs and, if so, whether EPA properly responded to the admitted absurdity that arises from this extension. EPA erred on both questions.

### **I. EPA Erred By Rewriting or Ignoring the Plain Terms of the PSD Statutes in Order to Extend the Program to Encompass GHGs.**

In response to a petition asking EPA to regulate mobile-source emissions, the Court concluded in *Massachusetts* that GHGs are “air pollutants” for purposes of the Act-wide definition in Section 302(g). But *Massachusetts* neither addressed the Act's stationary-source provisions nor had occasion to consider EPA's ultimate determination on remand that applying the PSD program to GHGs produces absurd results. The posture and stated limits of *Massachusetts* are significant because, regardless of

how the CAA's mobile-source emissions programs might be framed, the PSD program for stationary sources, if applied to GHGs, produces the very type of "extreme measures" that *Massachusetts* disapproved. 549 U.S. at 531.

The fact that PSD regulation of GHGs requires that the statute's coverage thresholds be multiplied by orders of magnitude itself dooms EPA's rulemakings. But the incompatibilities between the statutory PSD provisions and EPA's implementing rulemakings and guidance documents extend well beyond unworkable coverage thresholds. If allowed to stand, EPA's "tailoring" of the Act will become an ongoing enterprise that requires and enables the agency to cut, reshape, and remold numerous parts of the statute.

1. The PSD program's stated purposes underscore that it is designed to address only pollutants that, unlike GHGs, produce exposure-related harms, concentrate locally, and are emitted in modest amounts from very large facilities that Congress determined are best able to reduce emissions in economically feasible ways.

***Prevention of Exposure-Related Harms.*** The first of the PSD program's stated purposes is to "protect public health and welfare" from adverse effects that "occur from air pollution or from *exposures* to pollutants in other media, which pollutants originate as emissions to the ambient air" notwithstanding attainment of NAAQs standards. 42 U.S.C. § 7470(1) (emphasis added). This reference to preventing "exposures to pollutants"—whether directly from air pollution or indirectly via "other media"—makes clear the program aims at curtailing

the types of exposure-related harms characteristic of conventional pollutants.

***Control of Localized Concentrations.***

Congress also declared that the program's purposes include preventing harmful interstate transport of pollutants that produces "deterioration of air quality for any other State," 42 U.S.C. § 7470(4), and assuring that any "decision to permit increased air pollution *in any area*" is made only upon "careful evaluation" and after opportunity for "informed public participation." *Id.* § 7470(5) (emphasis added). In other words, the program was established to control localized concentrations of harmful pollutants—concentrations that can sensibly be ascribed to a particular "state" or a particular "area."

***Economically Feasible Application.*** A third purpose is to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). The PSD program's 100/250 tpy thresholds, see *id.* § 7479(1), implement this important purpose by imposing burdensome case-by-case PSD permitting requirements only on the "large" emissions sources that can most readily bear these costs. See, e.g., *Alabama Power Co. v. Costle*, 636 F.2d 323, 348 (D.C. Cir. 1979) (per curiam). Here, moreover, EPA admits that "the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs ...." 75 Fed. Reg. at 31,533 (JA356).

2. Unsurprisingly, the PSD program's declared purposes dovetail with and reinforce its operative provisions. As a result, EPA's extension of the program to encompass GHGs nullifies or renders unworkable core provisions of the program.

***Local Air Impact Analysis.*** Sections 165(a)(2) and (e)(1)'s public participation and local air quality assessment provisions cannot be squared with extending the program to GHGs. These Sections work in tandem to require a non-discretionary “public hearing” regarding “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.” 42 U.S.C. § 7475(e)(1) (emphasis added). Likewise, Section 165(e)(3) requires that the Administrator “shall” analyze “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 Act.” *Id.* § 7475(e)(3) (emphasis added).

These features make sense when applied to conventional pollutants that give rise to localized, exposure-related harms due to impacts on “ambient air quality.” But they make no sense as applied to substances that do not degrade “ambient air quality” and whose concentrations and impacts can be meaningfully assessed only on a global scale. Indeed, EPA has effectively conceded as much, informing PSD permit applicants and authorities that they may ignore the statutory “ambient air” requirements because GHGs—being “well-mixed” in the atmosphere—do not give rise to localized impacts. See, e.g., *PSD and Title V Permitting Guidance for Greenhouse Gases* 48 (2011), available at [http://www.epa.gov/nsr/ghgdocs/ghgpermitting\\_guidance.pdf](http://www.epa.gov/nsr/ghgdocs/ghgpermitting_guidance.pdf) (“Considering the nature of GHG emissions and their global impacts, EPA does not believe it is practical or appropriate to expect permitting authorities to collect

monitoring data for purpose of assessing ambient air impacts of GHGs.”).

***Case-by-Case Economic Analysis.*** Building on its stated purposes, the PSD program mandates that “case-by-case ... economic” analyses be undertaken in issuing PSD permits for large facilities. 42 U.S.C. § 7479(3). Because the PSD program properly applies only to large sources that emit conventional pollutants, it makes sense to require expensive, case-by-case analyses to determine the best available control technology for each individual facility.

Case-by-case BACT assessments are impossible to faithfully adapt, however, in the GHG context, especially for carbon dioxide. If EPA’s interpretation of the program were correct, six million facilities, including 4.5 million residential facilities, would become subject to case-by-case PSD emission-control assessments. To address this unmanageable caseload and avoid imposing intolerable costs on small emitters, EPA has effectively eliminated case-by-case analysis, declaring that small GHG emitters shall eventually be governed by “presumptive” BACT standards and “general” permitting. See, e.g., 75 Fed. Reg. at 31,526 (JA325). But although Title V expressly provides for such general permitting, see 42 U.S.C. § 7661c(d), the PSD program does not.

***Case-by-Case Energy and Environmental Analysis.*** The PSD program also requires “case-by-case” analysis of both “energy ... impacts” and “environmental ... impacts.” 42 U.S.C. § 7479(3). A cardinal rule of interpretation requires that these distinct statutory terms must carry distinct meanings. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In the context of PSD permitting for controls on conventional pollutants, this basic rule of

construction is readily followed. When permitting authorities confront proposed PSD controls in conventional-pollutant settings, they can and do make straightforward, independent, and sensible assessments of both energy and environmental impacts. In that context, a permitting authority need only consider the extra energy needed to prevent additional conventional pollution, for instance, by installing energy-consuming pollution-control equipment like the desulfurization units known as “scrubbers.” But when applied to the release of energy and carbon dioxide through burning fossil fuels, the required energy-impact and environmental-impact assessments become hopelessly muddled. The whole reason for emitting carbon dioxide, after all, is that fossil fuels *are* stores of energy and this energy can be released through combustion. As a result, what should be distinct inquiries into “energy” and “environmental” impacts collapse, in the context of fossil-fuel burning, into one and the same assessment: how should EPA regulate energy consumption itself?

***Coverage Thresholds.*** EPA recognized that conventional pollutants and GHGs critically differ in the scale on which they are emitted in an industrial economy. See, e.g., 75 Fed. Reg. at 31,535 (JA363) (“[I]t takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 tpy or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of CO<sub>2</sub> that are far in excess of the sources’ quantities of conventional pollutants and that, for even small sources, equal or exceed the 100/250 tpy levels.”).

In other words, as applied to conventional pollutants, the PSD program's 100/250 tpy emission thresholds make sense and limit the program's burdens to large industrial sources. See *id.* But because GHGs, especially carbon dioxide, are emitted in much greater amounts than conventional pollutants, GHG emissions from a given facility will often exceed by orders of magnitude the facility's conventional-pollutant emissions. As a result, extending the PSD program to GHGs does violence to the Act's coverage thresholds, set with exposure-related harms caused by modestly sized conventional pollutant emissions in mind. The realization that the statutory thresholds fail in a GHG context to effectively winnow out small facilities prompted EPA's concession below that applying the statutory terms to GHGs would be "absurd."

These multiple contradictions, taken individually and even more when taken together, are fatal to EPA's reading of the Act. After all, a statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," especially in cases where "only one of the permissible meanings produces a substantive effect compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). Here, the substantive effects of extending the PSD program to GHGs are manifestly untenable. Any such extension means nullifying or rendering unworkable most central elements of the program.

3. EPA nonetheless determined that the statutory reference in the PSD program to "any air pollutant" would include GHGs, pointing to its

reading of *Massachusetts*. 75 Fed. Reg. at 31,561 (JA481).

But tellingly, EPA itself rejected the broadest possible reading of the *Massachusetts* holding; namely, a reading under which “air pollutant” must refer to “any airborne compound of whatever stripe” for all purposes under the Act. 549 U.S. at 529. In proceedings below, EPA read “any air pollutant” under both the PSD and Title V programs to mean, more restrictively, “any *regulated* air pollutant.” JA236. On review, the Court of Appeals endorsed this reasoning and upheld the agency. JA236-41. The Court rejected the alternative view that, for PSD purposes, the relevant pollutant universe should exclude GHGs and thus be confined to *regulated conventional* air pollutants. JA421-46.

In reaching these conclusions, both EPA and the D.C. Circuit recognized that words and phrases like “any air pollutant,” 42 U.S.C. § 7479(1), and “each pollutant,” *id.* § 7475(a)(4), can and should be read in context. See *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (holding in a CAA case decided the same day as *Massachusetts* that “identical words used in different parts of the same act” need not always have the same meaning); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976) (holding that the term “pollutant”—defined to include “radioactive materials”—was properly read in context to exclude three types of radioactive materials). In light of this recognition and the interpretive evidence canvassed above, EPA and the D.C. Circuit should have further recognized that the term “pollutant” must be read in a PSD context to stop short of encompassing GHGs.

4. Finally, EPA was simply not permitted under the Court's precedents to interpret its authority to regulate localized emissions of conventional pollutants as an implicit grant of authority to regulate the conceptually distinct problem of global climate change. See *Brown & Williamson*, 529 U.S. at 160 (striking down FDA regulation of cigarettes); see also *Gonzales v. Oregon*, 546 U.S. 243 (2006) (striking down DoJ regulation of physician-assisted suicide); *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (striking down FCC deregulation of long-distance carriers). This is true “[r]egardless of how serious” the problem the agency “seeks to address” may be. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (quotation marks and citations omitted); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“axiomatic” that agencies lack power to promulgate regulations in absence of congressional authorization). And it is especially true here, in light of the “economic and political significance” of this expansive claim of new authority. *Brown & Williamson*, 529 U.S. at 160. Indeed, the implications of EPA’s claim of authority here are so great that, in the words of the Secretaries of Agriculture, Energy, Transportation, and Commerce, it would turn the agency into a “de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development.” 73 Fed. Reg. at 44,360 (JA985).

If *Brown & Williamson*, *MCI*, and *Gonzales* were “extraordinary” cases requiring the relevant agencies to “hesitate” before finding an improbable “implicit delegation,” 529 U.S. at 143, 159, this case surely is

even more extraordinary and requires even more hesitation. In *Massachusetts*, the Court reasoned that construing “air pollutant” to include GHGs “would lead to no ... extreme measures” because there was “nothing counterintuitive to the notion that EPA can curtail” automotive GHG emissions. 549 U.S. at 531. Unlike in *Massachusetts*, where the mobile sources at issue already faced functionally equivalent Department of Transportation fuel economy regulations of their emissions, it is difficult to imagine administrative measures and real-world consequences more extreme than those presented by EPA’s triggering of PSD and Title V regulation of GHGs from all types of stationary sources.

In sum, EPA points to nothing in the text, structure, purposes, or history of the Clean Air Act, nor in any background principle of construction, remotely adequate to establish that Congress intended to grant it authority to regulate GHGs under the PSD program. Indeed, the *only* substantial evidence the agency can marshal is the Act’s use of the term “air pollutant,” but even EPA concedes this language cannot be taken in its broadest sense. As a matter of first principles, EPA’s willingness, perhaps eagerness, to construe statutory language in a manner that produces absurd results and expands its jurisdiction to where it becomes a “de facto zoning authority” cannot be squared with the Court’s precedents.

## **II. EPA Erred By Deploying the Absurdity Doctrine As a Roving License to Ignore Statutory Text.**

In choosing to trigger controls on emissions of GHGs under the PSD program, notwithstanding that the triggering produces absurd results, EPA

overlooked the elementary rule that, when confronted with potentially absurd statutory results, the first and best option is to read the relevant statute so that “no absurdity arises in the first place.” *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012); see also *Nixon v. Missouri Mun. League, Inc.* 541 U.S. 125, 138 (2004) (avoiding interpretation “that leads to absurd or futile results”) (citation omitted); cf. John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2392-93 (2003) (urging careful textual analysis to avoid recourse to the absurdity doctrine). EPA should have recognized, before embarking on statutory reconstruction, that it was bound to reject an admittedly absurd interpretation in favor of the more natural reading of the statute described above.

1. Rather than properly interpreting the CAA, EPA invoked a novel, agency-authority-maximizing version of the absurdity doctrine that finds no support in the Court’s cases. As explained below, even in rare cases where absurd results are unavoidable, courts and agencies do not attain *carte blanche* to rewrite a statute, much less a roving commission to continually modify it well into the future. A review of this Court’s decisions over two centuries recognizes just two principal ways to respond to unavoidably absurd applications of statutory language.

*First*, where a minor, self-evident adjustment to literal meaning suggests itself, the Court has applied that adjustment rather than the statute’s literal terms. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). *Second*, in even rarer circumstances, the Court has declared a specific application of a statute, seemingly authorized by its plain terms, to be beyond its proper scope. See, e.g.,

*United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868). What the Court has never condoned is what EPA did here—using potentially absurd applications of statutory language as grounds for an “unhealthy process of amending the statute” by interpretation. *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment). Such “loose invocation[s]” of the canon create intolerable risks that the relevant court or agency will exercise “its own ‘WILL instead of JUDGMENT,’ with the consequence of ‘substituting its own pleasure to that of the legislative body.’” *Id.* at 471 (quoting *The Federalist* No. 78, p. 469 (C. Rossiter ed. 1961)) (internal alterations omitted).

Having concluded that its preferred construction produces unavoidably absurd results, EPA was bound to inquire whether a minor, self-evident adjustment to statutory language was available for resolving the identified absurdity and, if not, to conclude simply that GHG regulation lay beyond the permissible scope of the PSD provisions.

2. Because the absurdity doctrine is an accepted interpretive canon, EPA properly concluded that it applies at *Chevron* step one. See 75 Fed. Reg. at 31,545 (JA408-09). At this first *Chevron* step, courts consider statutory meaning by applying “traditional tools of statutory construction,” without any deference to an implementing agency’s interpretation. *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). These “traditional tools” include accepted construction canons, see, e.g., *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001), and these canons include the principle that statutes should be construed to avoid absurd

results—a practice deeply embedded in the Court’s jurisprudence and embraced for centuries by leading authorities. See *Kirby*, 74 U.S. (7 Wall.) at 487 (citing Baron Samuel von Pufendorf and Sir Edmund Plowden); see also, e.g., *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542 (1940); *Sorrells v. United States*, 287 U.S. 435, 450 (1932); *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 403 (2d ed. 1858); 1 W. Blackstone, *Commentaries on the Laws of England* 60, 61 (1765).

After correctly concluding that its preferred construction produces absurd results and that the absurdity doctrine binds agencies at *Chevron* step one, EPA got practically everything else about the doctrine wrong. This case is singular in that it appears to be the first in the Court’s history where no party disputes that an agency’s interpretation of a statute it administers produces absurd results. This case, therefore, turns solely on whether EPA can deploy an admittedly absurd statutory result to rewrite statutory text and bolster its own regulatory authority—as opposed to the more modest step of embracing an interpretation that avoids absurd results from the outset by excluding GHGs from the PSD requirements.

3. EPA chose neither of the two distinct and discernible paths by which the Court’s precedents allow an unavoidable absurdity to be safely addressed.

The first of the two paths marked out by the Court’s cases follows in the wake of Blackstone’s classic admonition that “where words bear either none, or a very absurd signification, if literally understood, *we must a little deviate from the received*

*sense of them.*” Blackstone, *supra*, at 61 (emphasis added).

Blackstone’s classic formulation recognizes that minor “deviations” from legislative text—as opposed to wholesale rewriting at the discretion of a court or agency—can at times produce a more faithful application of the statute than “literal[]” application of the law. *Id.* But such “deviations” must indeed be “little.” Hence, this approach to addressing an absurdity has been essentially confined to making self-evident adjustments to a statute’s scope, making it slightly more or less inclusive, not unlike correcting a scrivener’s error. See, e.g., *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring) (correcting text where nuance “could understandably have been omitted by inadvertence”). Limited in this fashion, courts can have confidence in their fidelity to congressional enactments. Accordingly, where self-evident deviations from literalism will prevent an absurdity, the Court has been willing to countenance such deviations.

The Court has followed this first path marked by Blackstone on numerous occasions, countenancing minor, self-evident, textual “deviations” to avoid absurdity without invading the legislative province or rewriting statutory terms from scratch. In *Bock Laundry*, for instance, the Court interpreted the word “defendant” in a federal rule of evidence to mean only criminal defendants, not civil defendants, for, as the Court explained, the language as written could not “mean what it sa[id].” 490 U.S. at 511. In *United States v. X-Citement Video, Inc.*, the Court rejected the “most natural grammatical reading” of a child-pornography statute and construed “the term ‘knowingly’” to “extend[] both to the sexually explicit

nature of the material and to the age of the performers” rather than merely to the transportation or shipment of a visual depiction in interstate or foreign commerce. 513 U.S. 64, 68-69, 78 (1994). In *Clinton v. City of New York*, the Court concluded that the category of “individuals” permitted to obtain expedited review of the constitutionality of the line-item veto statute should be interpreted to encompass not only natural persons but also corporate “persons” because it would be absurd to exclude corporate plaintiffs from the benefits of such review. 524 U.S. 417, 428-29 (1998). And in *Johnson v. South Pacific Co.*, the Court read “locomotives” to fall within a definition of rail “cars,” notwithstanding definitional language pointing in the other direction, in order to effectuate a railroad safety statute requiring that safer train couplings be used in interstate commerce. 196 U.S. 1, 14-15 (1904).

In each of these cases, the Court took care to respect statutory text by making what it thought were minor, natural adjustments to the scope of statutory language. “Any entity” meant any private entity. “Defendant” meant only criminal defendants. “Knowingly” applied to all elements of an offense. “Individual” was read to include all legal persons, including corporations. And rail “cars” was read to include all parts of a train, including locomotives. While some of these “deviations” prompted objections from dissenting justices, none were open-ended. All involved what appeared to be self-evident adjustments not unlike the correction of scrivener’s errors. Cf., e.g., *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring).

The second path marked by the Court’s precedents, also drawn from Blackstone, applies in

situations where “there arise[s]” from a statute “any absurd consequences, manifestly contrary to common reason” (that cannot be addressed by deviating just a little from the unaltered text). Blackstone, *supra*, at 91. According to Blackstone, such statutes should be construed with regard to such consequences as “void.” *Id.*

Accordingly, where, as here, an absurdity cannot be avoided through a fairly evident and minor adjustment to statutory language, the particular application of the statute’s literal language must be deemed simply and altogether beyond the statute’s scope. *Kirby* presents the classic example. In that case, a county sheriff arrested a mail carrier for murder while the mail carrier was delivering the mail. A federal statute declared that if any person should knowingly and willfully obstruct or retard the passage of the mail, the person would be subject to penalty. 74 U.S. at 482. The question in *Kirby* was whether the sheriff could be punished for arresting an accused murderer, an obvious absurdity. Although recognizing that the act’s categorical language contained no exceptions for officers acting in their official duties, the Court declared the particular situation before it beyond the intended compass of the law. See *id* at 487.

Following *Kirby*, the Court has occasionally concluded that a literal application of statutory language would create absurd results, but found no evident deviation from the statute’s literal terms was available. In those rare cases, the Court has been satisfied to hold that the particular application at issue falls outside the statute’s scope. See, e.g., *Public Citizen*, 490 U.S. at 443 (Federal Advisory Committee Act does not apply to communications

with the American Bar Association regarding judicial nominations); *Sorrells*, 287 U.S. at 448-49 (criminal statute does not apply to case of entrapment); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892) (immigration statute does not apply to clergyman). In none of these cases did the Court strain to offer a definitive reinterpretation of the meaning of the relevant text. It instead concluded, more modestly, that the statute at issue ought not be interpreted to extend so far as to produce absurd results in the instance at hand.

4. EPA failed to appreciate any limitations on the options available for addressing statutory absurdities, and the court below did not even address the issue with regard to EPA's triggering of PSD and Title V. If either had done so—after identifying what concededly were extreme and absurd results and realizing no minor, self-evident “deviation” from statutory text would eliminate them—they would have simply concluded that Congress had not authorized the type of extreme measures needed to bring GHGs under the PSD program.

Remarkably, after realizing that its PSD “triggering” would create results “so contrary to what Congress had in mind” that they “should be avoided under the ‘absurd results’ doctrine,” 74 Fed. Reg. at 55,310, EPA did nothing to prevent the triggering. It opted instead to try to partially alleviate the ensuing absurd results by rewriting codified numerical thresholds, while nullifying other statutory requirements by fiat. In this fashion, EPA replaced the statute's numerical limits with limits of the agency's choosing. See 75 Fed. Reg. at 31,533 (JA355-56).

Significantly, however, there is nothing minor or self-evident about a decision to “unilaterally” increase the statute’s coverage thresholds for stationary-source emissions of some (but not all) pollutants from “250 tons to 100,000 tons—a 400-fold increase.” JA173 (Kavanaugh, J., dissenting). Far from it, selecting a numerical parameter to delineate the bounds of regulatory authority is a quintessentially legislative decision. See, e.g., *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (explaining an agency rule was legislative because “[t]here is no way to reason” to a particular number selected by the agency) (Posner, J.). This is especially true here, where EPA purports to retain still more discretion to further modify the agency-created numerical thresholds over time. Nothing in the statute’s text or structure even hints at the precise thresholds EPA selected as its initial, preferred PSD coverage levels, and in fact EPA proposed thresholds substantially different from the ones it eventually promulgated. See 74 Fed. Reg. at 55,292 (proposing 25,000 tpy threshold).

EPA’s statutory rewrite was thus by no means self-evident or akin to correcting a scrivener’s error. It was extreme by any measure and not at all authorized by *Massachusetts*, which expressly admonished EPA not to assume “a roving license to ignore the statutory text” and expressly required EPA to ground its “action or inaction in the statute.” 549 U.S. at 533, 535.

In sum, the whole justification for the absurdity doctrine is to better discover and better apply the true meaning of the law. But as invoked by EPA, the doctrine has been transformed from a way of ensuring fidelity to congressional enactments into a

springboard for an agency's never-ending and ultimately legislative rewriting of statutes. Once EPA saw that triggering PSD controls for GHGs produces absurd results, it ought to have recognized that, when facing such results, the best option is to read a statute so no absurdity arises in the first place, as we and other petitioners contend. But failing that, EPA ought to have appreciated at a bare minimum—under the Court's precedents and principles dating to Blackstone—that because no self-evident textual adjustments were available for eliminating the absurdity and still accommodating PSD regulation of GHGs, such regulation necessarily falls, quite simply, beyond the agency's authority.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

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**STATUTORY ADDENDUM**

**Clean Air Act (“CAA”)**

Title I — Air Pollution Prevention and Control

Part A — Air Quality and Emission Limitations

- CAA § 103(g), 42 U.S.C. § 7403(g)..... 1a
- CAA § 107, 42 U.S.C. § 7407 ..... 3a
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Part C — Prevention of Significant Deterioration of Air Quality

Subpart 1 - Clean Air

- CAA § 160, 42 U.S.C. § 7470 ..... 21a
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1a

**42 U.S.C. § 7403(g): Research, investigation,  
training, and other activities**

\* \* \*

**(g) Pollution prevention and emissions control**

In carrying out subsection (a) of this section, the Administrator shall conduct a basic engineering research and technology program to develop, evaluate, and demonstrate nonregulatory strategies and technologies for air pollution prevention. Such strategies and technologies shall be developed with priority on those pollutants which pose a significant risk to human health and the environment, and with opportunities for participation by industry, public interest groups, scientists, and other interested persons in the development of such strategies and technologies. Such program shall include the following elements:

**(1)** Improvements in nonregulatory strategies and technologies for preventing or reducing multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide, from stationary sources, including fossil fuel power plants. Such strategies and technologies shall include improvements in the relative cost effectiveness and long-range implications of various air pollutant reduction and nonregulatory control strategies such as energy conservation, including end-use efficiency, and fuel-switching to cleaner fuels. Such strategies and technologies shall be considered for existing and new facilities.

2a

(2) Improvements in nonregulatory strategies and technologies for reducing air emissions from area sources.

(3) Improvements in nonregulatory strategies and technologies for preventing, detecting, and correcting accidental releases of hazardous air pollutants.

(4) Improvements in nonregulatory strategies and technologies that dispose of tires in ways that avoid adverse air quality impacts.

Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements. The Administrator shall consult with other appropriate Federal agencies to ensure coordination and to avoid duplication of activities authorized under this subsection.

\* \* \*

3a

**42 U.S.C. § 7407: Air quality control regions**

**(a)** Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

**(b)** Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title-

**(1)** an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

**(2)** the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

**(c)** Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with

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appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

**(d) Designations**

**(1) Designations generally**

**(A) Submission by Governors of initial designations following promulgation of new or revised standards**

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

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

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

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**(iii)** unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

**(B)** Promulgation by EPA of designations

**(i)** Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

**(ii)** In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate

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why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

**(iii)** If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

**(iv)** A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

**(C)** Designations by operation of law

**(i)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

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**(ii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

**(iii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

**(2)** Publication of designations and redesignations

**(A)** The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

**(B)** Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

**(3)** Redesignation

**(A)** Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning

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and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

**(B)** No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

**(C)** No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase “60 days” shall be substituted for the phrase “120 days” in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under

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subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

**(D)** The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

**(E)** The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

**(i)** the Administrator determines that the area has attained the national ambient air quality standard;

**(ii)** the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

**(iii)** the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

**(iv)** the Administrator has fully approved a

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maintenance plan for the area as meeting the requirements of section 7505a of this title; and

**(v)** the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

**(F)** The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

**(4)** Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

**(A)** Ozone and carbon monoxide

**(i)** Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

**(ii)** No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60

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days” shall be substituted for the phrase “120 days” in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

**(iii)** No nonattainment area may be redesignated as an attainment area under this subparagraph.

**(iv)** Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding,

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within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

**(B) PM-10 designations**

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)—

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**(i)** each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

**(ii)** any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

**(iii)** each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

**(5)** Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems

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appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase “2 years from the date of promulgation of the new or revised national ambient air quality standard” shall be replaced by the phrase “1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead”.

**(6) Designations****(A) Submission**

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

**(B) Promulgation**

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM national ambient air quality standards.

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**(7) Implementation plan for regional haze**

**(A) In general**

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as “regional haze requirements”).

**(B) No preclusion of other provisions**

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

**(e) Redesignation of air quality control regions**

**(1)** Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be

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modified accordingly.

**(2)** In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

**(3)** No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

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**42 U.S.C. § 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**

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**(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 NO<sub>2</sub> 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

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**(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.

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(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.

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**42 U.S.C. § 7470: Congressional declaration of purpose**

The purposes of this part are as follows:

- (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;
- (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
- (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
- (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
- (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

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**42 U.S.C. § 7471. Plan requirements**

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

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**42 U.S.C. § 7473: Increments and ceilings**

**(a)** Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

**(b)** Maximum allowable increases in concentrations over baseline concentrations

**(1)** For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 24a

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

**(2)** For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 25a

Pollutant	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	512

**(3)** For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 26a

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) 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.

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**(c)** Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

**(1)** In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

**(A)** concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of Title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

**(B)** the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C.A. § 791a et seq.] over the emissions from such sources before the effective date of such plan,

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(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

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**42 U.S.C. § 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

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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 facility 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

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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)**

32a

**(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.

33a

**(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:

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**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.

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**(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:

36a

**MAXIMUM ALLOWABLE INCREASE**

**[In micrograms per cubic meter]**

<b>Period of exposure</b>	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

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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,

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(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.

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**42 U.S.C. § 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.

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**42 U.S.C. § 7479: Definitions**

For purposes of this part—

(1) The term “major emitting facility” means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty 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 fifty 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 two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

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**(2)**

**(A)** The term “commenced” as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

**(B)** The term “necessary preconstruction approvals or permits” means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

**(C)** The term “construction” when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

**(3)** The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic

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impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

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**42 U.S.C. § 7491: Visibility protection for Federal Class I areas**

**(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

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**(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

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**(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.

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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.

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**(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

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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;

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(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.

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**42 U.S.C. § 7521: Emission standards for new motor vehicles or new motor vehicle engines**

**(a)** Authority of Administrator to prescribe by regulation

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

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

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

**(3)**

**(A)** In general

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**(i)** Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

**(ii)** In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

**(B)** Revised standards for heavy duty trucks

**(i)** On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the

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date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

**(ii)** Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO<sub>x</sub>) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

**(C)** Lead time and stability

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

**(D)** Rebuilding practices

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment

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cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

**(E) Motorcycles**

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

**(4)**

**(A)** Effective with respect to vehicles and engines manufactured after model year 1978, no emission

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control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

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

**(5)**

**(A)** If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall,

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after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

**(B)** Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

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

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

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**(6) Onboard vapor recovery**

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based (“onboard”) systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer’s fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

**IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS**

<b>Model year commencing after standards promulgated</b>	<b>Percentage*</b>
Fourth.....	40
Fifth.....	80
After Fifth .....	100

\*Percentages in the table refer to a percentage of the manufacturer’s sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture

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efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

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

**(1)**

**(A)** The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to

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emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

**(B)** The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any

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light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that—

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

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

(C) The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards

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are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

**(3)** For purposes of this part--

**(A)**

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

**(ii)** For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining “model year” otherwise than as provided in clause (i).

**(B)** Repealed. Pub.L. 101-549, Title II, § 230(1), Nov. 15, 1990, 104 Stat. 2529.

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

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special features enabling off-street or off-highway operation and use.

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

**(A)** that such waiver would not endanger public health,

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

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

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

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

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

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

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

**(4)** The Administrator shall furnish to such

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

**(d) Useful life of vehicles**

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

**(1)** in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000

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miles (or the equivalent), whichever first occurs;

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

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

**(e)** New power sources or propulsion systems

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

**(f)** High altitude regulations

**(1)** The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the

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country shall take effect no earlier than model year 1981.

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

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

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

**(B)** the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission

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requirements without reducing model availability;  
and

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

**(g)** Light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles; standards for model years after 1993

**(1)** NMHC, CO, and NO<sub>x</sub>

Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NO<sub>x</sub>) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation schedule below:

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**TABLE G—EMISSION STANDARDS FOR NMHC, CO,  
AND NO<sub>x</sub> FROM LIGHT-DUTY TRUCKS OF UP TO 6,000  
LBS. GVWR AND LIGHT-DUTY VEHICLES**

Vehicle type	Column A			Column B		
	(5 yrs/50,000 mi)			(10 yrs/100,000 mi)		
	NMHC	CO	NO <sub>x</sub>	NMHC	CO	NO <sub>x</sub>
LDTs (0-3,750 lbs. LVW) and light-duty vehicles.....	0.25	3.4	0.4*	0.31	4.2	0.6*
LDTs (3,751-5,750 lbs. LVW).....	0.32	4.4	0.7**	0.40	5.5	0.97

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.

\* In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for NO<sub>x</sub>, the applicable standards for NO<sub>x</sub> shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

\*\* This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).

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**IMPLEMENTATION SCHEDULE FOR  
TABLE G STANDARDS**

<b>Model year</b>	<b>Percentage *</b>
1994 .....	40
1995 .....	80
after 1995.....	100

**(2) PM Standard**

Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles, and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) of this section applicable to emissions of particulate matter (PM) from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

**PM STANDARD FOR LDTS OF UP TO 6,000  
LBS. GVWR**

<b>Useful life period</b>	<b>Standard</b>
5/50,000 .....	0.80 gpm
10/100,000 .....	0.10 gpm

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The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

**IMPLEMENTATION SCHEDULE FOR PM STANDARDS**

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<b>Model year</b>	<b>Light-duty vehicles</b>	<b>LDTs</b>
1994 .....	40%*	.....
1995 .....	80%*	40%*
1996 .....	100%*	80%*
after 1996.....	100%*	100%*

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**(h)** Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995

Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides

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of nitrogen (NO<sub>x</sub>), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

**TABLE H--EMISSION STANDARDS FOR NMHC AND CO FROM GASOLINE AND DIESEL FUELED LIGHT-DUTY TRUCKS OF MORE THAN 6,000 LBS. GVWR**

LDT Test weight	Column A			Column B			
	(5 yrs/50,000 mi)			(11 yrs/120,000 mi)			
	NMHC	CO	NO <sub>x</sub>	NMHC	CO	NO <sub>x</sub>	PM
3,751-5,750 lbs. TW	0.32	4.4	0.7*	0.46	6.4	0.98	0.10
Over 5,750 lbs. TW	0.39	5.0	1.1*	0.56	7.3	1.53	0.12

Standards are expressed in grams per mile (GPM).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent) whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

\* Not applicable to diesel-fueled LDTs.

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**(i) Phase II study for certain light-duty vehicles and light-duty trucks**

**(1)** The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this subchapter. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

**TABLE 3--PENDING EMISSION STANDARDS FOR GASOLINE AND DIESEL FUELED LIGHT-DUTY VEHICLES AND LIGHT-DUTY TRUCKS 3,750 LBS. LVW OR LESS**

Pollutant	Emission level*
NMHC .....	0.125 GPM
NOx .....	0.2 GPM
CO .....	1.7 GPM

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h) of this section).

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**(2)**

**(A)** As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 7543(b) of this title. As part of such study, the Administrator shall also examine—

**(i)** the availability of technology (including the costs thereof), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) of this section for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

**(ii)** the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this chapter, including their feasibility and cost effectiveness.

**(B)** The Administrator shall submit a report to

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Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

**(3)**

**(A)** Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii).

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The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

**(B)** If the Administrator determines under subparagraph (A) that—

**(i)** there is no need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

**(iii)** obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h) of this section. Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority under subsection (a) of this section to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a) of this

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section.

**(C)** If the Administrator determines under subparagraph (A) that—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h) of this section. Any such standards (or useful life periods) promulgated by the Administrator shall take effect with respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

**(D)** Nothing in this paragraph shall be construed

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by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rulemaking required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 7604(a)(2) of this title (relating to citizen suits).

**(E)** Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1, 2003, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NO<sub>x</sub>), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

**(j)** Cold CO standard

**(1)** Phase I

Not later than 12 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks

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when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

**PHASE-IN SCHEDULE FOR COLD START STANDARDS**

<b>Model Year</b>	<b>Percentage</b>
1994 .....	40
1995 .....	80
1996 and after .....	100

**(2) Phase II**

**(A)** Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees

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Fahrenheit.

**(B)**

**(i)** If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

**(ii)** In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

**(3) Useful-life for phase I and phase II standards**

In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 7525 of this title and in-use compliance under section 7541 of this title, the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the

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Administrator may extend such useful life period (for purposes of section 7525 of this title, or section 7541 of this title, or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d) of this section.

**(4) Heavy-duty vehicles and engines**

The Administrator may also promulgate regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

**(k) Control of evaporative emissions**

The Administrator shall promulgate (and from time to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles—

**(1)** during operation; and

**(2)** over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of

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emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after November 15, 1990. If final regulations are not promulgated under this subsection within 18 months after November 15, 1990, the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this chapter. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

**(l) Mobile source-related air toxics****(1) Study**

Not later than 18 months after November 15, 1990, the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this chapter and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

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**(2) Standards**

Within 54 months after November 15, 1990, the Administrator shall, based on the study under paragraph (1), promulgate (and from time to time revise) regulations under subsection (a)(1) of this section or section 7545(c)(1) of this title containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available, taking into consideration the standards established under subsection (a) of this section, the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under subsection (a) of this section. The regulations shall, at a minimum, apply to emissions of benzene and formaldehyde.

**(m) Emissions control diagnostics****(1) Regulations**

Within 18 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of—

**(A)** accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction,

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including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

**(B)** alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

**(C)** storing and retrieving fault codes specified by the Administrator, and

**(D)** providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines.

**(2)** Effective date

The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

**(3)** State inspection

The Administrator shall by regulation require States that have implementation plans containing

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motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 7541(a) and (b) of this title.

**(4) Specific requirements**

In promulgating regulations under this subsection, the Administrator shall require—

**(A)** that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

**(B)** that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

**(C)** that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

**(5) Information availability**

The Administrator, by regulation, shall require (subject to the provisions of section 7542(c) of this

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title regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. Such information shall also be available to the Administrator, subject to section 7542(c) of this title, in carrying out the Administrator's responsibilities under this section.

**(f) Model years after 1990**

For model years prior to model year 1994, the regulations under subsection (a) of this section applicable to buses other than those subject to standards under section 7554 of this title shall contain a standard which provides that emissions of particulate matter (PM) from such buses may not exceed the standards set forth in the following table:

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**PM STANDARD FOR BUSES**

.....

<b>Model year</b>	<b>Standard*</b>
1991 .....	0.25
1992 .....	0.25
1993 and thereafter .....	0.10

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**42 U.S.C. § 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.

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**(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.

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**(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..<sup>1</sup>

**(l)** The term “standard of performance” means a requirement of continuous emission reduction,

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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

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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<sub>x</sub>.** The term “NO<sub>x</sub>” 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.

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**(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.

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**42 U.S.C. § 7661: Definitions**

As used in this subchapter—

**(1) Affected source**

The term “affected source” shall have the meaning given such term in subchapter IV-A of this chapter.

**(2) Major source**

The term “major source” means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

**(A)** A major source as defined in section 7412 of this title.

**(B)** A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

**(3) Schedule of compliance**

The term “schedule of compliance” means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

**(4) Permitting authority**

The term “permitting authority” means the Administrator or the air pollution control agency

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authorized by the Administrator to carry out a permit program under this subchapter.

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**42 U.S.C. § 7661a. Permit programs****(a) Violations**

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

**(b) Regulations**

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The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

**(1)** Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

**(2)** Monitoring and reporting requirements.

**(3)**

**(A)** A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of—

**(i)** reviewing and acting upon any application for such a permit,

**(ii)** if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including

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any court costs or other costs associated with any enforcement action),

**(iii)** emissions and ambient monitoring,

**(iv)** preparing generally applicable regulations, or guidance,

**(v)** modeling, analyses, and demonstrations, and

**(vi)** preparing inventories and tracking emissions.

**(B)** The total amount of fees collected by the permitting authority shall conform to the following requirements:

**(i)** The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than \$25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

**(ii)** As used in this subparagraph, the term "regulated pollutant" shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been

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promulgated (except that carbon monoxide shall be excluded from this reference).

**(iii)** In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

**(iv)** The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

**(v)** The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after 1990, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause—

**(I)** the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

**(II)** the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

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**(C)**

**(i)** If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

**(ii)** Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

**(iii)** Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any

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fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

**(4)** Requirements for adequate personnel and funding to administer the program.

**(5)** A requirement that the permitting authority have adequate authority to:

**(A)** issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;

**(B)** issue permits for a fixed term, not to exceed 5 years;

**(C)** assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

**(D)** terminate, modify, or revoke and reissue permits for cause;

**(E)** enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation, and provide appropriate criminal penalties; and

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(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and

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monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

**(9)** A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

**(10)** Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: *Provided*, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

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**(c)** Single permit

A single permit may be issued for a facility with multiple sources.

**(d)** Submission and approval

**(1)** Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

**(2)**

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**(A)** If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

**(B)** If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

**(C)** The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

**(3)** If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program

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under paragraph (1), promulgate, administer, and enforce a program under this subchapter for that State.

**(e) Suspension**

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

**(f) Prohibition**

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

- (1)** All requirements established under subchapter IV-A of this chapter applicable to “affected sources”.
- (2)** All requirements established under section 7412 of this title applicable to “major sources”, “area sources,” and “new sources”.
- (3)** All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to

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sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

**(g)** Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

**(h)** Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the

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Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

**(i) Administration and enforcement**

**(1)** Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

**(2)** Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

**(3)** The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

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(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

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**42 U.S.C. § 7661b. Permit applications**

**(a) Applicable date**

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates--

- (1) the effective date of a permit program or partial or interim permit program applicable to the source; or
- (2) the date such source becomes subject to section 7661a(a) of this title.

**(b) Compliance plan**

- (1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.
- (2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

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**(c) Deadline**

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

**(d) Timely and complete applications**

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a permit required by this subchapter (including

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renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

**(e) Copies; availability**

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

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**42 U.S.C. § 7661c. Permit requirements and conditions**

**(a) Conditions**

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

**(b) Monitoring and analysis**

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

**(c) Inspection, entry, monitoring, certification, and reporting**

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.

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Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

**(d) General permits**

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

**(e) Temporary sources**

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

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**(f) Permit shield**

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

- (1)** the permit includes the applicable requirements of such provisions, or
- (2)** the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

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**No. 12-1272**  
**(consolidated with 12-1146, 12-1248, 12-1254, 12-1268, and 12-1269)**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,  
*Respondents.*

**CERTIFICATE OF COMPLIANCE WITH RULE 33.1**

I, William H. Burgess, a member of the Supreme Court Bar, hereby certify that the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation complies with the word limitations of this Court's Rule 33.1.

According to the word processing system used to prepare it, the brief contains 8,047 words.



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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,  
*Petitioners,*

v.

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*Respondents.*

**CERTIFICATE OF SERVICE**

I, William H. Burgess, a member of the Supreme Court Bar, hereby certify that on this 9th day of December, 2013, I caused three copies of the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation to be served by Federal Express, overnight delivery, and by e-mail, on the following counsel of record:

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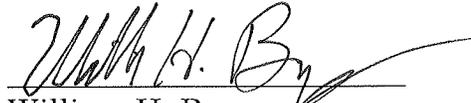
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All:

Attached is a PDF of the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation, filed today at the Supreme Court.

Regards,

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**No. 12-1272 (consolidated with  
Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)**

**In the Supreme Court of the United States**

CHAMBER OF COMMERCE OF THE UNITED STATES  
OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,

*Petitioners,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**OPENING BRIEF OF PETITIONERS  
CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION**

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**QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

**RULE 24.1(b) STATEMENT**

Petitioners in Case No. 12-1272 are the Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation. The Chamber of Commerce of the United States of America was petitioner or petitioner-intervenor as to all of the challenged agency actions addressed by the consolidated judgment below. The State of Alaska and the American Farm Bureau Federation were petitioners and/or petitioner-intervenors in cases addressed by the consolidated judgment below.

This case has been consolidated with Case Nos. 12-1146, 12-1248, 12-1254, 12-1268, and 12-1269, which arise out of the same proceedings in the court of appeals. Petitioners in those cases are: Utility Air Regulatory Group (*No. 12-1146*); American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association; Portland Cement Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin

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Manufacturers and Commerce (*No. 12-1248*); Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation and Glass Packaging Institute (*No. 12-1254*); Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Joe Barton; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Timber Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and Science and Environmental Policy Project (*No. 12-1268*); and the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality (*No. 12-1269*).

Respondents herein, who were also respondents in the cases below, are the Environmental Protection Agency and the Administrator of the Environmental Protection Agency. Lisa P. Jackson held the office of

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Administrator until February 15, 2013. Gina McCarthy currently holds that office.

Other parties who were petitioners in the cases addressed by the consolidated judgment below are the following: Greg Abbott, Attorney General of Texas; Alpha Natural Resources, Inc.; Haley Barbour, Governor of the State of Mississippi; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Great Northern Project Development, L.P.; Industrial Minerals Association—North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Landmark Legal Foundation; Mark R. Levin; Louisiana Department of Environmental Quality; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Mining Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Rick Perry, Governor of Texas; Rosebud Mining Co.; South Carolina Public Service Authority; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; and Texas Railroad Commission.

Intervenors for petitioners in cases addressed by the consolidated judgment below—other than petitioners herein—include Alpha Natural Resources, Inc.; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of

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Commerce; Associated Industries of Arkansas; Brick Industry Association; Coalition for Responsible Regulation, Inc.; Colorado Association of Commerce & Industry; Commonwealth of Kentucky; Corn Refiners Association; Glass Association of North America; Governor of Mississippi Haley Barbour; Great Northern Project Development, L.P.; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association North America; Kansas Chamber of Commerce and Industry; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Louisiana Department of Environmental Quality; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Manufacturers; National Association of Home Builders; National Cattlemen’s Beef Association; National Electrical Manufacturers Association; National Environmental Development Association’s Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Coal Association; Ohio Manufacturers Association; Peabody Energy Company; Pennsylvania Manufacturers Association; Portland Cement Association; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Virginia Manufacturers Association; Western States

Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

Intervenors for in cases addressed by the consolidated judgment below include Alliance of Automobile Manufacturers; Association of Global Automakers; Center for Biological Diversity; City of New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; Indiana Wildlife Federation; Michigan Environmental Council; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

#### **RULE 29.6 STATEMENT**

No petitioner has a parent company, and no publicly-held corporation has a 10% or greater ownership interest in any petitioner.

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## INTRODUCTION

This case is about the Environmental Protection Agency's determination to regulate greenhouse gas (GHG) emissions under the Clean Air Act (CAA) no matter how much the agency had to distort and even rewrite statutory provisions to do so. In fact, EPA conceded in the rulemaking and in this litigation that extending the CAA's Prevention of Significant Deterioration (PSD) program to cover GHGs produces "absurd" results that Congress never intended. Nonetheless, misreading *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA pressed ahead and promulgated what may be the costliest, most intrusive regulatory program the nation has yet seen. But *Massachusetts* did not address stationary sources in general or the PSD program in particular and hence could not have authorized the rules EPA promulgated below.

The PSD program requires permits to build new facilities or refurbish old ones. The text, structure, purposes, and history of the program show it was designed to apply to emissions of conventional pollutants like lead and carbon monoxide—pollutants that concentrate in local areas and affect health and welfare via direct exposures, such as through inhalation or ingestion. The statutory PSD apparatus simply does not work when applied to substances like GHGs that disperse globally and produce harms unrelated to pollutant exposures. Indeed, EPA's own statements, both in the rulemakings below and subsequent regulatory guidance, make clear that PSD controls can be applied to GHGs only by nullifying many of the program's key statutory elements.

Congress, for instance, set the PSD program's coverage provisions so that its cumbersome and

expensive permitting requirements would apply exclusively to large sources of conventional pollution, like steel mills and power plants. As applied to GHGs, however, the coverage provisions sweep in very small sources, like churches, bakeries, even large private homes. By EPA's admission, Congress never intended such a thing. Nonetheless, the agency plunged ahead and extended the program to encompass GHG emissions.

To justify this programmatic mismatch, EPA deployed the "absurd results" canon and claimed authority to rewrite the statute's numerical provisions defining which pollution sources are subject to PSD requirements. But that is not how the absurdity doctrine works. Once it recognized that the PSD program produced absurd results if extended to include GHGs, EPA should have drawn the obvious conclusion—GHGs are not the type of "pollutant" to which PSD applies. Because EPA overstepped the bounds of its authority, the Court should reverse the D.C. Circuit decision below.

### **OPINIONS AND ORDERS BELOW**

The opinion of the D.C. Circuit is reported at 684 F.3d 102 and reproduced in the Joint Appendix at 191-267. The order denying rehearing en banc is available at 2012 WL 6621785 and reproduced in the Joint Appendix at 139-190.

### **JURISDICTION**

The court of appeals rendered its decision on June 26, 2012, and denied petitions for rehearing on December 20, 2012. On October 15, 2013, the Court granted six petitions for writs of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

Relevant statutes are reproduced in the Statutory Addendum.

## STATEMENT OF THE CASE

In construing the Clean Air Act to justify these regulations, EPA reached an interpretive endpoint that, in its words, is “so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish” that the statute’s language should not be followed. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009). EPA recognized that, under its interpretation, PSD permitting requirements designed for utility and heavy industrial sources would now apply to millions of smaller facilities, including multi-family dwellings and even some large private homes. See *id.* at 55,338.

When faced with the extreme measures and absurd results caused by its preferred policy, EPA rewrote the tons-per-year (tpy) emissions thresholds defining which sources are subject to PSD permitting. As Judges Kavanaugh and Brown observed in separate dissents from the denial of rehearing en banc, this “is not the proper way to interpret a statute.” JA174 (Kavanaugh, J., dissenting); see also JA156-57 (Brown, J., dissenting). “Instead of ‘reading new words into the statute’ to avoid absurd results ... the statute should be interpreted so that ‘no absurdity arises in the first place.’” JA174 (Kavanaugh, J., dissenting) (quoting *Kloeckner v. Solis*, 133 S. Ct. 596, 606-07 (2012)).

1. The Clean Air Act is organized into six titles, none of which expressly addresses controls on GHG emissions or prevention of global climate change:

“Air Pollution Prevention and Control” (Title I, 42 U.S.C. §§ 7401-7515); “Emission Standards for Moving Sources” (Title II, 42 U.S.C. §§ 7521-7590); “General Provisions” (Title III, 42 U.S.C. §§ 7601-7627); “Acid Deposition Control” (Title IV, 42 U.S.C. §§ 7651-7651o); “Permits” (Title V, 42 U.S.C. §§ 7661-7661f); and “Stratospheric Ozone Protection” (Title VI, 42 U.S.C. §§ 7671-7671q); see also 68 Fed. Reg. 52,922, 52,925-29 (Sept. 8, 2003) (JA1341-63) (EPA overview of legislative history as it relates to GHGs). Section 103(g) does mention the most prevalent GHG, carbon dioxide. 42 U.S.C. § 7403(g). Section 103(g) authorizes “nonregulatory strategies and technologies,” and it specifically forbids its use “to authorize the imposition on any person of air pollution control requirements.” *Id.* Neither GHGs in general nor carbon dioxide in particular are mentioned in the Act’s PSD provisions.

GHGs differ in kind from conventional pollutants. See 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,399-401 (JA1083-95). Their concentrations and effects are global in character, in contrast to conventional pollutants, which concentrate in particular areas or regions. See 74 Fed. Reg. at 66,517 (JA871-72); 73 Fed. Reg. at 44,399-401 (JA1083-95). Unlike conventional pollutants, GHGs do not affect health and welfare through direct exposures, such as through inhalation or ingestion. See 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009) (Proposed Endangerment Rule) (“[A]mbient concentrations of carbon dioxide and the other greenhouse gases, whether at current levels or at projected ambient levels ... do not cause direct adverse health effects such as respiratory or toxic effects.”); EPA, *Technical Support Document for Final Endangerment Rule*, Regulatory Docket ID No. EPA-

HQ-OAR-2009-0171-11645, at 21 (Dec. 7, 2009) (available at [http://www.epa.gov/climatechange/Downloads/endangerment/Endangerment\\_TSD.pdf](http://www.epa.gov/climatechange/Downloads/endangerment/Endangerment_TSD.pdf)) (similar). And GHGs, particularly carbon dioxide, are emitted in much greater amounts than conventional pollutants, see 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,407, and from many more sources—including humans. See 75 Fed. Reg. at 31,535 (JA363); 73 Fed. Reg. at 44,376 (JA1041).

The issue of potentially regulating GHGs under the CAA initially arose under the Act's Title II, which focuses on emissions from mobile sources. See 68 Fed. Reg. at 52,922 (JA1332). This issue eventually reached the Court in *Massachusetts*, which held that GHGs are “air pollutants” for purposes of the Act-wide definition in Section 302(g), without addressing the Act's stationary-source provisions. In reaching this conclusion, *Massachusetts* distinguished *FDA v. Brown & Williamson Corp.*, 529 U.S. 120 (2000), reasoning that a ruling favoring the *Massachusetts* petitioners would not “lead to ... extreme measures.” 549 U.S. at 531.

In the proceedings on remand from *Massachusetts*, EPA regulated GHG emissions from new motor vehicles and went on to claim authority to regulate GHG emissions from stationary sources.

**2.** Two programs for regulating stationary-source GHG emissions are at issue in this case: Prevention of Significant Deterioration (PSD) of Title I, part C of the CAA (42 U.S.C. §§ 7470 et seq.), and the permitting provisions of Title V (42 U.S.C. §§ 7661 et seq.). Both programs impose permitting requirements on “major” emitting facilities—stationary sources with the potential to emit specific threshold amounts of “any air pollutant.”

The PSD program forbids the construction of “major emitting facilit[ies]” unless a permit is obtained from a state or federal permitting authority and a series of requirements are met. For purposes of the PSD program, “major emitting facility” means stationary sources that “emit, or have the potential to emit” either 100 tpy or 250 tpy of “any air pollutant.” 42 U.S.C. § 7479(1). Twenty-eight enumerated categories of industrial sources—for example, “iron and steel mill plants” and “primary lead smelters”—qualify as “major emitting facilities” if they have the potential to emit over 100 tpy of “any air pollutant.” *Id.* All other stationary sources qualify if they have potential to emit over 250 tpy of “any air pollutant.” *Id.*

Title V requires stationary sources to obtain state-issued operating permits to establish compliance with the PSD requirements, among others, if they have the potential to emit at least 100 tpy of “any air pollutant.” *Id.* § 7602(j).

3. The PSD program is closely related to maintenance of national ambient air quality standards (NAAQS). Under the NAAQS program, EPA designates certain pollutants as “criteria” pollutants and sets maximum allowable concentrations for regions throughout the nation. 42 U.S.C. §§ 7407, 7409. EPA thus far has designated only six substances as criteria pollutants—carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. All six harm human health and welfare through direct exposure by inhalation, ingestion, and the like; none is a greenhouse gas. See 40 C.F.R. pt. 50; 75 Fed. Reg. at 31,520 (JA298) (“There is no NAAQS for CO<sub>2</sub>.”); EPA, *National Ambient Air Quality Standards (NAAQS)*,

at <http://www.epa.gov/air/criteria.html> (Dec. 14, 2012); EPA, *What Are the Six Common Air Pollutants?*, at <http://www.epa.gov/air/urbanair/> (Apr. 20, 2012); see also EPA, *Health*, at <http://www.epa.gov/airquality/carbonmonoxide/health.html> (last visited Dec. 6, 2013) (describing exposure-related effects of carbon monoxide); EPA, *Health*, at <http://www.epa.gov/airquality/lead/health.html> (last visited Dec. 6, 2013) (same for lead). By contrast, carbon dioxide, the most ubiquitous greenhouse gas, see, e.g., 73 Fed. Reg. at 44,429, does not harm human health or welfare through direct exposure. See 74 Fed. Reg. at 18,901. People and animals exhale carbon dioxide when they breathe, and plants need carbon dioxide to live. See 73 Fed. Reg. at 44,376 (JA1047).

To ensure compliance with the NAAQS, EPA must determine whether a region is in “attainment” (the NAAQS is met), “nonattainment” (the NAAQS remains unmet), or “unclassifiable” (EPA cannot determine whether the NAAQS is met). 42 U.S.C. § 7407(d)(1)(A). The PSD program applies to areas that are in “attainment” or are “unclassifiable,” *id.* § 7471, and requires permits before major emitting facilities are built or modified in those regions, *id.* § 7475(a). To obtain a permit, a regulated facility must, among other things, install the “best available control technology [BACT] for each pollutant subject to regulation under [the CAA].” *Id.* § 7475(a)(4).

4. On remand from *Massachusetts*, EPA opened a single regulatory docket in July 2008, and issued an Advance Notice of Proposed Rulemaking (ANPR) to address GHG emissions from all sources, including both mobile and stationary sources. See 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (JA975, JA979-80).

The ANPR flagged the prospect that application of the PSD and Title V programs to carbon emissions would lead to “absurd” results. 73 Fed. Reg. at 44,503 (JA1272-73), 44,512 (JA1311-12).

In a preface to the ANPR, the EPA Administrator observed that it had “become clear” that EPA regulation of GHGs from motor vehicles under section 202(a)(1) could trigger “regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals,” resulting in “an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.” 73 Fed. Reg. at 44,355 (JA979). The Administrator found that the CAA was “ill-suited for the task of regulating global greenhouse gases.” *Id.* (JA980).

Other federal agencies reinforced EPA’s concerns about absurd consequences. The Department of Energy expressed concern about “an enormously elaborate, complex, burdensome and expensive regulatory regime that would not be assured of significantly mitigating global atmospheric GHG concentrations and global climate change.” *Id.* at 44,365 (JA1004). The Department of Transportation was wary “that attempting to regulate [GHGs] under the [CAA] will harm the U.S. economy while failing to actually reduce global emissions.” *Id.* at 44,362 (JA988). And the Department of Commerce expressed concerns that GHG emission controls “would impose significant costs on U.S. workers, consumers, and producers and harm U.S. competitiveness without necessarily producing meaningful reductions in global GHG emissions.” *Id.* at 44,371 (JA1029).

Departing from the ANPR's single-docket approach, on April 17, 2009, EPA issued a standalone Proposed Endangerment Ruling as to six GHGs, 74 Fed. Reg. 18,886, including the four at issue in *Massachusetts* plus two others that are emitted only by stationary sources. This proposal was soon followed by a final rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (JA793), that was followed in rapid succession by three more final rules, the so-called "Timing Rule" or "Triggering Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010) (JA705), the "Tailpipe Rule," 75 Fed. Reg. 25,324 (May 7, 2010) (JA683), and the "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010) (JA268).

EPA determined in the Triggering Rule that once it had regulated GHG emissions from motor vehicles, it also had to regulate GHG emissions from stationary sources under the PSD program. EPA declared that "once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable." 75 Fed. Reg. at 17,020 (April 2, 2010) (JA778). EPA did likewise for the Title V program. See *id.* at 17,023 (JA788). Further, EPA stated that "[u]nder the current interpretation of the PSD applicability provision, EPA's recent promulgation" of regulations governing GHG emissions from new motor vehicles "will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011." 75 Fed. Reg. at 31,554 (JA449).

In applying the PSD coverage provisions to GHGs, EPA rejected the broadest meaning of "air pollutant" and restricted the term to encompass only "*regulated* air pollutants." Hence, according to EPA,

the PSD and Title V programs would be triggered for stationary sources as of the day that controls mandated by the Tailpipe Rule took effect. See 75 Fed. Reg. 17,004 (JA705). EPA rejected commenters' suggestions that it read "any air pollutant" restrictively to exclude GHGs and include only regulated conventional air pollutants. See *EPA's Response to Public Comments*, Regulatory Docket ID No. EPA-HQ-OAR-2009-0597-0128, at 147 (Mar. 29, 2010) ("Nine industry and commerce commenters ... suggest that EPA clarify in the PSD Interpretive Memo that the term 'Pollutants Subject to Regulation' exclude GHGs.").

5. In the "Tailoring Rule," EPA again acknowledged that applying the PSD and Title V programs to GHGs would produce effects so extreme as to be "absurd." 75 Fed. Reg. at 31,596 (JA631-32), 74 Fed. Reg. 55,292, 55,306-11 (Oct. 27, 2009). In EPA's words, "[a]pplying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish with the PSD requirements—that it should be avoided under the 'absurd results' doctrine." *Id.* at 55,310. In 2009, the PSD program applied to only 280 stationary sources, while Title V reached 14,700 sources—primarily large industrial facilities and power plants. 74 Fed. Reg. at 55,301, 55,302. But because GHGs, especially carbon dioxide, are emitted in far greater amounts, and from many more sources than all other "air pollutants" previously regulated, applying PSD to GHGs would mean that the program would apply to "41,000 new and modified facilities per year," *id.* at 55,301, while the Title V program would apply, for the first time, to "more than six million sources of GHGs," *id.* at

55,302. Not only would such regulation add untold billions in compliance costs and permitting expenses, EPA concluded it could produce permitting delays of up to ten years. See 75 Fed. Reg. at 31,563-64 (JA485-94).

Confronted with the conundrum of how to address absurd results flowing from its preferred policy, EPA rewrote the numerical coverage thresholds set by Congress instead of construing the statute to exclude GHGs from the PSD program. In particular, EPA temporarily exempted some but not all emitters of some but not all pollutants that the statutory text, as construed by the agency, would otherwise cover. See 75 Fed. Reg. at 31,514 (JA268). While Congress determined that the PSD and Title V programs would apply to facilities discharging more than 100/250 tpy, the agency mandated that, to fit the programs to GHGs, they would apply only to sources emitting GHGs in amounts more than 75,000 or 100,000 tpy—two EPA-created thresholds. *Id.*; see also *id.* at 31,516, 31,533 (JA281-82, JA355).

EPA asserted authority to ratchet down the agency-created thresholds over time on grounds it claimed were both “intertwined” with and “independent” of the absurdity doctrine. *Id.* at 31,514 (JA391). Specifically, EPA relied on an “administrative necessity” doctrine, which it contended allows an agency to decline to “follow the literal requirements” of a statute that “is impossible for the agency to administer.” *Id.* at 31,543-44 (JA401-02). And EPA relied on a newly invented doctrine that it contended confers expansive agency authority to “implement statutory mandates one step at a time.” *Id.* at 31,544 (JA403). In this fashion, EPA claimed discretion to regulate more parties by

further changing the coverage thresholds in future years.

6. More than seventy business groups, public policy groups, and States challenged EPA's rulemakings. In a *per curiam* opinion, a D.C. Circuit panel rejected these challenges and held that EPA's reasoning in support of the decision to "trigger" the PSD program had appropriately led the agency to deviate from "the literal statutory definition of air pollutant." JA237.

The panel denied rehearing, and the court denied rehearing en banc, with Judge Kavanaugh and Judge Brown dissenting separately. Both Judge Brown and Judge Kavanaugh viewed skeptically EPA's response to the acknowledged "absurd results" of its interpretation, deeming it a kind of "abuse" used "to preempt legislative prerogatives." JA158-59 (Brown, J., dissenting); see also JA189-90 (Kavanaugh, J., dissenting). Judge Kavanaugh noted that "an unusual twist" in this case is that "EPA openly acknowledged unreasonableness—indeed, the absurdity—caused by its interpretation of the statute." JA173. Yet, "EPA surprisingly did not choose the seemingly obvious option" of revisiting its construction of "any air pollutant" and adopting a narrower construction that would eliminate the absurdity. *Id.* In Judge Kavanaugh's view, EPA's absurdity-causing interpretation of "any air pollutant" is "the most critical point in this case," even though the panel failed to address it. JA187. According to Judge Kavanaugh, "EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that." JA187. Judge Brown separately emphasized that "[a]lthough the *Massachusetts* Court

distinguished *Brown & Williamson*, it did so only in the context of tailpipe emissions. Its reasoning did not extend to Title V and the PSD program.” JA163. “Congress simply did not intend for EPA to convert the ‘Clean Air Act’ to the ‘Warm Air Act’ writ large.” JA166.

7. Nine petitions for certiorari followed, six of which the Court granted.

### SUMMARY OF THE ARGUMENT

Through the so-called “Triggering Rule,” EPA expanded the PSD program’s ambit to encompass millions of new stationary sources, all the way down to neighborhood restaurants and even some homes. But by EPA’s own admission, the fit between the PSD program and GHG regulation is so poor as to produce absurd results, which EPA decided to address through statutory “tailoring.” Surely, the fact EPA needed to perform such a thing as statutory “tailoring” should have set off alarms that its interpretive enterprise had badly gone awry.

Regardless of how the Clean Air Act’s mobile-source provisions might work, the Act’s PSD provisions, properly construed, cannot and do not work if extended to encompass GHGs. Indeed, the only way to shoehorn GHGs into the PSD program is by nullifying many core statutory requirements. (See Section I, *infra*.) Moreover, even if EPA’s statute-nullifying PSD interpretation were the only one available (which it is not), proper application of the absurdity doctrine would still compel the conclusion that PSD regulation of GHGs falls beyond EPA’s statutory authority. (See Section II, *infra*.)

## ARGUMENT

EPA offered various justifications for rewriting the PSD program's emission thresholds while it dramatically expanded its regulatory authority. But the occasion for rewriting statutory provisions would never have arisen if the agency had properly construed the PSD provisions and properly applied the absurdity doctrine. Moreover, if the Court holds the PSD program cannot extend to GHGs, then by the same reasoning Title V cannot extend to GHGs. Because whether Title V properly applies to GHGs presents a parallel question to whether the PSD program applies, we do not address it separately.

Against this backdrop, we focus solely on the PSD program and absurdity doctrine. We focus in particular on the two dispositive questions—whether EPA properly concluded that the PSD statutory provisions extend to encompass GHGs and, if so, whether EPA properly responded to the admitted absurdity that arises from this extension. EPA erred on both questions.

### **I. EPA Erred By Rewriting or Ignoring the Plain Terms of the PSD Statutes in Order to Extend the Program to Encompass GHGs.**

In response to a petition asking EPA to regulate mobile-source emissions, the Court concluded in *Massachusetts* that GHGs are “air pollutants” for purposes of the Act-wide definition in Section 302(g). But *Massachusetts* neither addressed the Act's stationary-source provisions nor had occasion to consider EPA's ultimate determination on remand that applying the PSD program to GHGs produces absurd results. The posture and stated limits of *Massachusetts* are significant because, regardless of

how the CAA's mobile-source emissions programs might be framed, the PSD program for stationary sources, if applied to GHGs, produces the very type of "extreme measures" that *Massachusetts* disapproved. 549 U.S. at 531.

The fact that PSD regulation of GHGs requires that the statute's coverage thresholds be multiplied by orders of magnitude itself dooms EPA's rulemakings. But the incompatibilities between the statutory PSD provisions and EPA's implementing rulemakings and guidance documents extend well beyond unworkable coverage thresholds. If allowed to stand, EPA's "tailoring" of the Act will become an ongoing enterprise that requires and enables the agency to cut, reshape, and remold numerous parts of the statute.

1. The PSD program's stated purposes underscore that it is designed to address only pollutants that, unlike GHGs, produce exposure-related harms, concentrate locally, and are emitted in modest amounts from very large facilities that Congress determined are best able to reduce emissions in economically feasible ways.

***Prevention of Exposure-Related Harms.*** The first of the PSD program's stated purposes is to "protect public health and welfare" from adverse effects that "occur from air pollution or from *exposures* to pollutants in other media, which pollutants originate as emissions to the ambient air" notwithstanding attainment of NAAQs standards. 42 U.S.C. § 7470(1) (emphasis added). This reference to preventing "exposures to pollutants"—whether directly from air pollution or indirectly via "other media"—makes clear the program aims at curtailing

the types of exposure-related harms characteristic of conventional pollutants.

***Control of Localized Concentrations.***

Congress also declared that the program's purposes include preventing harmful interstate transport of pollutants that produces "deterioration of air quality for any other State," 42 U.S.C. § 7470(4), and assuring that any "decision to permit increased air pollution *in any area*" is made only upon "careful evaluation" and after opportunity for "informed public participation." *Id.* § 7470(5) (emphasis added). In other words, the program was established to control localized concentrations of harmful pollutants—concentrations that can sensibly be ascribed to a particular "state" or a particular "area."

***Economically Feasible Application.*** A third purpose is to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). The PSD program's 100/250 tpy thresholds, see *id.* § 7479(1), implement this important purpose by imposing burdensome case-by-case PSD permitting requirements only on the "large" emissions sources that can most readily bear these costs. See, e.g., *Alabama Power Co. v. Costle*, 636 F.2d 323, 348 (D.C. Cir. 1979) (per curiam). Here, moreover, EPA admits that "the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs ...." 75 Fed. Reg. at 31,533 (JA356).

2. Unsurprisingly, the PSD program's declared purposes dovetail with and reinforce its operative provisions. As a result, EPA's extension of the program to encompass GHGs nullifies or renders unworkable core provisions of the program.

***Local Air Impact Analysis.*** Sections 165(a)(2) and (e)(1)'s public participation and local air quality assessment provisions cannot be squared with extending the program to GHGs. These Sections work in tandem to require a non-discretionary “public hearing” regarding “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.” 42 U.S.C. § 7475(e)(1) (emphasis added). Likewise, Section 165(e)(3) requires that the Administrator “shall” analyze “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 Act.” *Id.* § 7475(e)(3) (emphasis added).

These features make sense when applied to conventional pollutants that give rise to localized, exposure-related harms due to impacts on “ambient air quality.” But they make no sense as applied to substances that do not degrade “ambient air quality” and whose concentrations and impacts can be meaningfully assessed only on a global scale. Indeed, EPA has effectively conceded as much, informing PSD permit applicants and authorities that they may ignore the statutory “ambient air” requirements because GHGs—being “well-mixed” in the atmosphere—do not give rise to localized impacts. See, e.g., *PSD and Title V Permitting Guidance for Greenhouse Gases* 48 (2011), available at [http://www.epa.gov/nsr/ghgdocs/ghgpermitting\\_guidance.pdf](http://www.epa.gov/nsr/ghgdocs/ghgpermitting_guidance.pdf) (“Considering the nature of GHG emissions and their global impacts, EPA does not believe it is practical or appropriate to expect permitting authorities to collect

monitoring data for purpose of assessing ambient air impacts of GHGs.”).

***Case-by-Case Economic Analysis.*** Building on its stated purposes, the PSD program mandates that “case-by-case ... economic” analyses be undertaken in issuing PSD permits for large facilities. 42 U.S.C. § 7479(3). Because the PSD program properly applies only to large sources that emit conventional pollutants, it makes sense to require expensive, case-by-case analyses to determine the best available control technology for each individual facility.

Case-by-case BACT assessments are impossible to faithfully adapt, however, in the GHG context, especially for carbon dioxide. If EPA’s interpretation of the program were correct, six million facilities, including 4.5 million residential facilities, would become subject to case-by-case PSD emission-control assessments. To address this unmanageable caseload and avoid imposing intolerable costs on small emitters, EPA has effectively eliminated case-by-case analysis, declaring that small GHG emitters shall eventually be governed by “presumptive” BACT standards and “general” permitting. See, e.g., 75 Fed. Reg. at 31,526 (JA325). But although Title V expressly provides for such general permitting, see 42 U.S.C. § 7661c(d), the PSD program does not.

***Case-by-Case Energy and Environmental Analysis.*** The PSD program also requires “case-by-case” analysis of both “energy ... impacts” and “environmental ... impacts.” 42 U.S.C. § 7479(3). A cardinal rule of interpretation requires that these distinct statutory terms must carry distinct meanings. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In the context of PSD permitting for controls on conventional pollutants, this basic rule of

construction is readily followed. When permitting authorities confront proposed PSD controls in conventional-pollutant settings, they can and do make straightforward, independent, and sensible assessments of both energy and environmental impacts. In that context, a permitting authority need only consider the extra energy needed to prevent additional conventional pollution, for instance, by installing energy-consuming pollution-control equipment like the desulfurization units known as “scrubbers.” But when applied to the release of energy and carbon dioxide through burning fossil fuels, the required energy-impact and environmental-impact assessments become hopelessly muddled. The whole reason for emitting carbon dioxide, after all, is that fossil fuels *are* stores of energy and this energy can be released through combustion. As a result, what should be distinct inquiries into “energy” and “environmental” impacts collapse, in the context of fossil-fuel burning, into one and the same assessment: how should EPA regulate energy consumption itself?

***Coverage Thresholds.*** EPA recognized that conventional pollutants and GHGs critically differ in the scale on which they are emitted in an industrial economy. See, e.g., 75 Fed. Reg. at 31,535 (JA363) (“[I]t takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 tpy or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of CO<sub>2</sub> that are far in excess of the sources’ quantities of conventional pollutants and that, for even small sources, equal or exceed the 100/250 tpy levels.”).

In other words, as applied to conventional pollutants, the PSD program's 100/250 tpy emission thresholds make sense and limit the program's burdens to large industrial sources. See *id.* But because GHGs, especially carbon dioxide, are emitted in much greater amounts than conventional pollutants, GHG emissions from a given facility will often exceed by orders of magnitude the facility's conventional-pollutant emissions. As a result, extending the PSD program to GHGs does violence to the Act's coverage thresholds, set with exposure-related harms caused by modestly sized conventional pollutant emissions in mind. The realization that the statutory thresholds fail in a GHG context to effectively winnow out small facilities prompted EPA's concession below that applying the statutory terms to GHGs would be "absurd."

These multiple contradictions, taken individually and even more when taken together, are fatal to EPA's reading of the Act. After all, a statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," especially in cases where "only one of the permissible meanings produces a substantive effect compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). Here, the substantive effects of extending the PSD program to GHGs are manifestly untenable. Any such extension means nullifying or rendering unworkable most central elements of the program.

3. EPA nonetheless determined that the statutory reference in the PSD program to "any air pollutant" would include GHGs, pointing to its

reading of *Massachusetts*. 75 Fed. Reg. at 31,561 (JA481).

But tellingly, EPA itself rejected the broadest possible reading of the *Massachusetts* holding; namely, a reading under which “air pollutant” must refer to “any airborne compound of whatever stripe” for all purposes under the Act. 549 U.S. at 529. In proceedings below, EPA read “any air pollutant” under both the PSD and Title V programs to mean, more restrictively, “any *regulated* air pollutant.” JA236. On review, the Court of Appeals endorsed this reasoning and upheld the agency. JA236-41. The Court rejected the alternative view that, for PSD purposes, the relevant pollutant universe should exclude GHGs and thus be confined to *regulated conventional* air pollutants. JA421-46.

In reaching these conclusions, both EPA and the D.C. Circuit recognized that words and phrases like “any air pollutant,” 42 U.S.C. § 7479(1), and “each pollutant,” *id.* § 7475(a)(4), can and should be read in context. See *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (holding in a CAA case decided the same day as *Massachusetts* that “identical words used in different parts of the same act” need not always have the same meaning); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976) (holding that the term “pollutant”—defined to include “radioactive materials”—was properly read in context to exclude three types of radioactive materials). In light of this recognition and the interpretive evidence canvassed above, EPA and the D.C. Circuit should have further recognized that the term “pollutant” must be read in a PSD context to stop short of encompassing GHGs.

4. Finally, EPA was simply not permitted under the Court's precedents to interpret its authority to regulate localized emissions of conventional pollutants as an implicit grant of authority to regulate the conceptually distinct problem of global climate change. See *Brown & Williamson*, 529 U.S. at 160 (striking down FDA regulation of cigarettes); see also *Gonzales v. Oregon*, 546 U.S. 243 (2006) (striking down DoJ regulation of physician-assisted suicide); *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (striking down FCC deregulation of long-distance carriers). This is true "[r]egardless of how serious" the problem the agency "seeks to address" may be. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (quotation marks and citations omitted); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("axiomatic" that agencies lack power to promulgate regulations in absence of congressional authorization). And it is especially true here, in light of the "economic and political significance" of this expansive claim of new authority. *Brown & Williamson*, 529 U.S. at 160. Indeed, the implications of EPA's claim of authority here are so great that, in the words of the Secretaries of Agriculture, Energy, Transportation, and Commerce, it would turn the agency into a "de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development." 73 Fed. Reg. at 44,360 (JA985).

If *Brown & Williamson*, *MCI*, and *Gonzales* were "extraordinary" cases requiring the relevant agencies to "hesitate" before finding an improbable "implicit delegation," 529 U.S. at 143, 159, this case surely is

even more extraordinary and requires even more hesitation. In *Massachusetts*, the Court reasoned that construing “air pollutant” to include GHGs “would lead to no ... extreme measures” because there was “nothing counterintuitive to the notion that EPA can curtail” automotive GHG emissions. 549 U.S. at 531. Unlike in *Massachusetts*, where the mobile sources at issue already faced functionally equivalent Department of Transportation fuel economy regulations of their emissions, it is difficult to imagine administrative measures and real-world consequences more extreme than those presented by EPA’s triggering of PSD and Title V regulation of GHGs from all types of stationary sources.

In sum, EPA points to nothing in the text, structure, purposes, or history of the Clean Air Act, nor in any background principle of construction, remotely adequate to establish that Congress intended to grant it authority to regulate GHGs under the PSD program. Indeed, the *only* substantial evidence the agency can marshal is the Act’s use of the term “air pollutant,” but even EPA concedes this language cannot be taken in its broadest sense. As a matter of first principles, EPA’s willingness, perhaps eagerness, to construe statutory language in a manner that produces absurd results and expands its jurisdiction to where it becomes a “de facto zoning authority” cannot be squared with the Court’s precedents.

## **II. EPA Erred By Deploying the Absurdity Doctrine As a Roving License to Ignore Statutory Text.**

In choosing to trigger controls on emissions of GHGs under the PSD program, notwithstanding that the triggering produces absurd results, EPA

overlooked the elementary rule that, when confronted with potentially absurd statutory results, the first and best option is to read the relevant statute so that “no absurdity arises in the first place.” *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012); see also *Nixon v. Missouri Mun. League, Inc.* 541 U.S. 125, 138 (2004) (avoiding interpretation “that leads to absurd or futile results”) (citation omitted); cf. John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2392-93 (2003) (urging careful textual analysis to avoid recourse to the absurdity doctrine). EPA should have recognized, before embarking on statutory reconstruction, that it was bound to reject an admittedly absurd interpretation in favor of the more natural reading of the statute described above.

1. Rather than properly interpreting the CAA, EPA invoked a novel, agency-authority-maximizing version of the absurdity doctrine that finds no support in the Court’s cases. As explained below, even in rare cases where absurd results are unavoidable, courts and agencies do not attain *carte blanche* to rewrite a statute, much less a roving commission to continually modify it well into the future. A review of this Court’s decisions over two centuries recognizes just two principal ways to respond to unavoidably absurd applications of statutory language.

*First*, where a minor, self-evident adjustment to literal meaning suggests itself, the Court has applied that adjustment rather than the statute’s literal terms. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). *Second*, in even rarer circumstances, the Court has declared a specific application of a statute, seemingly authorized by its plain terms, to be beyond its proper scope. See, e.g.,

*United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868). What the Court has never condoned is what EPA did here—using potentially absurd applications of statutory language as grounds for an “unhealthy process of amending the statute” by interpretation. *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment). Such “loose invocation[s]” of the canon create intolerable risks that the relevant court or agency will exercise “its own ‘WILL instead of JUDGMENT,’ with the consequence of ‘substituting its own pleasure to that of the legislative body.’” *Id.* at 471 (quoting *The Federalist* No. 78, p. 469 (C. Rossiter ed. 1961)) (internal alterations omitted).

Having concluded that its preferred construction produces unavoidably absurd results, EPA was bound to inquire whether a minor, self-evident adjustment to statutory language was available for resolving the identified absurdity and, if not, to conclude simply that GHG regulation lay beyond the permissible scope of the PSD provisions.

2. Because the absurdity doctrine is an accepted interpretive canon, EPA properly concluded that it applies at *Chevron* step one. See 75 Fed. Reg. at 31,545 (JA408-09). At this first *Chevron* step, courts consider statutory meaning by applying “traditional tools of statutory construction,” without any deference to an implementing agency’s interpretation. *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). These “traditional tools” include accepted construction canons, see, e.g., *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001), and these canons include the principle that statutes should be construed to avoid absurd

results—a practice deeply embedded in the Court’s jurisprudence and embraced for centuries by leading authorities. See *Kirby*, 74 U.S. (7 Wall.) at 487 (citing Baron Samuel von Pufendorf and Sir Edmund Plowden); see also, e.g., *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542 (1940); *Sorrells v. United States*, 287 U.S. 435, 450 (1932); *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 403 (2d ed. 1858); 1 W. Blackstone, *Commentaries on the Laws of England* 60, 61 (1765).

After correctly concluding that its preferred construction produces absurd results and that the absurdity doctrine binds agencies at *Chevron* step one, EPA got practically everything else about the doctrine wrong. This case is singular in that it appears to be the first in the Court’s history where no party disputes that an agency’s interpretation of a statute it administers produces absurd results. This case, therefore, turns solely on whether EPA can deploy an admittedly absurd statutory result to rewrite statutory text and bolster its own regulatory authority—as opposed to the more modest step of embracing an interpretation that avoids absurd results from the outset by excluding GHGs from the PSD requirements.

3. EPA chose neither of the two distinct and discernible paths by which the Court’s precedents allow an unavoidable absurdity to be safely addressed.

The first of the two paths marked out by the Court’s cases follows in the wake of Blackstone’s classic admonition that “where words bear either none, or a very absurd signification, if literally understood, *we must a little deviate from the received*

*sense of them.*” Blackstone, *supra*, at 61 (emphasis added).

Blackstone’s classic formulation recognizes that minor “deviations” from legislative text—as opposed to wholesale rewriting at the discretion of a court or agency—can at times produce a more faithful application of the statute than “literal[]” application of the law. *Id.* But such “deviations” must indeed be “little.” Hence, this approach to addressing an absurdity has been essentially confined to making self-evident adjustments to a statute’s scope, making it slightly more or less inclusive, not unlike correcting a scrivener’s error. See, e.g., *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring) (correcting text where nuance “could understandably have been omitted by inadvertence”). Limited in this fashion, courts can have confidence in their fidelity to congressional enactments. Accordingly, where self-evident deviations from literalism will prevent an absurdity, the Court has been willing to countenance such deviations.

The Court has followed this first path marked by Blackstone on numerous occasions, countenancing minor, self-evident, textual “deviations” to avoid absurdity without invading the legislative province or rewriting statutory terms from scratch. In *Bock Laundry*, for instance, the Court interpreted the word “defendant” in a federal rule of evidence to mean only criminal defendants, not civil defendants, for, as the Court explained, the language as written could not “mean what it sa[id].” 490 U.S. at 511. In *United States v. X-Citement Video, Inc.*, the Court rejected the “most natural grammatical reading” of a child-pornography statute and construed “the term ‘knowingly’” to “extend[] both to the sexually explicit

nature of the material and to the age of the performers” rather than merely to the transportation or shipment of a visual depiction in interstate or foreign commerce. 513 U.S. 64, 68-69, 78 (1994). In *Clinton v. City of New York*, the Court concluded that the category of “individuals” permitted to obtain expedited review of the constitutionality of the line-item veto statute should be interpreted to encompass not only natural persons but also corporate “persons” because it would be absurd to exclude corporate plaintiffs from the benefits of such review. 524 U.S. 417, 428-29 (1998). And in *Johnson v. South Pacific Co.*, the Court read “locomotives” to fall within a definition of rail “cars,” notwithstanding definitional language pointing in the other direction, in order to effectuate a railroad safety statute requiring that safer train couplings be used in interstate commerce. 196 U.S. 1, 14-15 (1904).

In each of these cases, the Court took care to respect statutory text by making what it thought were minor, natural adjustments to the scope of statutory language. “Any entity” meant any private entity. “Defendant” meant only criminal defendants. “Knowingly” applied to all elements of an offense. “Individual” was read to include all legal persons, including corporations. And rail “cars” was read to include all parts of a train, including locomotives. While some of these “deviations” prompted objections from dissenting justices, none were open-ended. All involved what appeared to be self-evident adjustments not unlike the correction of scrivener’s errors. Cf., e.g., *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring).

The second path marked by the Court’s precedents, also drawn from Blackstone, applies in

situations where “there arise[s]” from a statute “any absurd consequences, manifestly contrary to common reason” (that cannot be addressed by deviating just a little from the unaltered text). Blackstone, *supra*, at 91. According to Blackstone, such statutes should be construed with regard to such consequences as “void.” *Id.*

Accordingly, where, as here, an absurdity cannot be avoided through a fairly evident and minor adjustment to statutory language, the particular application of the statute’s literal language must be deemed simply and altogether beyond the statute’s scope. *Kirby* presents the classic example. In that case, a county sheriff arrested a mail carrier for murder while the mail carrier was delivering the mail. A federal statute declared that if any person should knowingly and willfully obstruct or retard the passage of the mail, the person would be subject to penalty. 74 U.S. at 482. The question in *Kirby* was whether the sheriff could be punished for arresting an accused murderer, an obvious absurdity. Although recognizing that the act’s categorical language contained no exceptions for officers acting in their official duties, the Court declared the particular situation before it beyond the intended compass of the law. See *id* at 487.

Following *Kirby*, the Court has occasionally concluded that a literal application of statutory language would create absurd results, but found no evident deviation from the statute’s literal terms was available. In those rare cases, the Court has been satisfied to hold that the particular application at issue falls outside the statute’s scope. See, e.g., *Public Citizen*, 490 U.S. at 443 (Federal Advisory Committee Act does not apply to communications

with the American Bar Association regarding judicial nominations); *Sorrells*, 287 U.S. at 448-49 (criminal statute does not apply to case of entrapment); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892) (immigration statute does not apply to clergyman). In none of these cases did the Court strain to offer a definitive reinterpretation of the meaning of the relevant text. It instead concluded, more modestly, that the statute at issue ought not be interpreted to extend so far as to produce absurd results in the instance at hand.

4. EPA failed to appreciate any limitations on the options available for addressing statutory absurdities, and the court below did not even address the issue with regard to EPA's triggering of PSD and Title V. If either had done so—after identifying what concededly were extreme and absurd results and realizing no minor, self-evident “deviation” from statutory text would eliminate them—they would have simply concluded that Congress had not authorized the type of extreme measures needed to bring GHGs under the PSD program.

Remarkably, after realizing that its PSD “triggering” would create results “so contrary to what Congress had in mind” that they “should be avoided under the ‘absurd results’ doctrine,” 74 Fed. Reg. at 55,310, EPA did nothing to prevent the triggering. It opted instead to try to partially alleviate the ensuing absurd results by rewriting codified numerical thresholds, while nullifying other statutory requirements by fiat. In this fashion, EPA replaced the statute's numerical limits with limits of the agency's choosing. See 75 Fed. Reg. at 31,533 (JA355-56).

Significantly, however, there is nothing minor or self-evident about a decision to “unilaterally” increase the statute’s coverage thresholds for stationary-source emissions of some (but not all) pollutants from “250 tons to 100,000 tons—a 400-fold increase.” JA173 (Kavanaugh, J., dissenting). Far from it, selecting a numerical parameter to delineate the bounds of regulatory authority is a quintessentially legislative decision. See, e.g., *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (explaining an agency rule was legislative because “[t]here is no way to reason” to a particular number selected by the agency) (Posner, J.). This is especially true here, where EPA purports to retain still more discretion to further modify the agency-created numerical thresholds over time. Nothing in the statute’s text or structure even hints at the precise thresholds EPA selected as its initial, preferred PSD coverage levels, and in fact EPA proposed thresholds substantially different from the ones it eventually promulgated. See 74 Fed. Reg. at 55,292 (proposing 25,000 tpy threshold).

EPA’s statutory rewrite was thus by no means self-evident or akin to correcting a scrivener’s error. It was extreme by any measure and not at all authorized by *Massachusetts*, which expressly admonished EPA not to assume “a roving license to ignore the statutory text” and expressly required EPA to ground its “action or inaction in the statute.” 549 U.S. at 533, 535.

In sum, the whole justification for the absurdity doctrine is to better discover and better apply the true meaning of the law. But as invoked by EPA, the doctrine has been transformed from a way of ensuring fidelity to congressional enactments into a

springboard for an agency's never-ending and ultimately legislative rewriting of statutes. Once EPA saw that triggering PSD controls for GHGs produces absurd results, it ought to have recognized that, when facing such results, the best option is to read a statute so no absurdity arises in the first place, as we and other petitioners contend. But failing that, EPA ought to have appreciated at a bare minimum—under the Court's precedents and principles dating to Blackstone—that because no self-evident textual adjustments were available for eliminating the absurdity and still accommodating PSD regulation of GHGs, such regulation necessarily falls, quite simply, beyond the agency's authority.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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**STATUTORY ADDENDUM**

**Clean Air Act (“CAA”)**

Title I — Air Pollution Prevention and Control

Part A — Air Quality and Emission Limitations

- CAA § 103(g), 42 U.S.C. § 7403(g)..... 1a
- CAA § 107, 42 U.S.C. § 7407 ..... 3a
- CAA § 109, 42 U.S.C. § 7409 ..... 17a

Part C — Prevention of Significant Deterioration of Air Quality

Subpart 1 - Clean Air

- CAA § 160, 42 U.S.C. § 7470 ..... 21a
- CAA § 161, 42 U.S.C. § 7471 ..... 22a
- CAA § 163, 42 U.S.C. § 7473 ..... 23a
- CAA § 165, 42 U.S.C. § 7475 ..... 29a
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Title II — Emission Standards for Moving Sources

Part A — Motor Vehicle Emission and Fuel Standards

- CAA § 202, 42 U.S.C. § 7521 ..... 50a

Title III — General Provisions

- CAA § 302, 42 U.S.C. § 7602 ..... 86a

Title V — Permits

- CAA § 501, 42 U.S.C. § 7661 ..... 92a
- CAA § 502, 42 U.S.C. § 7661a ..... 94a
- CAA § 503, 42 U.S.C. § 7661b ..... 108a
- CAA § 504, 42 U.S.C. § 7661c ..... 111a

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**42 U.S.C. § 7403(g): Research, investigation,  
training, and other activities**

\* \* \*

**(g) Pollution prevention and emissions control**

In carrying out subsection (a) of this section, the Administrator shall conduct a basic engineering research and technology program to develop, evaluate, and demonstrate nonregulatory strategies and technologies for air pollution prevention. Such strategies and technologies shall be developed with priority on those pollutants which pose a significant risk to human health and the environment, and with opportunities for participation by industry, public interest groups, scientists, and other interested persons in the development of such strategies and technologies. Such program shall include the following elements:

**(1)** Improvements in nonregulatory strategies and technologies for preventing or reducing multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide, from stationary sources, including fossil fuel power plants. Such strategies and technologies shall include improvements in the relative cost effectiveness and long-range implications of various air pollutant reduction and nonregulatory control strategies such as energy conservation, including end-use efficiency, and fuel-switching to cleaner fuels. Such strategies and technologies shall be considered for existing and new facilities.

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(2) Improvements in nonregulatory strategies and technologies for reducing air emissions from area sources.

(3) Improvements in nonregulatory strategies and technologies for preventing, detecting, and correcting accidental releases of hazardous air pollutants.

(4) Improvements in nonregulatory strategies and technologies that dispose of tires in ways that avoid adverse air quality impacts.

Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements. The Administrator shall consult with other appropriate Federal agencies to ensure coordination and to avoid duplication of activities authorized under this subsection.

\* \* \*

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**42 U.S.C. § 7407: Air quality control regions**

**(a)** Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

**(b)** Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title-

**(1)** an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

**(2)** the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

**(c)** Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with

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appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

**(d) Designations**

**(1) Designations generally**

**(A) Submission by Governors of initial designations following promulgation of new or revised standards**

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

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

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

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**(iii)** unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

**(B)** Promulgation by EPA of designations

**(i)** Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

**(ii)** In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate

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why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

**(iii)** If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

**(iv)** A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

**(C)** Designations by operation of law

**(i)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

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**(ii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

**(iii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

**(2)** Publication of designations and redesignations

**(A)** The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

**(B)** Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

**(3)** Redesignation

**(A)** Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning

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and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

**(B)** No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

**(C)** No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under

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subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

**(D)** The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

**(E)** The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

**(i)** the Administrator determines that the area has attained the national ambient air quality standard;

**(ii)** the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

**(iii)** the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

**(iv)** the Administrator has fully approved a

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maintenance plan for the area as meeting the requirements of section 7505a of this title; and

**(v)** the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

**(F)** The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

**(4)** Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

**(A)** Ozone and carbon monoxide

**(i)** Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

**(ii)** No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60

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days” shall be substituted for the phrase “120 days” in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

**(iii)** No nonattainment area may be redesignated as an attainment area under this subparagraph.

**(iv)** Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding,

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within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

**(B) PM-10 designations**

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)—

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**(i)** each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

**(ii)** any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

**(iii)** each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

**(5)** Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems

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appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase “2 years from the date of promulgation of the new or revised national ambient air quality standard” shall be replaced by the phrase “1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead”.

**(6) Designations****(A) Submission**

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

**(B) Promulgation**

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM national ambient air quality standards.

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**(7) Implementation plan for regional haze**

**(A) In general**

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as “regional haze requirements”).

**(B) No preclusion of other provisions**

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

**(e) Redesignation of air quality control regions**

**(1)** Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be

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modified accordingly.

**(2)** In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

**(3)** No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

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**42 U.S.C. § 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**

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**(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 NO<sub>2</sub> 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

19a

**(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.

20a

(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.

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**42 U.S.C. § 7470: Congressional declaration of purpose**

The purposes of this part are as follows:

- (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;
- (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
- (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
- (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
- (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

22a

**42 U.S.C. § 7471. Plan requirements**

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

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**42 U.S.C. § 7473: Increments and ceilings**

**(a)** Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

**(b)** Maximum allowable increases in concentrations over baseline concentrations

**(1)** For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 24a

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

**(2)** For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 25a

Pollutant	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	512

**(3)** For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

## 26a

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) 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.

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**(c)** Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

**(1)** In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

**(A)** concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of Title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

**(B)** the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C.A. § 791a et seq.] over the emissions from such sources before the effective date of such plan,

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(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

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**42 U.S.C. § 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

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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 facility 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

31a

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)**

32a

**(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.

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**(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:

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**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.

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**(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:

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**MAXIMUM ALLOWABLE INCREASE**

**[In micrograms per cubic meter]**

<b>Period of exposure</b>	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

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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,

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(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.

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**42 U.S.C. § 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.

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**42 U.S.C. § 7479: Definitions**

For purposes of this part—

(1) The term “major emitting facility” means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty 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 fifty 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 two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

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**(2)**

**(A)** The term “commenced” as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

**(B)** The term “necessary preconstruction approvals or permits” means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

**(C)** The term “construction” when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

**(3)** The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic

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impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

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**42 U.S.C. § 7491: Visibility protection for Federal Class I areas**

**(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

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**(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

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**(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.

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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.

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**(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

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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;

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(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.

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**42 U.S.C. § 7521: Emission standards for new motor vehicles or new motor vehicle engines**

**(a)** Authority of Administrator to prescribe by regulation

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

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

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

**(3)**

**(A)** In general

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**(i)** Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

**(ii)** In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

**(B)** Revised standards for heavy duty trucks

**(i)** On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the

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date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

**(ii)** Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO<sub>x</sub>) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

**(C)** Lead time and stability

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

**(D)** Rebuilding practices

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment

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cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

**(E) Motorcycles**

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

**(4)**

**(A)** Effective with respect to vehicles and engines manufactured after model year 1978, no emission

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control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

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

**(5)**

**(A)** If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall,

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after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

**(B)** Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

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

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

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**(6) Onboard vapor recovery**

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based (“onboard”) systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer’s fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

**IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS**

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<b>Model year commencing after standards promulgated</b>	<b>Percentage*</b>
Fourth.....	40
Fifth.....	80
After Fifth.....	100

\*Percentages in the table refer to a percentage of the manufacturer’s sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture

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efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

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

**(1)**

**(A)** The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to

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emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

**(B)** The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any

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light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that—

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

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

(C) The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards

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are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

**(3)** For purposes of this part--

**(A)**

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

**(ii)** For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining “model year” otherwise than as provided in clause (i).

**(B)** Repealed. Pub.L. 101-549, Title II, § 230(1), Nov. 15, 1990, 104 Stat. 2529.

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

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special features enabling off-street or off-highway operation and use.

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

**(A)** that such waiver would not endanger public health,

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

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

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

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

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

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

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

**(4)** The Administrator shall furnish to such

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

**(d) Useful life of vehicles**

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

**(1)** in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000

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miles (or the equivalent), whichever first occurs;

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

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

**(e)** New power sources or propulsion systems

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

**(f)** High altitude regulations

**(1)** The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the

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country shall take effect no earlier than model year 1981.

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

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

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

**(B)** the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission

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requirements without reducing model availability;  
and

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

**(g)** Light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles; standards for model years after 1993

**(1)** NMHC, CO, and NO<sub>x</sub>

Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NO<sub>x</sub>) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation schedule below:

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**TABLE G—EMISSION STANDARDS FOR NMHC, CO,  
AND NO<sub>x</sub> FROM LIGHT-DUTY TRUCKS OF UP TO 6,000  
LBS. GVWR AND LIGHT-DUTY VEHICLES**

Vehicle type	Column A			Column B		
	(5 yrs/50,000 mi)			(10 yrs/100,000 mi)		
	NMHC	CO	NO <sub>x</sub>	NMHC	CO	NO <sub>x</sub>
LDTs (0-3,750 lbs. LVW) and light-duty vehicles.....	0.25	3.4	0.4*	0.31	4.2	0.6*
LDTs (3,751-5,750 lbs. LVW).....	0.32	4.4	0.7**	0.40	5.5	0.97

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.

\* In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for NO<sub>x</sub>, the applicable standards for NO<sub>x</sub> shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

\*\* This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).

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**IMPLEMENTATION SCHEDULE FOR  
TABLE G STANDARDS**

<b>Model year</b>	<b>Percentage *</b>
1994 .....	40
1995 .....	80
after 1995.....	100

**(2) PM Standard**

Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles, and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) of this section applicable to emissions of particulate matter (PM) from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

**PM STANDARD FOR LDTS OF UP TO 6,000  
LBS. GVWR**

<b>Useful life period</b>	<b>Standard</b>
5/50,000 .....	0.80 gpm
10/100,000 .....	0.10 gpm

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The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

**IMPLEMENTATION SCHEDULE FOR PM STANDARDS**

.....

<b>Model year</b>	<b>Light-duty vehicles</b>	<b>LDTs</b>
1994 .....	40%*	.....
1995 .....	80%*	40%*
1996 .....	100%*	80%*
after 1996.....	100%*	100%*

**(h)** Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995

Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides

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of nitrogen (NO<sub>x</sub>), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

**TABLE H--EMISSION STANDARDS FOR NMHC AND CO FROM GASOLINE AND DIESEL FUELED LIGHT-DUTY TRUCKS OF MORE THAN 6,000 LBS. GVWR**

LDT Test weight	Column A			Column B			
	(5 yrs/50,000 mi)			(11 yrs/120,000 mi)			
	NMHC	CO	NO <sub>x</sub>	NMHC	CO	NO <sub>x</sub>	PM
3,751-5,750 lbs. TW	0.32	4.4	0.7*	0.46	6.4	0.98	0.10
Over 5,750 lbs. TW	0.39	5.0	1.1*	0.56	7.3	1.53	0.12

Standards are expressed in grams per mile (GPM).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent) whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

\* Not applicable to diesel-fueled LDTs.

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**(i) Phase II study for certain light-duty vehicles and light-duty trucks**

**(1)** The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this subchapter. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

**TABLE 3--PENDING EMISSION STANDARDS FOR GASOLINE AND DIESEL FUELED LIGHT-DUTY VEHICLES AND LIGHT-DUTY TRUCKS 3,750 LBS. LVW OR LESS**

Pollutant	Emission level*
NMHC .....	0.125 GPM
NOx .....	0.2 GPM
CO .....	1.7 GPM

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h) of this section).

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**(2)**

**(A)** As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 7543(b) of this title. As part of such study, the Administrator shall also examine—

**(i)** the availability of technology (including the costs thereof), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) of this section for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

**(ii)** the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this chapter, including their feasibility and cost effectiveness.

**(B)** The Administrator shall submit a report to

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Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

**(3)**

**(A)** Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii).

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The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

**(B)** If the Administrator determines under subparagraph (A) that—

**(i)** there is no need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

**(iii)** obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h) of this section. Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority under subsection (a) of this section to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a) of this

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section.

**(C)** If the Administrator determines under subparagraph (A) that—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h) of this section. Any such standards (or useful life periods) promulgated by the Administrator shall take effect with respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

**(D)** Nothing in this paragraph shall be construed

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by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rulemaking required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 7604(a)(2) of this title (relating to citizen suits).

**(E)** Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1, 2003, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NO<sub>x</sub>), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

**(j)** Cold CO standard

**(1)** Phase I

Not later than 12 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks

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when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

**PHASE-IN SCHEDULE FOR COLD START STANDARDS**

Model Year	Percentage
1994 .....	40
1995 .....	80
1996 and after .....	100

**(2) Phase II**

**(A)** Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees

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Fahrenheit.

**(B)**

**(i)** If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

**(ii)** In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

**(3) Useful-life for phase I and phase II standards**

In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 7525 of this title and in-use compliance under section 7541 of this title, the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the

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Administrator may extend such useful life period (for purposes of section 7525 of this title, or section 7541 of this title, or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d) of this section.

**(4) Heavy-duty vehicles and engines**

The Administrator may also promulgate regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

**(k) Control of evaporative emissions**

The Administrator shall promulgate (and from time to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles—

**(1)** during operation; and

**(2)** over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of

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emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after November 15, 1990. If final regulations are not promulgated under this subsection within 18 months after November 15, 1990, the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this chapter. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

**(l) Mobile source-related air toxics****(1) Study**

Not later than 18 months after November 15, 1990, the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this chapter and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

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**(2) Standards**

Within 54 months after November 15, 1990, the Administrator shall, based on the study under paragraph (1), promulgate (and from time to time revise) regulations under subsection (a)(1) of this section or section 7545(c)(1) of this title containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available, taking into consideration the standards established under subsection (a) of this section, the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under subsection (a) of this section. The regulations shall, at a minimum, apply to emissions of benzene and formaldehyde.

**(m) Emissions control diagnostics****(1) Regulations**

Within 18 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of—

**(A)** accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction,

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including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

**(B)** alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

**(C)** storing and retrieving fault codes specified by the Administrator, and

**(D)** providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines.

**(2)** Effective date

The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

**(3)** State inspection

The Administrator shall by regulation require States that have implementation plans containing

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motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 7541(a) and (b) of this title.

**(4) Specific requirements**

In promulgating regulations under this subsection, the Administrator shall require—

**(A)** that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

**(B)** that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

**(C)** that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

**(5) Information availability**

The Administrator, by regulation, shall require (subject to the provisions of section 7542(c) of this

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title regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. Such information shall also be available to the Administrator, subject to section 7542(c) of this title, in carrying out the Administrator's responsibilities under this section.

**(f) Model years after 1990**

For model years prior to model year 1994, the regulations under subsection (a) of this section applicable to buses other than those subject to standards under section 7554 of this title shall contain a standard which provides that emissions of particulate matter (PM) from such buses may not exceed the standards set forth in the following table:

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**PM STANDARD FOR BUSES**

.....

<b>Model year</b>	<b>Standard*</b>
1991 .....	0.25
1992 .....	0.25
1993 and thereafter .....	0.10

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**42 U.S.C. § 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.

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**(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.

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**(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..<sup>1</sup>

**(l)** The term “standard of performance” means a requirement of continuous emission reduction,

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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

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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<sub>x</sub>.** The term “NO<sub>x</sub>” 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.

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**(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.

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**42 U.S.C. § 7661: Definitions**

As used in this subchapter—

**(1) Affected source**

The term “affected source” shall have the meaning given such term in subchapter IV-A of this chapter.

**(2) Major source**

The term “major source” means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

**(A)** A major source as defined in section 7412 of this title.

**(B)** A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

**(3) Schedule of compliance**

The term “schedule of compliance” means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

**(4) Permitting authority**

The term “permitting authority” means the Administrator or the air pollution control agency

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authorized by the Administrator to carry out a permit program under this subchapter.

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**42 U.S.C. § 7661a. Permit programs****(a) Violations**

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

**(b) Regulations**

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The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

**(1)** Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

**(2)** Monitoring and reporting requirements.

**(3)**

**(A)** A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of—

**(i)** reviewing and acting upon any application for such a permit,

**(ii)** if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including

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any court costs or other costs associated with any enforcement action),

**(iii)** emissions and ambient monitoring,

**(iv)** preparing generally applicable regulations, or guidance,

**(v)** modeling, analyses, and demonstrations, and

**(vi)** preparing inventories and tracking emissions.

**(B)** The total amount of fees collected by the permitting authority shall conform to the following requirements:

**(i)** The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than \$25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

**(ii)** As used in this subparagraph, the term "regulated pollutant" shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been

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promulgated (except that carbon monoxide shall be excluded from this reference).

**(iii)** In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

**(iv)** The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

**(v)** The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after 1990, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause—

**(I)** the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

**(II)** the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

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**(C)**

**(i)** If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

**(ii)** Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

**(iii)** Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any

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fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

**(4)** Requirements for adequate personnel and funding to administer the program.

**(5)** A requirement that the permitting authority have adequate authority to:

**(A)** issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;

**(B)** issue permits for a fixed term, not to exceed 5 years;

**(C)** assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

**(D)** terminate, modify, or revoke and reissue permits for cause;

**(E)** enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation, and provide appropriate criminal penalties; and

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(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and

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monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

**(9)** A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

**(10)** Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions: *Provided*, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

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**(c) Single permit**

A single permit may be issued for a facility with multiple sources.

**(d) Submission and approval**

**(1)** Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

**(2)**

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**(A)** If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

**(B)** If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

**(C)** The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

**(3)** If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program

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under paragraph (1), promulgate, administer, and enforce a program under this subchapter for that State.

**(e) Suspension**

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

**(f) Prohibition**

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

- (1)** All requirements established under subchapter IV-A of this chapter applicable to “affected sources”.
- (2)** All requirements established under section 7412 of this title applicable to “major sources”, “area sources,” and “new sources”.
- (3)** All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to

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sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

**(g)** Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

**(h)** Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the

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Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

**(i) Administration and enforcement**

**(1)** Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

**(2)** Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

**(3)** The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

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(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

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**42 U.S.C. § 7661b. Permit applications**

**(a) Applicable date**

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates--

- (1) the effective date of a permit program or partial or interim permit program applicable to the source; or
- (2) the date such source becomes subject to section 7661a(a) of this title.

**(b) Compliance plan**

- (1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.
- (2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

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**(c) Deadline**

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

**(d) Timely and complete applications**

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a permit required by this subchapter (including

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renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

**(e) Copies; availability**

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

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**42 U.S.C. § 7661c. Permit requirements and conditions**

**(a) Conditions**

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

**(b) Monitoring and analysis**

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

**(c) Inspection, entry, monitoring, certification, and reporting**

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.

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Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

**(d) General permits**

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

**(e) Temporary sources**

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

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**(f)** Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

- (1)** the permit includes the applicable requirements of such provisions, or
- (2)** the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

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**No. 12-1272**  
**(consolidated with 12-1146, 12-1248, 12-1254, 12-1268, and 12-1269)**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,  
*Respondents.*

**CERTIFICATE OF COMPLIANCE WITH RULE 33.1**

I, William H. Burgess, a member of the Supreme Court Bar, hereby certify that the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation complies with the word limitations of this Court's Rule 33.1.

According to the word processing system used to prepare it, the brief contains 8,047 words.



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**(consolidated with 12-1146, 12-1248, 12-1254, 12-1268, and 12-1269)**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND  
AMERICAN FARM BUREAU FEDERATION,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,  
*Respondents.*

**CERTIFICATE OF SERVICE**

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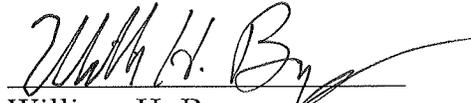
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Thank you!

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Attached is a PDF of the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation, filed today at the Supreme Court.

Regards,

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Subject: RE: Chamber of Commerce/Alaska/AFBF Opening Brief -- Supreme Court consolidated case nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272

Date: Tue Dec 10 2013 10:54:34 EST

Attachments: 12-1254 ts Energy-Intensive Manuf .pdf  
CWEmbed1.xml

Counsel,

Attached is a copy of the brief of the Energy-Intensive Manufacturers, et al. The Chamber's list is broader than the one I used for courtesy copies, so I wanted to make sure everyone got one.

Jack McMackin

From: Burgess, William H. [mailto:wburgess@kirkland.com]

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Subject: Chamber of Commerce/Alaska/AFBF Opening Brief -- Supreme Court consolidated case nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272

All:

Attached is a PDF of the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation, filed today at the Supreme Court.

Regards,

Bill Burgess

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Last Modified: Tue Dec 10 10:54:34 EST 2013

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**Nos. 12-1146, 12-1248, 12-1254,  
12-1268, 12-1269, 12-1272**

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**In The  
Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP, et al.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

*Respondents.*

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**On Writs Of Certiorari To The  
United States Court Of Appeals For The  
District Of Columbia Circuit**

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**BRIEF OF PETITIONERS IN NO. 12-1254,  
THE ENERGY-INTENSIVE MANUFACTURERS  
WORKING GROUP ON GREENHOUSE  
GAS REGULATION AND THE  
GLASS PACKAGING INSTITUTE**

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December 9, 2013

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**QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

## **PARTIES TO THE PROCEEDINGS**

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

### **Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010)** **(the “Timing Rule”):**

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John

**PARTIES TO THE PROCEEDINGS – Continued**

Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Nathan Deal, U.S. Representative, Georgia 9th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers

**PARTIES TO THE PROCEEDINGS – Continued**

Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; Portland Cement Association.

4. Petitioner-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Louisiana Department of Environmental Quality; Michigan Manufacturers Association; National Association Manufacturers; National Mining Association; National Oilseed Processors Association; National Petrochemical

**PARTIES TO THE PROCEEDINGS** – Continued

& Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce.

5. Respondent-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were Alpha Natural Resources, Inc.; American Farm Bureau Federation; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Corn Refiners Association; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Michigan Manufacturers Association; Industrial Minerals Association – North America; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; National Petrochemical and Refiners Association; Ohio Coal Association; Peabody Energy Company; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and

**PARTIES TO THE PROCEEDINGS – Continued**

Industry; Utility Air Regulatory Group; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce.

6. Respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

**Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) (the “Tailoring Rule”):**

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review were Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia

**PARTIES TO THE PROCEEDINGS – Continued**

3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy, Inc.; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers’ Working Group on

**PARTIES TO THE PROCEEDINGS – Continued**

Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Missouri Joint Municipal Electric Utility Commission; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Association of Home Builders; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Texas.

**PARTIES TO THE PROCEEDINGS – Continued**

4. Petitioner-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce.

5. Respondent-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Clean Air Implementation Project; Commonwealth of Massachusetts; Conservation Law Foundation; Georgia ForestWatch; National Environmental Development Association's Clean Air Project; National Mining Association; Natural Resources Council of Maine, Inc.; Peabody Energy Company; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State

**PARTIES TO THE PROCEEDINGS – Continued**

of Rhode Island; Utility Air Regulatory Group; West Virginia.

6. Respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

**CORPORATE DISCLOSURE STATEMENT**

The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation is a coalition of individual companies and the Glass Packaging Institute is a non-profit association. Neither has outstanding shares or debt securities in the hands of the public nor has a parent company. No publicly held company has a 10 percent or greater ownership interest in either.

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## **OPINIONS BELOW AND JURISDICTION**

Pursuant to the Court's briefing order, we adopt these portions of the briefs of other petitioners.

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## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Relevant provisions of Article I of the Constitution of the United States are set out at Pet. App. 2. Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* are reproduced at Pet. App. 162-190.

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## **STATEMENT OF THE CASE**

Pursuant to the Court's briefing order, we adopt the Statements of the other petitioners, and add the following points concerning the PSD program:

1. Pre-GHG History.

Over the contentious course of its pre-greenhouse-gas (GHG) history, the Prevention of Significant Deterioration (PSD) program was focused primarily on the relatively straightforward matter of "bolt on" control devices such as catalytic converters and particle precipitators.<sup>1</sup> Nevertheless, it has been

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<sup>1</sup> The nature of the program is well reflected in the administrative litigation involving it. A compilation of Environmental

(Continued on following page)

among the Clean Air Act's most criticized and controversial programs, primarily because of the complexity involved in the determination of "best available control technology" (BACT), which it requires. Thus, in proposing its Tailoring Rule, EPA described the PSD program – because of the complexity of the BACT determination – as a "complicated, resource-intensive, time consuming and sometimes contentious process." 74 Fed. Reg. at 55,321-22. In its Advance Notice of Proposed Rulemaking on Regulating Greenhouse Gases Under the Clean Air Act (ANPR), EPA reviewed a long list of the program's controversial aspects, including:

Because of the case-by-case nature . . . the complexity . . . and the time needed to complete the PSD permitting process, it can take . . . more than a year to receive a permit. . . . There have been significant and broad-based concerns . . . over the years due to the program's complexity and the costs, uncertainty, and construction delays. . . .

73 Fed. Reg. at 44,500-01.

## 2. As Applied to GHGs.

A remarkably detailed picture of the PSD program as applied to GHGs is already available, from three sources. First, the Agency's discussion in the Tailoring Rule of the reach and burdensomeness of

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Review Board cases is available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/PSD+Permit+Appeals?OpenView](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/PSD+Permit+Appeals?OpenView).

the program when applied to GHGs, which EPA, in turn, used to justify the temporary exemption of minor emitters from it; second, the extensive and detailed general “PSD and Title V Permitting Guidance for Greenhouse Gases”<sup>2</sup> (hereinafter “*Guidance*”); and, third, some initial EPA sector-specific additional permitting guides. Below is a brief summary of two important aspects revealed in those documents.

a. Local Orientation of the Statute To Be Ignored.

The statute imposes as part of its permitting regime – using “shall” language – requirements explicitly made applicable to “each pollutant subject to regulation under the Act” to monitor and assess the air quality surrounding the facility to be permitted, as well as to assess local environmental impacts, as to vegetation, soil or visibility. 42 U.S.C §§ 7475(a)(6), 7475(a)(7), 7475(e)(1), 7475(e)(3)(B). The monitoring, analysis and data required are preconditions to issuing a permit and are to be available for the required local hearing. 42 U.S.C. §§ 7475(a), 7475(a)(1), 7475(a)(2), 7475(e)(1), 7475(e)(3)(C); *Guidance*, 20, 38, 44, 45.

Because these locale-centric factors do not fit the nature of GHGs and the harm associated with them,

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<sup>2</sup> PSD and Title V Permitting Guidance for Greenhouse Gases, Pub. No. EPA-457/B-11/001 (March 2011), <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.

the Agency, in an aside in the Tailoring Rule, 75 Fed. Reg. at 31,520 (June 3, 2010) (J.A. 300-01), elaborated in the *Guidance* (47-48; *see also* 39, 41-42), declared that these requirements may be ignored by permitting officials and applicants. Further, the Agency declared, a “proxy” for these considerations will be “to focus on reducing GHG emissions to the maximum extent.” *Guidance*, 48.

b. Aspects of Production Regulated.

The statute requires BACT, which is defined to include not just “control technology” in the everyday sense but also production technology, as well as operational and “process” options. In the statute’s words, it includes “production processes and available methods, systems, and techniques.” 42 U.S.C. § 7479(3).

Because of the correlation of carbon emissions with energy consumption, PSD carbon regulation, explicitly, is mostly a scheme to regulate energy consumption. As the *Guidance* puts it, “The application of methods, systems, or techniques to increase energy efficiency is a key GHG-reducing opportunity that falls under the category of ‘lower-polluting processes/practices.’” *Guidance*, 29; *see also* 21-22, 28-32, 40-46. For example, all of the BACT options in the Agency’s 39-page document on reducing GHG emissions in steel-industry production are about *energy efficiency*. *See generally*, Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from the Iron and Steel Industry (Sept. 2012).

As that document also notes, “Because energy is a major part of a manufacturer’s cost of production, many companies typically have strong internal programs that perform the same functions. . . .” *Id.*, 5.

The broader Guidance calls for ranking each *option* for each *aspect* of production that could affect the emission of carbon dioxide or consumption of energy, from best to worst. The end sought is “control options that result in energy efficiency measures to achieve the lowest possible emission level.” *Guidance*, 37; *see also* 21-22, 28-32, 40-46. The Agency specifies that selection should “default to the highest level of control for which the applicant could not adequately justify its elimination based on energy, environmental and economic impacts.” *Id.*, 45.

At one extreme, the microscopic, the Agency confirms that control options could reach the selection of light bulbs in a factory cafeteria, yet it assures that is unlikely “since the burden of this level of review would likely outweigh any gain in emissions reductions achieved.” *Guidance*, 31. However, regulation of “induced draft fans and electric water pumps,” for example, is likely to be worth the effort. *Id.*

At the other extreme, with respect to the most fundamental matters, EPA states that permitting authorities can demand changes that would “fundamentally redefine the source,” as otherwise defined by the facility owner’s “goal, objectives, purpose or basic design of the facility.” *Guidance*, 26. However, the Agency cautions, this should be ordered only after a “hard look.” *Id.*

One example of regulation between these extremes of light-bulb selection and facility-redefinition involves the commercially and industrially ubiquitous “natural gas boiler.” Regulation of a boiler could include specification of a “combination of oxygen trim control, an economizer and condensate recovery for the boiler, along with high transfer efficiency design for the heat exchanger,” a “preventative maintenance program” for the controller, and “a requirement for periodic maintenance and calibration of the natural gas meter and the steam flow analyzer.” *Guidance*, F1-3.



### **SUMMARY OF ARGUMENT**

There are differences between, on the one hand, the conventional pollutants and conventional pollution Congress had in mind as it wrote the provisions of the PSD and title V programs, and, on the other, carbon dioxide and global warming. These differences cause the nature, function, effect or import of each of the key statutory provisions that make up these programs to change dramatically when they are applied to GHGs. As a result, at least ten of these provisions – nine for the PSD program and one for title V – are damaged in various ways by their extension to GHGs. The various types of damage include: (i) nullification, as reflected in the obscured but critical Agency admission that all concerned may ignore statutorily-commanded provisions essential to the integrity of PSD regulation; (ii) self-contradiction,

exemplified by the fact that a provision meant to assure that minor emitters were excluded from the program instead becomes a provision that requires their regulation; *(iii)* absurdities, admitted and unadmitted, that result; and *(iv)* elephantine expansion, beyond Congressional intent and beyond all reason.

With respect to the last, inflation of the effect of textual provisions to unintended and unreasonable dimensions, the best example is PSD's signature BACT requirement. BACT is defined by the statute to include not just "control technology" as commonly understood, but to include "production processes and available methods, systems and techniques." 42 U.S.C. § 7479(3). Applied to the conventional pollutants for which PSD was intended, this resulted in a program that was essentially about "add on" controls such as catalytic converters or particle collectors, with only occasional forays into operations. Applied to carbon dioxide, it covers – as the Agency has explained in great detail – every aspect of a facility's operation and design that affects either its emission of carbon dioxide or its consumption of energy, because the latter is the primary determinant of the former. This is – as EPA has explained – everything conceivable, from light bulbs in the factory cafeteria to changes that, in the Agency's term, "fundamentally redefine the facility."

With respect to "absurdity," the Agency correctly acknowledged that its reading would lead to regulation of millions of previously and intentionally excluded

minor emitters of all sizes. EPA employed the absurdity, administrative necessity and one-step-at-a-time doctrines to *facilitate* the eventual achievement of permanent contravention of the statute's meaning and intent, by promising to regulate, eventually, as many as possible of the minor emitters Congress told it to exclude.

The Agency explicitly equated the “absurdity” involved with the “administrative necessity” it could not yet meet: it did not have enough permitting capacity to regulate all of the small facilities and minor emitters swept into the program by the inclusion of CO<sub>2</sub>. In keeping with this, EPA promises to find (statute-contravening) ways to “streamline” permitting, through such things as “general permits” and “presumptive BACT.” Its goal – and commitment – is to regulate as many as possible of the minor emitters, as rapidly as possible. This is the same reasoning that would attempt to solve the problem of an over-broadly interpreted criminal statute by streamlining indictment and eliminating trial for the newly targeted would-be criminals, because of the “absurdity” of not enough enforcement personnel and courtrooms.

The Agency trumpets its commitment to eventual full compliance with the literal terms of the Act as it reads it. This is as damaging a mistaken commitment as ever made by an administrative agency. Compliance with the literal GHG-*transformed* meaning, import or effect of CAA provisions is a commitment to Congressional-intent-defying, statute-destroying,

elephantine regulation, created without constitutional processes.

The underlying errors of interpretive approach that produced this commitment and any number of other errors of interpretive outcome in this matter, are truly fundamental, and both the Agency and lower court make them. Their approach had two primary characteristics: undue reliance on “plain” and “isolated” language. The Agency and court stopped at “plain language,” or as the Agency often put it, “literal” meaning. Hence, their approach was unable to see the damage to the text’s import and intended effects caused by the GHG application. This can only be seen by an interpretive process that includes “substantive effects” or “textual consequences.”

Similarly, the approach of the Agency and court fell victim to the limitations of “isolated language,” in two respects. First, abandoning the process that it had begun in an ANPR, the Agency made no effort to see the statute as an integrated whole. It thereby abandoned any effort to consider alternative ways of regulating stationary sources under the statute that might better serve what the Agency itself has correctly identified as the statute’s “dual” purposes – controlling pollution and “promoting” economic growth. 75 Fed. Reg. at 31,555 (J.A. 452). Second, it ignored the “whole statute” in another sense by ignoring all of the relevant substantive statutory components of the PSD program and their transformation, contradiction,

and nullification that result when they are applied to GHGs.

The misuse of plain meaning and the associated error of ignoring relevant statutory context and its effects in the new GHG context produced an indefensible claim by the Agency and lower court that there existed a *Chevron*-one command of Congress that tied the Agency's hands. The law made the Agency do it.

*Chevron* step one, in its original and full formulation, applies where Congress has "directly addressed the precise question at issue" and answered it "unambiguously." *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842-43 (1984). PSD carbon regulation – and its "triggering" – were not within Congress' wildest imagination as it created the program, just as they would not be within the contemplation of any rational policymaker as a means to regulate carbon and combat climate change.

In fact, Congress was speaking with *Chevron* clarity – about conventional pollutants, not carbon dioxide and global warming and their marriage with the PSD program. And, any "ambiguity" that exists in this case is, precisely, the radical change in meaning, import or effect of otherwise clear terms when they are applied to GHGs, to the point of their self-contradiction.

Rather than being a *Chevron*-one command, PSD and title V GHG regulation fails at step one of *Chevron* because it clearly contravenes the statute – as apparent under the proper interpretive approach.

Moreover, it represents a clearly impermissible construction of the statute under *Chevron* step two for exactly the same reasons. And, because it is impermissible, it is also beyond the Agency's authority under the separation-of-powers-bounded conception of agency authority last stated by this Court in *City of Arlington, Texas v. F.C.C.*, 133 S.Ct. 1863, 1870 (2013). Similarly, for the same reason, it violates the judicial review provisions incorporated into the Act itself, which, in addition to the familiar "contrary to law" standard for reversing agency actions, contains the less often quoted but even more basic standard "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 42 U.S.C. §§ 7607(b)(9)(B), 7607(b)(9)(C).

A fundamentally erroneous approach to statutory construction for cases involving application of the CAA to GHGs has created – without ownership of the decision in any branch – a prescriptive and particularistic scheme of comprehensive regulation of industrial operations that has the potential for almost unlimited harm.

It is, however, just the beginning. This is but the first of a likely endless parade of cases that turn the CAA on its head, and claims the Act's plain language requires it.

The second has arrived. It is *Center for Biological Diversity v. E.P.A.*, No. 11-1101, slip. op. (D.C. Cir. July 12, 2013). There the court on various grounds sided with environmental-group petitioners who

argued that exempting from the PSD program – as EPA wished to do – so-called “biogenic” carbon dioxide, the kind that comes from decaying plant material, “violates the Clean Air Act’s plain language” and that therefore “the agency has no *authority* to exempt any sources of carbon dioxide.” *Id.*, 12. (emphasis added).

Against this, the Agency had argued that it had authority to defer regulation while it studied the matter “because these sources have unique characteristics that were ‘unquestionably unforeseen when Congress enacted [the] PSD program.’” *Id.* As a concurrence stated, however, given the D.C. Circuit precedent – that is, the case presently before this Court – “There is zero basis in the text . . . to distinguish biogenic carbon dioxide. . . .” (Kavanaugh, J., concurring, at 1).

As our argument demonstrates, EPA does not have the authority to regulate GHGs under the PSD program, because of the damage to the statute’s terms it causes. Under the precedent represented by the case under review, however, and the mistaken approach to interpretation it represents, parties are successfully arguing, by contrast, that the Agency does not have authority *not* to regulate, even, a distinctively different form of GHGs, or, even, as the Agency thought wise, take time to study the question in a way that took into account factual differences of potentially enormous policy significance.

For the present – broader – case, the factual differences between GHGs and conventional pollutants are the reasons that no reasonable person or political entity would choose or has chosen a prescriptive, particularistic, public-hearing-requiring means of regulating carbon – and energy. They are also the reasons that the meaning, import or effect of all of the important PSD and title V statutory components has been destructively transformed.

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## ARGUMENT

### **I. Whether Any Particular CAA Provision or Program Can Encompass GHGs Requires an Interpretive Approach that Considers the Effects of Applying the Relevant Provisions to GHGs.**

The Agency and lower court relied on plain and isolated language, making it impossible for them to see the effect that the GHG application had on the relevant statutory provisions.<sup>3</sup> Before proceeding in Section II to the particular statute-defying effects of applying the PSD statutory provisions to GHGs, we briefly outline the relationship of *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), to the change in meaning

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<sup>3</sup> The approach of the lower court, featuring “plain” language, lack of “ambiguity,” “clear” congressional intent, *Chevron* step one, and “judicial inquiry is complete,” is illustrated at: Pet. 18-19, and J.A. 144, 145, 236, 242.

or import of CAA terms in this and similar cases and the approach to interpretation it makes necessary, using three propositions.

1. The change in meaning or import of the Act's terms can only be seen by examination of what the Court has called "substantive effects," rather than relying on plain and isolated language alone. As the Court has explained,

Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect compatible with the rest of the law.

*United Sav. Ass'n of Tex. v. Timbers of Indwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). This element of the requisite interpretive process could also be called attending to "textual consequences."<sup>4</sup>

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<sup>4</sup> See, ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at 352 (Thompson/West 2012). ["Some outcome-pertinent consequences – what might be called textual consequences – are relevant to a sound textual decision – specifically those that: . . . cause a private instrument or governmental prescription to be ineffective . . . invalid . . . contain a provision that contradicts another provision . . . (or) produce an absurd result . . . "]; cf., STEVEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 120 (Vintage 2006) ["(T)o emphasize consequences is to emphasize consequences related to the particular textual provision at issue."].

2. Even if *Massachusetts*' holding was that the statute's general definition of "air pollutant" was such that it *must* include greenhouse gases, as opposed to that it is broad enough *to* include greenhouse gases, that would not necessarily control its meaning in any given "statutory context." This is the holding of *Brown & Williamson*, which was addressing, *inter alia*, a definition of "drug" in the Food, Drug & Cosmetic Act that did in fact, as all agreed, necessarily include nicotine. Yet there the Court warned:

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

*Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (other internal citations omitted).

Similarly, that is the import of *United States v. Palmer*, 16 U.S. 610, 631 (1818), wherein Chief Justice Marshall said of the meaning of "any person or persons" in a piracy statute under consideration:

The words of the section are in terms of unlimited extent. The words "any person or persons" are broad enough to comprehend every human being. But general words must

not only be limited to cases within jurisdiction of the state, but also those objects to which the legislature intended to apply them.

3. Moreover, in any event, the definition of “air pollutant” in the CAA cannot be said necessarily to include GHGs. The limited statement that definition can support is that it is unambiguously broad enough to include GHGs, such that one cannot say as a matter of definition alone that it cannot. A careful reading of *Massachusetts* indicates that was all the Court was saying, in keeping with terms of the definition.

That definition is essentially circular, turning on a tautological use of the adjective “polluting” in the term “polluting agent.” 42 U.S.C. § 7602(g). It would be possible to misread the Court’s opinion, as the lower court seems to, to say that because the definition contains an unexceptional elaboration that the “polluting agent” can be in any form of matter, from molecule to compound or radiation, that, therefore, any molecule, compound or electromagnetic wave is an “air pollutant” so long as it meets the definition’s other (also very broadly defined) requirement that it is “emitted” into the air. This, however, would include light, data transmission, baseballs and animal waste – solid, liquid or gaseous. Most of the definition’s restrictiveness – and the key to its meaning – are in the open-ended and flexible “polluting.”

Underlying the mistaken reading, of course, is a logical fallacy. It would be no more valid than this claim: “Because ‘American hero’ is defined as ‘any agent of a heroic action, including a person of any gender, nationality or country of birth,’ we are all American heroes thereby.”

## **II. The Most Important PSD and Title V Statutory Provisions Are Contravened in Various Ways by Their Application to GHGs.**

We note at the outset two preliminary points about the meaning, effect or import of key PSD and title V provisions as affected by their application to GHGs.

First, all of the PSD provisions at issue are directly tied to one of the *four* usages in the PSD part of the Act of the term “any air pollutant subject to regulation under the Act” (or variants of it), or to the fifth instance in which the phrase “regulated under the Act” has been added, by the Agency’s “longstanding” interpretation, to the statute’s broader term “any air pollutant.”

With respect to that phrase in particular, a kind of “cross reference” (of which the Act is laden), our argument is that the principles of holism, which include the statute’s purposes and all of its relevant provisions, and the importance of statutory context and “substantive effects,” apply just as they do to any other statutory term, whatever its function. Since

this phrase is what the Agency refers to as the “automatic trigger” of PSD (and title V) regulation, the key point is that whether Congress would have intended that an “automatic trigger” apply to a new or transformed context depends on what is triggered thereby and the effect on relevant text.

This is in the same way that triggering of a pound of gunpowder is one thing, of plastic explosives quite another. In formal terms, the trigger is in the nature of an if/then statement: if  $x$ , then  $y$ . Such statements are not necessarily valid for all meanings of  $x$ .

Second, all of the substantive effects that contravene the provisions in various ways result from three categories of differences between GHGs and conventional pollutants.

1. Carbon dioxide’s relative ubiquity and abundance in human productive activity as compared to that of conventional pollutants. Much of industrial activity involves using heat, derived from combustion, which by definition releases carbon dioxide, to cause chemical reactions involving carbonate materials that separately release carbon dioxide, to produce things using energy-consuming machinery.<sup>5</sup>

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<sup>5</sup> *See, generally*, Comments of Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation, at 11, also 19-22, 27-29, 30-36, 40-41; EPA-HQ-OAR-2009-0517 (also: 2009-0472 and 2009-0597) (Dec. 26, 2009).

2. GHGs are “well mixed” in the atmosphere and their harm is caused by long-term build-up in upper atmospheric levels. 68 Fed. Reg. at 52,926-27 (Sep. 8, 2003). These differences render it impossible to use ambient levels of GHGs or assessment of local impacts to gauge regulation of GHGs, in practice and in theory.

3. Energy is a “first party” cost. As a consequence, unlike with respect to the emission of conventional pollutants, energy efficiency, which is what the PSD GHG scheme regulates, is incentivized by market forces, especially for energy-intensive industries.<sup>6</sup> Moreover, for related reasons, PSD GHG regulation amounts to the second-guessing of an almost unlimited number of production-management trade-offs involving such things as reliability, speed, familiarity, convenience, maintenance and product quality and differentiation.<sup>7</sup> This difference also explains why, when an inter-agency task force, which included EPA, last examined the matter, America’s energy-intensive industries were on course to meet the President’s goals for carbon emissions – without regulation.<sup>8</sup>

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<sup>6</sup> See, Steel Industry Guidance Document, *ante*, p.4, at 45.

<sup>7</sup> See, Comments, *supra* note 5.

<sup>8</sup> See, The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive and Trade-Exposed Industries (Dec. 2, 2009) (available at <http://www.epa.gov/climatechange/economics/economicanalyses.html#interagency>) (“Overall . . . the total energy-related CO<sub>2</sub> emissions of the six sectors . . . would decline nearly 20 percent from 1996 to 2020 under business-as-usual circumstances.” *Id.*, 19).

There are at least nine instances in which applying the PSD provisions to GHGs contravenes those provisions in various ways, and a tenth related to title V. We briefly outline them below, including references to places where the Agency for various reasons – including declaring some provisions void – has itself elaborated them.

1 & 2. The statutory scheme features provisions, as part of the PSD permitting process, requiring monitoring and analysis of the ambient air quality around the facility to be regulated and, similarly, analysis of local impacts as to “climate, meteorology, terrain, soils, vegetation and visibility.” 42 U.S.C §§ 7475(a)(6), 7475(a)(7), 7475(e)(1), 7475(e)(3)(B). These requirements are expressed in “shall” terms by the statute, and pertain to “each pollutant subject to regulation under the Act.” The required actions and information are preconditions for issuing a permit. 42 U.S.C. §§ 7475(a), 7475(a)(1), 7475(a)(2), 7475(e)(1). And, the information is to be available for the required local hearing. 42 U.S.C. §§ 7475(a)(2), 7475(e)(3)(C); *Guidance*, 44. The information is an essential part of a reasonable case-by-case permitting decision, as required by the Act, and is an essential part of the showing an applicant must make, and the burden it must carry, to obtain its permit. *Guidance*, 20, 38, 44, 45. Yet, because these requirements make no sense for GHGs, EPA declared in an aside in the Tailoring Rule that permitting officials and applicants may ignore them. 75 Fed. Reg. at 31,520 (J.A.

300-01). It elaborates on the point at length in the Guidance. *Guidance*, 47-48, *see also* 39, 41-42. In other words, these statutory provisions, as EPA effectively concedes, are contradicted, rendered ineffective or nullified, or, alternatively, rendered absurd, by the GHG application.

3 & 4. By limiting the program to objectively defined “major emitters,” Congress blocked EPA from regulating minor emitters – because they could not afford it *and* because they were a minor part of the problem of local conventional pollution. *See, Alabama Power v. Costle*, 636 F.2d 323, 353-54 (D.C. Cir. 1979); *see also*, 75 Fed. Reg. at 31,550, 31,558-59 (J.A. 430, 467-68). For instance, the Senate version of the legislation gave an exemplary list of the kinds of minor emitters to be excluded even if they somehow had the potential to emit more than the legislation’s general threshold of 100 tpy of “any air pollutant”: “houses, dairies, farms, highways, hospitals, schools, grocery stores and other such sources.” *See*, 75 Fed. Reg. at 31,550 (J.A. 429) and the legislative history cited there. In the statute as enacted, Congress chose to assure their (and similar minor facilities’) exclusion by raising the regulatory threshold as to them to 250 tpy of “any air pollutant” – creating an extra margin to assure that these facilities would never be subjected to PSD permitting. 42 U.S.C. § 7479(1); *see also*, 75 Fed. Reg. at 31,550 (J.A. 430). Hence, in selecting both the 100- and 250-tpy definitions of “major” facilities, Congress was taking advantage of a common quality of all conventional pollutants: the fact that they are emitted in small, even if harmful, amounts.

It did so to remove EPA discretion to determine how major was major, but to accomplish that in a way that did not try to name all of the kinds of excluded facilities. However, as EPA explains, it is the marked difference of CO<sub>2</sub> in the relevant dimension – its relative ubiquity and abundance in human productive activity – that causes the statutory terms to take on an import that is opposite that of the enacted provision and the Congressional intent that accompanied it. 75 Fed. Reg. at 31,535 (J.A. 363). The Agency, nonetheless, promises to regulate as many of these minor emitters as possible, as soon as possible, through streamlining of the permitting process. *See*, 75 Fed. Reg. at 31,523, 31,548, 31,566, 31,573, 31,577 (J.A. 310, 421-22, 502-03, 529, 549).<sup>9</sup> The comparable dynamic respecting the title-V 100-tpy threshold makes the fourth statutory contravention. 42 U.S.C. § 7602(j); 75 Fed. Reg. at 31,583 (J.A. 485-502, 574). Lastly, the Court needs to be aware of this additional point: To accomplish conveniently these statutory contraventions without the need for states to change their parallel statutes, the Agency has adopted a radically new GHG-specific regulation interpreting the words “subject to regulation,” under which GHGs are both subject to regulation and not, depending not on their chemical identity but the quantity and location of their emission. *See*,

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<sup>9</sup> The government correctly insists that the Agency “did not disavow the goal of ultimately applying those thresholds according to their literal terms.” Br. for Fed. Resps. in Opp. 41.

75 Fed. Reg. 31,607 (J.A. 680-81); *see also* 75 Fed. Reg. 31,525 (J.A. 320-23).

5. BACT – Production Processes, Methods, Systems, Techniques, etc. The sweeping definition of BACT includes “production processes and available methods, systems, and techniques. . . .” 42 U.S.C. § 7479(3). Again, the effect of this provision when it is applied to GHGs transforms the program from one of limited intrusion to a comprehensive scheme of regulation of industrial operations.

6. BACT – Energy. The definition of BACT incorporates the following qualification: “which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . .” 42 U.S.C. § 7479(3). The statute contemplated “energy” as one of the potential costs of regulating conventional pollutants – as is almost always the case because devices such as catalytic converters and particle precipitators consume energy, and low-contaminant fuels likewise are often less energy-efficient. *See, e.g., Guidance*, 39, 41. Applied to carbon dioxide, the role of energy is turned on its head. PSD regulation becomes mostly a scheme for the *mandating of energy efficiency* in all its manifestations. It converts a limitation on regulation – *i.e.*, the weighing of increases in energy consumption required to control conventional pollutants – into an object of regulation, a regulated *first-party* cost, one that opens the factory door or the farm gate to unlimited regulator access.

7 & 8. BACT – Case-by-Case Requirement and Local Hearing Requirement. In the language quoted above, the BACT definition incorporates the statute’s requirement of case-by-case analysis, hearing, and decision. A companion of the BACT-definition case-by-case requirement is the PSD public hearing requirement, found in 42 U.S.C. § 7475(a)(2), requiring as a pre-condition of a permit that “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.” *See also*, 42 U.S.C. § 7475(e)(3)(C). Commenting on changes to the program worked by the 1977 amendments, in *Alabama Power v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979), the court emphasized these changes: “case-by-case determination of BACT rather than automatic application of NSPS . . . provisions requiring public hearing in all cases instead of mere opportunity for written comment.” Both of these provisions are rendered ineffective or nullified both by the elimination of local-impacts information and analysis and the proposed streamlining of the permitting process through “general permits” and “presumptive BACT.”

9. BACT – Local Impacts. As indicated above, the BACT definition incorporates the phrase “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, [the permitting authority] determines is achievable for such facility.” 42 U.S.C. § 7479(3). Hence, this

aspect of *the definition of BACT* also incorporates consideration of the local information to be adduced under the requirements of §§ 7475(a)(6) and 7475(e) discussed above, the same requirements and associated information that the Agency has declared applicants and permitting authorities are free to ignore.

10. BACT – “Economic Effects and Other Costs.” The damage to the BACT definitional factors is nowhere greater than with respect to the “economic impacts and other costs.” 42 U.S.C. § 7479(3). Given the pervasiveness of the effects of PSD carbon regulation on production, and the nearly impossible-to-measure impact it could have on production efficiency, reliability, quality, familiarity of personnel with existing practices, maintenance, and such, factoring in costs to permit applicants would be so complex and uncertain as to be nearly impossible.

In response, EPA adopts the following extraordinarily liberating – and statute-defying – conception of such “costs” for purposes of PSD carbon regulation: “The emphasis should be on the cost of control relative to the amount of pollutant removed, rather than the economic parameters that provide an indication of the general affordability of the control alternative relative to the source.” *Guidance*, 38.

The “economic parameters that provide an indication of the general affordability of the control alternative to the source,” of course, concern things like “production costs,” “capital costs,” “materials costs,” “costs of maintenance and repair,” “cost of goods sold,” “profit margins,” and “return on investment” – the “parameters” that make private economic

activity possible. Concern with cost to a regulated entity in this everyday sense has been turned into the very different concept of the relative efficiency of one pollution/energy-control strategy to another. The irony is that the very structure of PSD regulation – prescriptive and particularistic – makes true efficiency even in that sense unachievable.

### **III. Extension of the PSD Program to GHGs, as the Agency and Lower Court Conceive It, Contradicts Important Doctrines in Administrative Law, Defeating Their Purposes.**

In addition to the absurd consequences doctrine discussed above, two others have been subjected to rationale-defying contravention.

#### **A. The *Chevron* Doctrine Is Misused, Causing the Mis-Assignment of Accountability for the Policy Decisions Implicit in PSD GHG Regulation and Defeating Rational Policymaking.**

Of the many reasons for the *Chevron* typology, the most basic is to assign policymaking responsibility and accompanying accountability to the two policy-making branches, as opposed to courts. *See, Chevron*, 467 U.S. at 864-65 [“Such policy arguments are more properly addressed to legislators or administrators, not to judges. . . . (A)n agency to which Congress has delegated policymaking responsibilities may, within limits of the delegation, properly rely on the incumbent administration’s views of wise policy to inform its judgments.”].

Here, by virtue of the false *Chevron*-one claim, EPA and the lower court assign responsibility for PSD and title V carbon regulation – “directly” and “precisely” – to Congress, even though it is a way of regulating *carbon dioxide* Congress did not contemplate and that would be unthinkable to it. By the same token, political responsibility is evaded by the Executive,<sup>10</sup> which claims its hands are tied by Congress.

Moreover, *rational* policymaking, not just accountable policymaking, is utterly defeated. It is replaced by the irrational premise that a means of regulation appropriate for conventional pollutants is necessarily appropriate – or tolerable – for GHGs.

Additionally, this Court has explained *Chevron* as a stable “background” rule against which Congress can legislate. Congress knows that if it leaves ambiguous gaps in statutes it will be for agencies to fill them, and, if it wishes to avoid that, it must write unambiguously. *See generally, City of Arlington, Texas v. F.C.C.*, 133 S.Ct. 1863, 1868 (2013).

*Chevron* is usually thought to refer to a statutory gap, which, indeed, is how *Chevron* explained itself. *See, Chevron*, 467 U.S. 837 at 843-44 (“If congress has explicitly left a gap. . .”). This case is not about

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<sup>10</sup> Indeed, PSD carbon regulation seems directly contrary to Administration policy. *See*, Barack Obama, President, U.S.A., 2013 State of the Union Address (Feb. 12, 2013) (calling for “market-based” carbon regulation).

gap-filling. It is a case of stretching the coverage of a statute beyond that for which it was designed, and each statutory contravention represents a snapping of a thread of the statutory fabric stitched by Congress.

There is no colorable *Chevron*-one command to regulate GHGs under the PSD program. The *Chevron* command was to regulate *conventional* pollutants under the program if they are regulated elsewhere in the Act. Congress supported this command with substantive PSD provisions that make sense for conventional pollutants, but not for GHGs. Congress cannot be said to have commanded an application that contravenes the provisions that it wrote.

A *Chevron*-one command with respect to GHGs exists in this case – the *Chevron*-one command *not* to regulate GHGs under the PSD and title V programs. Under an approach to interpretation that includes substantive effect, this is clear. Moreover, for the same reasons – the ten contraventions of the text – PSD and title V GHG regulation would represent an impermissible construction of the Act under *Chevron* step two.

### **B. The Implied Delegation Doctrine Is Misused.**

As the above indicates, any implicit delegation to regulate GHGs under the CAA found in its flexible and capacious definition of “air pollutant” cannot apply to PSD and title V regulation. To so apply it would be to create an irrational “term” for such delegation, under which Congress would be said to

require: apply the Act's PSD provisions, written for the conventional-pollutant context, to GHGs without considering whether the application changes their effect in ways that contravene the provisions, whether it makes sense, or whether there are better ways under the Act to attempt to achieve the statute's purposes. Because this also involves the constitutionally significant destruction of any intelligible principle for a delegation of authority to regulate GHGs, we discuss it further in that context, below.

#### **IV. PSD Application to GHGs Fails Because It Causes Absurdity and Raises Grave Constitutional Issues.**

Other petitioners have explicated well the principle that any permissible alternative interpretation, in particular the interpretation that PSD and title V do not apply to GHGs, should prevail over one that causes absurdity. To this we add the constitutional doubt avoidance canon: "When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided." *Crowell v. Bensen*, 285 U.S. 22, 62 (1932).

In the normal case, these two avoidance canons, seeking to avoid unnecessary constitutional doubt and absurd outcomes, could be said to seek to protect Congress from itself – to protect its presumed intent

from its imperfect execution. In the present case, the canons apply in a different way and with added force – they protect, in addition, Congress’ Article I prerogatives, and its ability to fulfill the obligations that accompany them, to exercise reasoned judgment about the necessary and proper means of exercising its powers. Because the canons would protect against absurdity and unconstitutionality caused not by any action of Congress or its drafting, but from actions of other branches that cause untoward results in a statute that otherwise does not contain them, the canons serve the separation of powers, as well as sound interpretation.

#### **A. It Causes Absurdity.**

PSD GHG regulation is thoroughly absurd, root and branch. For instance, it constitutes this three-headed absurd-policy creature: *(i)* an energy-efficiency-driven BACT definition so intrusive it can impose almost unlimited costs on trade-exposed, energy-intensive industries, costs as extensive as could be imposed on any regulated utility; *(ii)* a regulatory “cost” mechanism so transformed it is no longer concerned with costs to the facility owner in a business-survival-relevant sense; yet, *(iii)* no mechanism of a rate-regulation type to assure that the demi-utility can earn an asset-replacement-level return, or any return. And, in response to pleas from the energy-intensive industries that this could create quintessential CAA-policy absurdity, severe economic harm to the country coupled with worsening of global

GHG emissions, the Agency responded it may someday look into that matter under its “absurd consequences” powers: Regulate first; find out if it is absurd later. 75 Fed. Reg. at 31,589-90 (J.A. 602-04); Comments of EIM Group, *ante*, p.18 n.5.

### **B. It Raises Grave Constitutional Issues.**

The core Article I issues in this case can be summarized using two concepts that have been well explored by this Court – proper “means” of regulation and a proper “delegation” of legislative powers.

While Congress’ power under the Commerce Clause to regulate GHGs is not challenged in this case, there are pressing questions of the proper *means* of regulation and the delegation of the determination of the proper means. The text and form of PSD regulation, applied to carbon dioxide, produce the most extensive and intrusive exercise of the Commerce Power in our history. In order to regulate one thing – the level of GHG emissions – the PSD program claims the power to prescribe virtually everything, even to the point of “fundamentally redefining the facility” regulated.

Because pollution, and *a fortiori* carbon dioxide emissions and energy consumption, are not themselves “interstate commerce,” Congress’ power to regulate them comes from the Necessary and Proper Clause. In *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819), the Court, in an opinion by Chief Justice Marshall, established the test for determining whether

an act of Congress has selected a means permissible under that clause to regulate a concededly proper end:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

As Justice Scalia wrote in his concurrence in *Gonzales v. Raich*, 485 U.S. 1, 39 (2005), the requirements that the means selected be “appropriate,” “plainly adapted” to the end sought, “not prohibited,” and “consistent with the letter and spirit of the constitution,” are “not mere hortatory.” The Court enforces them by striking down legislation.

If Congress had enacted PSD/title V carbon regulation, that would have presented a substantial issue as to whether the means chosen met the *McCullough v. Maryland* requirements. Because Congress did not choose these means, additional substantial constitutional questions are raised, because Congress was denied the opportunity *to make the judgments* involved in determining whether the means were proper.

The opportunity to make these judgments is a necessary concomitant of the vesting of both the Commerce and Necessary and Proper powers in Congress by Article I. The most important cases of this Court establishing the broad limits of the Commerce

Power turn on deference to *Congress*' exercise of judgment in the exercise of its powers. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144 (1938); and *United States v. Darby*, 312 U.S. 100, 121 (1941).

The fundamental Article I concerns involved in this can also be seen by considering this Court's explication of proper terms of delegation of legislative powers. In fact, carefully expressed, as this Court has made clear, the legislative power vested in Congress by Article I *cannot* be delegated. *Touby v. United States*, 500 U.S. 160, 165 (1991) ["From the (language of this section of the Constitution) the Court has derived the non-delegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government."].

Accordingly, to retain the legislative power but leave some important decision-making to others, Congress must lay down in the delegating legislation "intelligible principles" to govern its exercise. "When Congress confers decision-making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., Co. v. United States*, 276 U.S. 394, 409 (1928)).

If decision-making authority pursuant to an Article I power cannot be delegated without an intelligible principle to govern it, it follows that it cannot

be delegated *implicitly* without an intelligible principle to govern it. Indeed, such a scenario would seem to present even greater separation of powers problems, since potentially it would involve other branches in the expropriation of unguided legislative powers – not just their delegation by Congress.

The PSD program is an elaborate and detailed *express* delegation to EPA to regulate conventional pollutants. At a general level, the most fundamental principles upon which that delegation is based involve careful study of, and the making of distinctions appropriate to, the different conventional pollutants to be covered by PSD. In addition to this and other general principles, there are *specific terms, provisions, rules and standards* to govern the delegation. All of this is rendered incoherent, even self-contradictory, by the application to GHGs.

The most aggressive exercise of the Commerce Power in our history, PSD/title V carbon regulation, does not in any real sense represent an “act” of Congress, nor does it represent, therefore, an opportunity afforded Congress to guide and restrict its exercise. In *Whitman’s* phrase, while the PSD-enacting Congress enacted principles and terms to which the Agency’s actions must “conform” as part of the express PSD delegation, these are “deformed” by a misperceived implied delegation (or, here, misperceived command) to regulate GHGs.



**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dear Counsel,

Please find attached a courtesy copy Brief for Petitioners Southeastern Legal Foundation, Inc. et al., No. 12-1268.

If you have any problems opening or viewing the attachment, please do not hesitate to contact our office.

Sincerely,

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Nos. 12-1146, 12-1248, 12-1254,  
12-1268, 12-1269, 12-1272

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In The  
**Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP, *et al.*,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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**On Writs Of Certiorari To The United States Court  
Of Appeals For The District Of Columbia Circuit**

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**BRIEF FOR PETITIONERS SOUTHEASTERN  
LEGAL FOUNDATION, INC., ET AL., NO. 12-1268**

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## ADDITIONAL PETITIONERS

U.S. Representative Michele Bachmann; U.S. Representative Joe Barton; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U. S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Timber Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kenesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project.

**QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

## **RULE 24.1(b) STATEMENT**

The parties to the proceedings below were as follows:

### ***Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule):***

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project petitioners on review, were petitioners below.

2. Respondent United States Environmental Protection Agency, respondent on review, was a respondent below.

**RULE 24.1(b) STATEMENT – Continued**

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers’ Working Group on Greenhouse Gas Regulation; Center for Biological Diversity; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association’s Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum

**RULE 24.1(b) STATEMENT – Continued**

Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

4. Petitioner-intervenor below who is nominal respondent on review, was Louisiana Department of Environmental Quality.

5. Respondents-intervenors below who are nominal respondents on review, were Environmental Defense Fund; Natural Resources Defense Council; Sierra Club; Indiana Wildlife Federation; Michigan Environmental Council; Ohio Environmental Council; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Ohio Coal Association; National Environmental Development Association's Clean Air Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of

**RULE 24.1(b) STATEMENT – Continued**

Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; Utility Air Regulatory Group; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association-North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.; and Clean Air Implementation Project.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

***Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule):***

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S.

**RULE 24.1(b) STATEMENT – Continued**

Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project, petitioners on review, were petitioners below.

2. Respondent United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy,

**RULE 24.1(b) STATEMENT – Continued**

Inc.; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Center for Biological Diversity; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Alliance of Forest Owners; American Forest & Paper Association; Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Utility Air Regulatory Group; Missouri Joint Municipal Electric Utility Commission; Sierra Club; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott, Attorney

**RULE 24.1(b) STATEMENT – Continued**

General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioners-intervenors below who are nominal respondents on review, were National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondents-intervenors below who are respondents on review, were Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; Conservation Law Foundation, Inc.; Georgia Forest Watch; Natural Resources Council of Maine; Wild Virginia; State of New York; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania Department of Environmental Protection; State of Rhode Island; South Coast Air Quality

**RULE 24.1(b) STATEMENT – Continued**

Management District; Center for Biological Diversity; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Glass Association for North America; Independent Petroleum Association for America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufactures & Commerce; Peabody Energy Company; National Association of Manufacturers; Corn Refiners Association; National Environmental Development Association; Clean Air Project; and Utility Air Regulatory Group.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

## **RULE 29.6 DISCLOSURE STATEMENT**

Petitioner Southeastern Legal Foundation, Inc. (SLF) is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly held corporation has ten percent or greater ownership interest in SLF.

Petitioner the Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which were described in Petitioners' Petition. The Langdale Company has no parent companies. No publicly held corporation has ten percent or greater ownership in the Langdale Company.

Petitioner Langdale Forest Products Company is a Georgia corporation and is a leading producer of lumber, utility poles, marine piling, and fence posts. Langdale Forest Products Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Forest Products Company.

Petitioner Langdale Farms, LLC is a Georgia Corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms, LLC is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Farms, LLC.

**RULE 29.6 DISCLOSURE STATEMENT**

– Continued

Petitioner Langdale Fuel Company is a Georgia corporation in the business of providing fuel and lubricants for the Langdale Company's needs. Langdale Fuel Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Fuel Company.

Petitioner Langdale Chevrolet-Pontiac, Inc. is a Georgia corporation in the business of selling and servicing automobiles. Langdale Chevrolet-Pontiac, Inc. is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Chevrolet-Pontiac, Inc.

Petitioner Langdale Ford Company, Inc. is a Georgia corporation in the business of selling and servicing automobiles and trucks, including for commercial fleets. Langdale Ford Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Ford Company.

Petitioner Langboard, Inc. – OSB is a Georgia corporation in the business of producing oriented strand board, which is used as flooring, roofing, and siding in the home construction industry. Langboard, Inc. – OSB is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has

**RULE 29.6 DISCLOSURE STATEMENT**

– Continued

ten percent or greater ownership in Langboard, Inc. – OSB.

Petitioner Langboard, Inc. – MDF is a Georgia corporation in the business of producing medium density fiberboard, which is used, among other things, in the construction of molding, flooring, and furniture. Langboard, Inc. – MDF is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langboard, Inc. – MDF.

Petitioner Georgia Motor Trucking Association, Inc. is a Georgia corporation and trade association for the trucking industry in Georgia. The mission of the Georgia Motor Trucking Association is to promote: reasonable laws; evenhanded, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. It represents more than 400 for-hire carriers, 400 private carriers, and 300 associate members. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in the Georgia Motor Trucking Association.

Petitioner Collins Industries, Inc. is a Georgia corporation in the business of transporting building

**RULE 29.6 DISCLOSURE STATEMENT**

– Continued

products. Collins Industries, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in Collins Industries.

Petitioner Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in Georgia. Collins Trucking Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly held corporation has ten percent or greater ownership interest in Collins Trucking Company, Inc.

Petitioner Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods across the United States. Kennesaw Transportation, Inc. has no parent company. No publicly held corporation has a ten percent or greater ownership interest in Kennesaw Transportation, Inc.

Petitioner J&M Tank Lines, Inc. is a Georgia corporation in the business of transporting industrial-grade products, such as lime, calcium carbonate, cement, and sand; food-grade products, such as flour; and agricultural-grade products, such as salt. J&M Tank Lines, Inc. operates a fleet of tractors and tanks and has terminals located in Georgia, Alabama, and Texas. J&M Tank Lines, Inc. has no parent company.

**RULE 29.6 DISCLOSURE STATEMENT**

– Continued

No publicly held corporation has a ten percent or greater ownership in J&M Tank Lines, Inc.

Petitioner Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling and servicing semi-trailers. Southeast Trailer Mart, Inc. has no parent company. No publicly held company has a ten percent or greater ownership in Southeast Trailer Mart, Inc.

Petitioner Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship in Georgia. The Georgia Agribusiness Council, Inc. has no parent company. No publicly held company has a ten percent or greater ownership in Georgia Agribusiness Council, Inc.

Petitioner Competitive Enterprise Institute is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law. Competitive Enterprise Institute has no parent companies. No publicly held corporation has a ten percent or greater ownership interest in Competitive Enterprise Institute.

Petitioner FreedomWorks is a non-profit 501(c)(4) corporation organized under the laws of the District of Columbia for the purpose of promoting individual liberty, consumer choice and competition, and has

**RULE 29.6 DISCLOSURE STATEMENT**

– Continued

over 870,000 members nationwide. FreedomWorks has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in FreedomWorks.

Petitioner The Science and Environmental Policy Project is a non-profit 501(c)(3) corporation organized under the laws of the State of Virginia for the purpose of promoting sound and credible science as the basis for regulatory decisions. The Science and Environmental Policy Project has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in The Science and Environmental Policy Project.

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## PRELIMINARY STATEMENT

This case involves perhaps the most audacious seizure of pure legislative power over domestic economic matters attempted by the Executive Branch since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). EPA's assumption of authority to "tailor" stationary source permitting to target a select universe of greenhouse gas (GHG) emitters on a scale and schedule of the Agency's own choosing directly contravenes the carefully chosen numerical permitting thresholds mandated by Congress in the Clean Air Act. This action is an unabashed assault on the foundational structure of the Constitution, and this Court should confront EPA's executive overreach and firmly invalidate it.

Answering the question before the Court in this case calls for more than routine judicial review of an administrative action. In a moment of unusual candor, EPA acknowledged that regulating GHG emissions under the Act's "Prevention of Significant Deterioration" (PSD) and Title V provisions would inevitably lead to "absurd results" involving "undue costs for sources and impossible administrative burdens for permitting authorities." *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010) [hereinafter Tailoring Rule], Joint Appendix [hereinafter JA] 418-19. Further, these extreme results could never have been contemplated by Congress and would actually "undermine" the "congressional purposes" behind the PSD program and Title V of the Clean Air Act. *Id.* In

light of those acknowledged consequences, the proper template for analyzing and resolving the question of statutory interpretation presented here is supplied by this Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

In *Brown & Williamson*, this Court held that Congress had not authorized FDA to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA), given the extreme consequences that would follow and the history of congressional actions addressing tobacco issues. The *Brown & Williamson* framework should lead the Court to similarly conclude here that Congress foreclosed PSD and Title V regulation of GHG emissions. EPA's GHG regulatory program is foreclosed by (1) the text and structure of the Clean Air Act read as a whole, (2) the legislative history of the Act, and (3) the "absurd results" and administrative impossibility that EPA itself conceded would necessarily follow if the PSD and Title V mandatory permitting thresholds were applied to GHG emissions.



### **OPINIONS AND ORDERS BELOW**

The opinion of the Court of Appeals is reported at 684 F.3d 102 and is reproduced at JA 191-267. The unpublished order denying rehearing en banc is reproduced at JA 139-90.



## **JURISDICTION**

The Court of Appeals issued its opinion on June 26, 2012, and denied petitions for rehearing en banc by order dated December 20, 2012. Nine groups of petitioners filed timely petitions for writs of certiorari with this Court, and on October 15, 2013, this Court granted six of the petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Article I of the Constitution of the United States provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I, § 1.

Article II of the Constitution provides: The President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient,” and “shall take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3, cl. 1 & cl. 4.

Relevant provisions of the Clean Air Act, 42 U.S.C. § 7471-7476, 7479, 7602(j) are reproduced at 1-30 of the appendix to this brief. Relevant rulemakings

of the U.S. Environmental Agency are reproduced at JA 268-1331.

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### STATEMENT OF THE CASE

Petitioners Southeastern Legal Foundation, Inc., *et al.*, hereby incorporate by reference, as if set forth in this brief, the Statement of the Case contained in the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation (Chamber Brief) and the Statutory and Regulatory Background contained in the Brief of the Utility Air Regulatory Group (UARG Brief).

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### SUMMARY OF THE ARGUMENT

Congress has not authorized EPA to regulate GHG emissions under PSD and Title V. This Court's decision in *Brown & Williamson* is on all fours with the present case and provides the controlling framework for that conclusion. The text and structure of the Clean Air Act, read as a whole, plainly foreclose EPA's conclusion that PSD and Title V permitting requirements are triggered by the Agency's separate decision to regulate GHG emissions from new motor vehicles. EPA's recognition that applying the Act's PSD and Title V provisions to GHGs would produce "absurd results" and "impossible administrative burdens" that could never have been contemplated or

intended by Congress resoundingly confirms that EPA has no such authority. As in *Brown & Williamson*, there is a rich legislative backdrop of failed climate change legislation that further supports this reading of the statute.

EPA's contrary interpretation of the statute, which depended upon an assertion of unbounded administrative discretion, must be rejected as beyond the limits of proper executive authority under the Constitution. EPA misapplied the "absurd results" and "administrative necessity" canons of construction in an agenda-driven effort to aggrandize its own discretionary policy-making power at the expense of Congress. In doing so, it effected an intolerable invasion of Congress's domain that threatens to obliterate the line dividing executive from legislative power. This breakdown in the constitutional separation of powers must be avoided where, as here, there are other reasonable readings of the statute that preserve and respect the Constitution's great bulwarks.

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### ARGUMENT

There are two core rulings at issue in the orders under review. First, EPA ruled that the Clean Air Act compels PSD and Title V regulation of GHG emissions as an unavoidable result of the Agency's decision to regulate GHG emissions from new motor vehicles. *See* Reconsideration of Interpretation of

Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010) [hereinafter Triggering Rule], JA 705-92. Second, though it conceded that applying the Act's mandatory numerical permitting thresholds to GHGs would produce absurd and impossible consequences never intended by Congress, EPA chose to relieve those consequences by rewriting those thresholds and constructing a regulatory framework far different from that carefully specified in the Act. In the process, EPA created a new permitting regime that would be rolled out on a scale and schedule more politically palatable and more administratively convenient. Tailoring Rule, JA 268-682.

The first ruling is based on a misconstruction of the Clean Air Act. A proper reading of the Act as a whole confirms that the statute forecloses GHG regulation under PSD and Title V. The second ruling plainly invades the legislative domain reserved exclusively to Congress under our constitutional structure. For the sake of preserving that founding structure, this Court should decisively reject EPA's effort to assume for itself unbounded law-making discretion.

**I. The text, structure, and background of the Clean Air Act make it plain that Congress has not authorized EPA to regulate GHG emissions under PSD and Title V.**

In *Brown & Williamson*, this Court addressed another federal agency's response to a pressing national issue – the public health problems attendant to tobacco use. Frustrated by Congress's refusal to enact legislation comprehensively addressing the issue, FDA took the dramatic step of attempting to regulate the promotion, labeling, and sale of tobacco products under the FDCA, by interpreting the term “drug” under the Act to include nicotine and the term “drug delivery device” to encompass cigarettes and smokeless tobacco. *See Brown & Williamson*, 529 U.S. at 127-29. The Court's approach to FDA's assertion of regulatory authority over tobacco products has direct relevance in the present case and should control the outcome here.<sup>1</sup>

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<sup>1</sup> The grounds stated in *Massachusetts v. EPA*, 549 U.S. 497 (2007), for not applying *Brown & Williamson* to foreclose EPA from regulating GHG emissions in new motor vehicles do not hold in the present case. In *Massachusetts*, the Court observed that there had been no showing that the regulation of GHG in new motor vehicles would produce “extreme measures” and counter-intuitive results or that such regulation would be incompatible with the expressed purposes of Congress. *See* 549 U.S. at 530-31. Here, by contrast, EPA acknowledges that extending the PSD and Title V permitting requirements as written to GHG emissions would generate “absurd results” that would “vitiate much of the purpose” of the permitting thresholds and “would directly

(Continued on following page)

**A. *Brown & Williamson* is the correct framework for reviewing EPA's action.**

In striking down FDA's action under step one of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), the Court in *Brown & Williamson* did not probe for subtle ambiguities in the statutory terms. Rather, the Court looked to the overall structure of the statutory regime for drug regulation and read it against the background of other congressional enactments addressing tobacco products. See *Brown & Williamson*, 529 U.S. at 132-33, 142-43. First, the Court noted that “[t]hese findings [that tobacco products are harmful] logically imply that, if tobacco products were ‘devices’ under the FDCA, the FDA would be required to remove them from the market.” *Id.* at 135. The Court continued, “Congress, however, has foreclosed the removal of tobacco products from the market.” *Id.* at 137. As a result, “[a] ban on tobacco products by the FDA would therefore plainly contradict congressional policy.” *Id.* at 139. Precisely the same analysis applies here. Part C of the Act logically implies that if GHGs are “air pollutants” for purposes of PSD, EPA would be required to regulate numerous small sources. Congress, however, intended to foreclose the regulation of numerous small sources by the way the PSD provisions were drafted. In both cases, therefore, for both FDA and EPA, the agency reading of the statute requires it to do something that Congress has precluded.

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contravene Congress's intention” to limit such permitting to the largest industrial sources. Tailoring Rule, JA 457.

“In addition,” the Court observed, “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Id.* at 133 (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)). In the case of tobacco regulation, the Court concluded, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160; *see also MCI*, 512 U.S. at 231 (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion – and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

**B. The *Brown & Williamson* analysis shows that Congress foreclosed regulation of GHG emissions under PSD and Title V.**

EPA’s present action is, if anything, even more extraordinary and implausible than FDA’s effort to regulate tobacco products, and the *Brown & Williamson* analysis leads to a very similar conclusion here.

***The text and structure of the Act.*** For the reasons argued in greater detail in Argument Point I of the Chamber Brief and in the UARG Brief, the PSD and Title V provisions of the Clean Air Act, read as a whole, make it plain that Congress intended

such stationary source permitting to be triggered only for a small number of large sources and only by the emission of certain types of air pollutants, namely those that have adverse effects in the region where they are emitted.

In contrast, as EPA itself has found, the asserted dangers of GHG emissions are the opposite of local: They occur only through the mixing of gases in the upper atmosphere and the global diffusion of those gases to produce worldwide climate effects, such that a molecule of carbon dioxide released in one location will produce precisely the same potential climate effect as a molecule of carbon dioxide released on the other side of the world. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) [hereinafter Endangerment Finding], JA 793-974, 858 (“Greenhouse gases, once emitted, become well mixed in the atmosphere, meaning U.S. emissions can affect not only the U.S. population and environment, but other regions of the world as well. Likewise, emissions in other countries can affect the United States.”); *id.* at 894 (“[T]he air over the United States will by definition affect climate change only in circumstances where the air around the world is also doing so. The impacts of the air over the United States cannot be assessed separately from the impacts from the global pool, as they occur together and work together to affect the climate.”). The direct exposure to carbon dioxide in the ambient air poses no human health risks, and GHGs

have no measurable or differentiated local effect on air quality. *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008), JA 975-1331, 1135.

Just as this Court concluded that tobacco products “simply do not fit” within the statutory regime enacted by Congress, *Brown & Williamson*, 529 U.S. at 143, so too is it plain that GHG emissions do not fit within the Clean Air Act’s regime for local PSD and Title V permitting. Indeed, even apart from the mandatory numerical thresholds for PSD and Title V regulation contained in 42 U.S.C. §§ 7479(1) and 7602(j), discussed below, there are numerous other provisions of the Act that are incompatible with EPA’s interpretation. As more fully set forth in the Chamber and UARG Briefs, the PSD and Title V provisions of the Clean Air Act form a complex, integrated, coherent whole. EPA’s regulatory scheme dismantles this entire structure. For example:

- (1) Section 161, 43 U.S.C. § 7471, requires implementation plans for areas designated as attainment or nonclassifiable relative to National Ambient Air Quality Standards (NAAQS). This requirement cannot work for GHGs because they are globally well-mixed and have no regional variation in concentration, and because there is no NAAQS standard by which an area can be classified;

- (2) Section 162, 42 U.S.C. § 7472, provides for initial classifications of air quality areas. This provision is meaningless for GHGs because they are globally well-mixed and have no effect on local air quality;
- (3) Section 163, 42 U.S.C. § 7473, limits the “maximum allowable increases” in the concentration of pollutants in attainment areas. This limitation cannot work for GHGs because they are globally well-mixed and there are no NAAQS against which an increase can be compared;
- (4) Section 164, 42 U.S.C. § 7474, establishes procedures for reclassification of local air quality areas. This provision is meaningless for GHGs because they are globally well-mixed and have no effect on local air quality;
- (5) Section 165, 42 U.S.C. § 7475, requires pre-construction permits, which are keyed to maximum allowable increments relative to NAAQS in local air quality areas. As a condition of permitting, this Section requires local air quality impact monitoring and analysis. These requirements make no sense for GHGs because they are globally well-mixed, have no effect on local air quality, and there are no NAAQS for such gases. For these reasons, EPA has dispensed with the statutory air quality impact analysis and monitoring requirements. *See* PSD and

Title V Permitting Guidance for Greenhouse Gases,<sup>2</sup> p. 48 (“Considering the nature of greenhouse gas emissions and their global impacts, EPA does not believe it is practical or appropriate to expect permitting authorities to collect monitoring data for purpose of assessing ambient air impacts of greenhouse gases.”);

- (6) Section 166, 42 U.S.C. § 7476, establishes procedures for promulgating regulations for pollutants with newly established NAAQS. Since EPA’s new GHG program does not and cannot set a NAAQS for GHGs, the program necessarily ignores and bypasses these procedures; and
- (7) EPA’s interpretation is inconsistent with the Federal-State partnership construct found throughout the Act.

As with tobacco regulation under the FDCA, GHG regulation under PSD and Title V simply does not fit, and the program EPA has enacted bears essentially no resemblance to the structure carefully crafted by Congress. EPA claims this statutory debris field is compelled by a triumphalist definition for the phrase “any air pollutant” to which all contrary provisions of the Act are subordinate. But no statute can be properly read to compel its own repudiation.

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<sup>2</sup> Available at <http://www.epa.gov/nsr/ghgdocs/ghgpermitting-guidance.pdf> (last visited Dec. 6, 2013).

***Absurd consequences.*** Any conceivable doubt that might exist about the impermissibility of EPA's interpretation, and the consequent encroachment into Congress's legislative domain, is erased completely by the "absurd results" and "impossible administrative burdens" that EPA acknowledged would occur from the application of the Clean Air Act's mandatory numerical permitting thresholds to GHGs. Tailoring Rule, JA 418-19, 454-55 (applying the numerical thresholds "would result in a program that would have been unrecognizable to the Congress that designed PSD" and "contrary to Congress's careful efforts to confine PSD to large industrial sources" because it would expand the program "from the current 280 sources per year to almost 82,000 sources, virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources" that "would each incur, on average, almost \$60,000 in PSD permitting expenses").

Once the Agency recognized that interpreting the statute to require PSD and Title V permitting for GHGs would necessarily produce extreme and absurd consequences under the mandatory terms of the Act, that realization should have been the end of the enterprise. To avoid encroaching on legislative prerogatives, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). As shown in the briefs

of petitioners, the alternative interpretation of the Act that limits stationary source permitting to certain pollutants not including GHGs is fully consistent with the plain language of the statute and the purposes of the permitting regime.

**Legislative background.** The conclusion that Congress has not authorized EPA to require PSD and Title V permitting for GHGs under the Clean Air Act is further confirmed by the relevant legislative background. *See Brown & Williamson*, 529 U.S. at 144 (canvassing legislative proposals in which Congress had addressed tobacco-related legislation on the understanding that FDA “lacked authority under the FDCA to regulate tobacco,” including bills rejected by Congress “that would have granted the FDA such jurisdiction”).

EPA acknowledged that Congress chose the 100- and 250-tons-per-year mandatory numerical PSD and Title V permitting thresholds so they would apply only to a few of the largest industrial sources that could bear the costs. *See Tailoring Rule*, JA 430-31. Because GHGs are typically emitted in volumes far greater than these statutory thresholds by small businesses – and even by many residential buildings and other non-commercial facilities like churches and schools – the application of PSD and Title V permitting requirements to GHGs cannot possibly be consistent with congressional intent. *Id.*

Congress has considered a huge volume of bills for regulating or reducing GHG emissions since

enactment of the PSD program in the 1977 Amendments to the Clean Air Act and since the addition of the Title V permitting provisions in the Clean Air Act Amendments of 1990. *See, e.g.*, Center for Climate and Energy Solutions, *Climate Debate in Congress*, available at <http://www.c2es.org/federal/congress> (overview of all legislative proposals related to climate change from the 106th Congress to the present) (last visited Dec. 6, 2013); *see* JA 152 (Brown, J., dissenting from denial of rehearing *en banc*), citing Abigail R. Moncrieff, Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-interference (or Why Massachusetts v. EPA Got It Wrong), 60 Admin. L. Rev. 593, 636-37 (2008) (finding more than 400 bills from 101st to 110th Congress); Marlo Lewis, EPA Permitting of Greenhouse Gases: What Does Legislative History Reveal about Congressional Intent?, available at <http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/#more-18134> (finding 692 bills from 101st through 111th Congresses) (last visited Dec. 6, 2013).

These proposals have involved a wide variety of approaches to reducing GHG emissions from stationary sources, including emission caps through permits, industry-wide emission caps, so-called “cap and trade” programs, and tax and other incentives for achieving reductions. *See, e.g.*, Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007) and Climate Stewardship Act of 2007, H.R.

620, 110th Cong. (2007) (bill to establish market-driven system of tradable GHG allowances to be administered by EPA; passed by House but died in Senate); Greenhouse Gas Registry Act, H.R. 232, 111th Cong. (2009) (bill to authorize EPA to create federal GHG registry; failed in House); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) and American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (bill to create "Pollution Reduction and Investment" program to be administered by EPA to establish economy-wide, market-based program for reducing GHG emissions; passed House but not Senate). But none of these subsequent legislative proposals indicates that Congress ever intended to extend the PSD and Title V programs beyond their limited scope.

In addition, nearly all of these bills would have involved a significant role for EPA in administering programs for reducing GHG emissions from stationary sources. Congress's repeated consideration of such legislative proposals, as it continues to grapple with the immense and divisive economic and policy implications of GHG regulation, only reinforces the plain meaning of the statute. These proposals obviously assume that EPA currently lacks the broad authority it now claims to restrict GHG emissions through PSD and Title V permits.

***In sum.*** Just as with FDA's effort to regulate tobacco products, EPA's interpretation of the Clean Air Act that PSD and Title V stationary source permitting for GHG emissions are automatically triggered by mobile source regulation is foreclosed by the

text, structure, and legislative background of the Act. EPA has created a permitting regime for GHGs that bears no resemblance to the limited PSD and Title V programs established by Congress. This new regime cannot plausibly be squared with the statutory scheme Congress intended the Agency to administer.

## **II. EPA's action depended on a gross misuse of canons of statutory interpretation.**

In contravention of the plain meaning of the statute and Congress's manifest intent not to authorize PSD and Title V regulation for GHG emissions under the Clean Air Act, EPA nevertheless devised a new program to do exactly that. EPA did so through the gross misapplication of two doctrines of statutory interpretation – the doctrine of “absurd results” and the doctrine of “administrative necessity.” As will be discussed in Section III, below, this action by EPA raises an intolerable separation of powers issue.

### **A. The “absurd results” doctrine does not authorize an administrative override of congressional intent.**

Resort to the “absurd results” doctrine has been approved by this Court only in the most limited circumstances. The Court has sanctioned its use to give a narrowing or specialized construction to a statutory term where applying the literal meaning or most natural reading of the term would produce an absurdly broad reach for the statutory regime or an

absurd application of a statutory requirement that could not have been intended by Congress. *See, e.g., Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004) (“any entity” construed to mean only private entity); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) (“defendant” construed to mean only criminal defendant); *Train v. Colo. Pub. Interest Res. Group*, 426 U.S. 1, 23-24 (1976) (“pollutants,” defined in the Federal Water Pollution Control Act to include any “radioactive materials,” construed not to include three specific types of radioactive materials); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 538-42 (1940) (“employees” construed to be limited to employees whose activities affect safety); *Holy Trinity Church v. United States*, 143 U.S. 457, 516-17 (1892) (“any alien” construed not to apply to foreign pastor).

Because of the dangers inherent in a license to stray from the natural meaning of statutory language, any invocation of the doctrine must remain true to congressional intent. *See Horn v. Comm’r of Internal Rev.*, 968 F.2d 1229, 1239 (D.C. Cir. 1992) (“The [absurd results] canon is sensible, so far as it goes, but it can only be used to further Congress’ intent, not to circumvent it. . . . A canon of interpretation cannot nullify part of a statute.”); *see also Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment) (“When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative

Branch, which we assume would not act in an absurd way.”); *United States v. Brown*, 333 U.S. 18, 27 (1948) (absurd results doctrine is only justified where necessary to avoid “blind nullification of the congressional intent” behind a statute); *Holy Trinity Church*, 143 U.S. at 459 (approving invocation of the absurd results doctrine to exclude a subject from the literal scope of a statute’s reach where it would be “unreasonable to believe that the legislator intended to include the particular act”).

As is apparent, the “absurd results” doctrine is used only where Congress inadvertently used a term and the absurdity of a literal application requires a non-literal reading to avoid an unreasonable outcome. Here, by contrast, EPA has relied on “absurd results” as justification for *ignoring* Congress’s carefully crafted, deliberate, express intent that the precisely specified numerical permitting thresholds, and only those thresholds, would define the scope of the PSD and Title V programs. Properly understood and applied, this doctrine could readily support a narrowed construction of “any air pollutant” for purposes of PSD permitting to include only pollutants having a localized effect on ambient air quality, even if the term may be given a broader meaning in the mobile source provisions of the statute. Such a narrowed construction for stationary source purposes is necessary to avoid the absurd application of the statute that EPA itself recognized would be contrary to anything Congress ever contemplated. *See Griffin*, 458 U.S. at 575. But to invoke “absurd results,” as

EPA did, to alter radically the statute's strict numerical stationary source permitting requirements – by changing 250 tons-per-year to 100,000 tons-per-year and 100 tons-per-year to 75,000 tons-per-year – is an obvious misuse of the doctrine.

**B. EPA cannot rely on the concept of “administrative necessity” to establish a new regulatory program that Congress has not authorized.**

EPA also misused the “administrative necessity” doctrine as authority for rewriting the statute's permitting thresholds so as to enable an extension of the PSD and Title V programs to GHGs. EPA rationalized this maneuver on the ground that complying with the literal terms of the Act was impossible. Of course: It was only EPA's own deviation from the clear limits that Congress placed on the scope of these programs that rendered compliance impossible.

In approving the doctrine of administrative necessity, the D.C. Circuit has circumscribed its use to three types of regulatory accommodations: adopting limited categorical exemptions where the statute permits flexibility; crafting case-by-case determinations within the discretion of the agency; and postponing statutory deadlines to avoid administrative hardship or harsh or unintended consequences. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 357-60 (D.C. Cir. 1980); *see also Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983); *Env'tl. Def. Fund, Inc. v. EPA*,

636 F.2d 1267 (D.C. Cir. 1980). Here, EPA ventured well beyond any such measured precedents to fashion its own novel standard that would sanction use of “administrative necessity” whenever the Agency can (1) demonstrate the unavailability of alternatives, (2) quantify the impossible administrative burdens, and (3) achieve a favored result by claiming to deviate from the plain text of the statute as little as possible. *See* Tailoring Rule, JA 401-02. Quite apart from EPA’s own culpability in creating the asserted “administrative necessity,” EPA did not even hew to its own newly minted three-factor test in that there were readily available alternatives and it radically deviated from the plain text of the statute. EPA effectively converted this carefully circumscribed doctrine into an unconstrained tool of “administrative convenience.”

Indeed, the authority claimed by EPA is so unconstrained that it imperils more than just one provision of the statutory scheme of PSD and Title V regulation. As shown above at pp. 11-13, EPA’s reasoning eventually compels it to repudiate a panoply of other requirements of the PSD provisions that are made ridiculous or superfluous if applied to GHGs. The ensuing legal chaos shows why the use of “administrative necessity” to abrogate congressional intent should never be permitted.

### **III. EPA's actions create a grave threat to the constitutional separation of executive and legislative powers.**

By its misconstruction and abuse of these interpretive doctrines, EPA arrogated to itself a degree of unadulterated legislative power that, if accepted, would represent a far-reaching incursion of the Executive Branch into the constitutionally assigned province of Congress. See JA 170-90, JA 175 (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (“Allowing agencies to exercise [this] kind of statutory re-writing authority could significantly enhance the Executive Branch’s power at the expense of Congress’s and thereby alter the relative balance of powers in the administrative process.”).

Actions, such as EPA’s, by which one Branch of our Government would presume to expropriate or invade the constitutionally assigned functions of another Branch present one of the greatest threats to liberty. “In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other.” Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farand, Records of the Federal Convention of 1787, p. 108 (rev. ed. 1966); see The Federalist Nos. 47-51 (James Madison) (explaining and defending the Constitution’s structural design of separated powers); see also *Clinton v. City of New York*, 524 U.S. 417, 447

(1998) (striking down the line-item veto as unconstitutional because it “gives the President the unilateral power to change the text of duly enacted statutes”); *see also id.* at 450 (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

**A. Separation of powers is essential to the constitutional design.**

In addressing EPA’s action, it is appropriate to recall this Court’s clarion repudiation of executive overreach in the *Youngstown* case. There, Members of the Court warned that the “accretion of dangerous power” is spawned by “unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.” *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring). In voting to strike down the President’s Executive Order directing the Secretary of Commerce to take possession of major steel mills to head off the grave consequences of a labor shutdown of the mills during time of war, Justice Douglas returned to first principles: “In the framework of our Constitution, the president’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Id.* at 587 (Douglas, J., concurring). The purpose of the separation of powers is “not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Id.* at 629; *see id.* at 638

(Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution.”).

The EPA Administrator and the President of the United States apparently believe that GHGs contribute to global climate change and that global climate change poses a serious long-term risk to the Earth that demands a national policy response. They may also be frustrated by Congress’s failure to enact a legislative program to respond to their concerns. But while the failure to enact a regulatory response may create challenges in some ways, “a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (internal quotation marks, alterations, and citations omitted). “Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient,” *Youngstown*, 343 U.S. at 629 (Douglas, J.), but the Framers of the Constitution “designed it that way,” and “[t]he time and difficulty of enacting new legislation has never justified an agency’s contravention of statutory limits.” JA 189 (Kavanaugh, J., dissenting). See *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) (“The Constitution’s structure requires a stability which transcends the convenience of the moment.”).

If existing statutory authority is insufficient to meet a national challenge, the President has the duty and power under the Recommendations Clause

to “recommend” for Congress’s “Consideration such Measures as he shall judge necessary and expedient.” U.S. Const. art. II, § 3, cl. 1. The President is expected to advocate forcefully until Congress grants the necessary regulatory authority, but in the meantime, he is obligated to ensure that the laws Congress actually has enacted are “faithfully executed.” *Id.* art. II, § 3, cl. 4.

**B. The Act can and must be interpreted to avoid EPA’s separation of powers violation.**

Ultimately, the Court in this case need not pronounce a definitive judgment on the constitutional violation effected by EPA’s interpretive strategem. The separation of powers Kraken that would be unleashed if EPA’s action were upheld is sufficient to trigger a superior principle: constitutional avoidance. EPA’s misuse of the “absurd results” and “administrative necessity” doctrines to invade the legislative domain is put to the sword by this greater canon of construction. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing that the avoidance of serious constitutional issues wherever possible is a “cardinal principle” of statutory interpretation that “has for so long been applied by [this Court] that it is beyond debate”). To preserve the Constitution free from unnecessary judicial involvement, the avoidance canon demands that a statute be interpreted to avoid giving rise to any serious constitutional issue unless

the saving construction is unreasonable and plainly contrary to Congress's intent. "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* "If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' the Court is obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

This Court applied the avoidance canon in *Solid Waste Agency of No. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001), to reject the Army Corps of Engineers' interpretation of "navigable waters" under the Clean Water Act to extend federal authority to reach isolated patches of wholly intrastate wetlands. *See id.* at 172-73. Similarly, this Court has held that where an interpretation of a statute would result in a "sweeping delegation of legislative power" to an agency, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 646 (1980). These cases call for a similar affirmation of constitutional boundaries: EPA's interpretation of the Clean Air Act to trigger stationary source permitting for GHGs under the PSD and Title V programs exceeded the Agency's authority in a manner that threatens an undue aggrandizement of executive power at the expense of the Legislative Branch.

As shown in Point I above, and as argued in greater detail in the briefs of other petitioners, the alternative readings of the Act that would deny EPA authority to trigger PSD and Title V permitting for stationary source emissions of GHGs avoid this unconstitutional power grab. Those alternative interpretations fully align with the statute's text and structure and honor and preserve the intent of Congress. Under the rule of constitutional avoidance, EPA's faulty interpretation, which satisfies none of these requirements, must be rejected.



**CONCLUSION**

For the reasons set forth above, and those discussed in the briefs of other petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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App. 1

42 U.S.C. § 7471

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

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App. 2

42 U.S.C. § 7472

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all –

- (1) international parks,
- (2) national wilderness areas which exceed 5,000 acres in size,
- (3) national memorial parks which exceed 5,000 acres in size, and
- (4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section 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.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

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App. 3

42 U.S.C. § 7473

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

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**Pollutant                    Maximum allowable increase  
(in micrograms per cubic meter)**

Particulate matter:

Annual geometric mean .....	5
Twenty-four-hour maximum .....	10

Sulfur dioxide:

Annual arithmetic mean .....	2
Twenty-four-hour maximum .....	5
Three-hour maximum .....	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

**Pollutant                    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 .....	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of

App. 5

such pollutants shall not exceed the following amounts:

**Pollutant                      Maximum allowable increase  
(in micrograms per cubic meter)**

Particulate matter:

Annual geometric mean .....37

Twenty-four-hour maximum .....75

Sulfur dioxide:

Annual arithmetic mean .....40

Twenty-four-hour maximum .....182

Three-hour maximum .....700

(4) 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.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying

## App. 6

out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

**(A)** concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of Title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

**(B)** the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. § 791a et seq.] over the emissions from such sources before the effective date of such plan,

**(C)** concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

**(D)** the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources

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which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

**(2)** No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

**(3)** No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

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App. 8

42 U.S.C. § 7474

§ 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

- (1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and
- (2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

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. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if –

- (A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session

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(unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

**(B)** such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

**(C)** such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

**(1)(A)** Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and

## App. 10

analysis of such effects shall be reviewed and examined by the redesignating authorities.

**(B)** Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

**(C)** The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

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(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, within<sup>2</sup> 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.

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## (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.

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App. 13

42 U.S.C. § 7475

§ 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

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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 facility 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.

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(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.

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**(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

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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:

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**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.

## App. 19

(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:

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**MAXIMUM ALLOWABLE INCREASE****[In micrograms per cubic meter]**

<b>Period of exposure</b>	<b>Low terrain areas</b>	<b>High terrain areas</b>
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

## App. 21

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,

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(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.

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App. 23

42 U.S.C. § 7476

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, photochemical 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 or 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

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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.

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(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.

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42 U.S.C. § 7479

§ 7479. Definitions

For purposes of this part –

(1) The term “major emitting facility” means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty 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 fifty 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 two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include

## App. 27

new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

**(2)(A)** The term “commenced” as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

**(B)** The term “necessary preconstruction approvals or permits” means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

**(C)** The term “construction” when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

**(3)** The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case

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basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction

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commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

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42 U.S.C. § 7602. Definitions

§ 7602. Definitions

(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).

---

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Moment to Connect  
Date: Sun Dec 15 2013 16:50:11 EST  
Attachments:

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Hi Mike, Is there a convenient time to talk? Best wishes, Vickie

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Moment to Connect  
Date: Sun Dec 15 2013 23:50:30 EST  
Attachments:

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Vickie, I'm available Monday other than 1-2 eastern. You should also know that someone from my office will likely be speaking with either the Administrator or the WH tomorrow.

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Sunday, December 15, 2013 4:50 PM  
To: Michael J. Myers  
Subject: Moment to Connect

Hi Mike, Is there a convenient time to talk? Best wishes, Vickie

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From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: Moment to Connect  
Date: Sun Dec 15 2013 23:51:49 EST  
Attachments:

---

Hi Mike, Is 9am ET convenient? I hope you had a terrific weekend.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Sunday, December 15, 2013 9:51 PM  
To: Vickie Patton  
Subject: RE: Moment to Connect

Vickie, I'm available Monday other than 1-2 eastern. You should also know that someone from my office will likely be speaking with either the Administrator or the WH tomorrow.

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Sunday, December 15, 2013 4:50 PM  
To: Michael J. Myers  
Subject: Moment to Connect

Hi Mike, Is there a convenient time to talk? Best wishes, Vickie

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Moment to Connect  
Date: Sun Dec 15 2013 23:55:07 EST  
Attachments:

---

That should work. If I'm not at my desk, try my bberry (518-937-3148).

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Sunday, December 15, 2013 11:52 PM  
To: Michael J. Myers  
Subject: RE: Moment to Connect

Hi Mike, Is 9am ET convenient? I hope you had a terrific weekend.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Sunday, December 15, 2013 9:51 PM  
To: Vickie Patton  
Subject: RE: Moment to Connect

Vickie, I'm available Monday other than 1-2 eastern. You should also know that someone from my office will likely be speaking with either the Administrator or the WH tomorrow.

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Sunday, December 15, 2013 4:50 PM  
To: Michael J. Myers  
Subject: Moment to Connect

Hi Mike, Is there a convenient time to talk? Best wishes, Vickie

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any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

From: Siobhan Collins, Ceres  
<collins@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Integrated Reporting Framework Launched  
Date: Mon Dec 16 2013 13:02:01 EST  
Attachments:

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To view this email as a web page, go here.

INCR a project of CeresINCR Bulletin- December 16, 2013

In the News

INCR Members Receive Strong Scores on New AODP Climate Index

The Asset Owners Disclosure Project's second Global Climate Investment Index, rates how the world's biggest institutional investors are managing growing financial risks to their investments posed by climate change. INCR members including CalPERS, CalSTRS, the New York State Comptroller's Office and the AFL-CIO all received high ratings, with CalPERS being ranked among the world's top 5 pension funds on climate disclosure and related investment practices.

[Read more...](#)

Tools & Materials

New CTI White Paper Focus' on Keystone XL Pipeline

A new white paper by The Carbon Tracker Initiative (CTI), *The Keystone XL Pipeline: A Potential Mirage for Oil-Sands Investors*, looks at the implications for the project economics of different Canadian oil-sands export options with a particular emphasis on KXL. Their research finds that the pipeline risks creating stranded assets even without CO2 pricing.

[Download and read CTI's KXL White Paper](#)

Events

INCR Policy Working Group Call

Tuesday, December 17  
1:00 - 2:00 pm ET

Join this month's INCR Policy working group call to hear from guest speakers, Ceres staff and investor peers. The discussion will focus on upcoming engagements, investor opportunities and new regulations. To register and learn more, contact Brandon Smithwood, Senior Manager, Policy Program.

INCR Sustainable Stock Exchanges Working Group Call

Thursday, December 19

12:00 - 1:00 pm ET

INCR Sustainable Stock Exchanges Working Group Call - The SSE Working Group will review major plans for 2014, including the public launch of the INCR Listing Standards Proposal, creation of the SSE Progress database, planning for a global IOSCO sign-on letter, updates on shareholder resolutions filed with exchanges, and potential partnerships for communications to investors. Register here. For more information, contact Tracey Rembert , Senior Manager, Investor Programs.

The INCR Bulletin will be taking a break for the holidays. We'll be back January 6, 2014. We hope you all have a happy holiday season!  
Integrated Reporting Framework Launched

IRLogoThe International Integrated Reporting Council (IIRC) has generated substantial financial press with the launch of the much-awaited <IR> Framework . The Framework is the Integrated Reporting guidance document for investors, companies, and others, and follows a three-month consultation period that began in April 2013. It is also the culmination of several reports put out by the IIRC seeking investor and corporate views on the concepts and principles of integrated reporting.

INCR's Integrated Reporting Working Group hosted a webinar discussion on the new Framework on its launch day, December 9th-the first post-launch event to discuss the new <IR> guidance. Guest speaker Ricky Cronin, who serves as North American Relationship Manager for the IIRC and previously at KPMG, walked investors through the final framework, highlighting the following topics:

- \*Key differences between the consultation document and the final framework
- \*Areas where companies and investors raised concerns during the consultation
- \*The journey in getting to the framework, and who was involved in reviewing comments
- \*The Emerging <IR> Database
- \*Technical and legal issues that arose during the consultation and final drafting
- \*Controversies over using the term "materiality" in the Framework
- \*The road ahead in 2014 and rollout plan

Listen to the IR Working Group webinar.

View the presentation slides.

Read or download the <IR> Framework.

For information on INCR's quarterly Integrated Reporting Working Group, contact Tracey Rembert, Senior Manager of Investor Engagement or call 617-247-0700 x106.

#### INCR Members Push State RPS Programs and Renewable Energy Policy

Driven in part by the American Legislative Exchange Council, a number of states are considering legislation to repeal or weaken state renewable energy standards. These standards are critical policies that drive renewable energy deployment and scale clean energy for broad capital market investment. These State RPS Programs and standards generate 1/3 of the demand for new renewable energy in the United States and, as the Ceres report Power Forward indicates, they facilitate corporate adoption of renewable energy. To date, all of the efforts to roll back these standards have failed, in part due to effective investor advocacy on the value of RPS'.

INCR members have been critical in pushing forward key climate and renewable energy policies. Read about member engagements and op-eds related to Ohio's renewable energy and efficiency legislation below:

- \*Wind Makes a Powerful Investment, by Jeff Perkins of Friends Fiduciary
- \*Stu Dalheim of Calvert Investments made the business case for Ohio renewable energy policies at the

Ohio Statehouse

\*Campbell's Soup came out in opposition to the bill following engagement by Tim Smith and Aaron Ziulkowski of Walden Asset Management

INCR members interested in learning more about renewable energy legislation and to join the INCR Policy Working Group call next Tuesday December 17th from 1-2:00 pm ET, contact Brandon Smithwood, Senior Manager, Policy Program.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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group/cn=recipients/cn=barbaraunderwood>; Michael J. Myers  
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group/cn=recipients/cn=michaelmyers>; Morgan Costello  
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<wlewis@morganlewis.com>; rtenpas@morganlewis.com  
<rtenpas@morganlewis.com>; pday@hollandhart.com  
<pday@hollandhart.com>; egroten@velaw.com <egroten@velaw.com>;  
margaret.campbell@troutmansanders.com  
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byron.kirkpatrick.@troutmansanders.com  
<byron.kirkpatrick.@troutmansanders.com>;  
peter.glaser@troutmansanders.com  
<peter.glaser@troutmansanders.com>; mgeertsma@nrdc.org  
<mgeertsma@nrdc.org>; doster.brian@epa.gov  
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jlewis@catf.us <jlewis@catf.us>; sganley@catf.us  
<sganley@catf.us>; dmarshall@catf.us <dmarshall@catf.us>;  
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<mbernstein@ncdoj.gov>; maiolson@nd.gov <maiolson@nd.gov>;  
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<jjmcmackin@wms-jen.com>; john.west@ky.gov <john.west@ky.gov>;  
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sfarris@nmag.gov <sfarris@nmag.gov>; tfox@nmag.gov  
<tfox@nmag.gov>; amoore@nmag.gov <amoore@nmag.gov>;  
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mskaufman@atlanticlegal.org <mskaufman@atlanticlegal.org>;  
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Bcc:  
Subject: No. 12-1146 tsac Texas Oil & Gas  
Date: Mon Dec 16 2013 13:11:40 EST  
Attachments: 12-1146 tsac Texas Oil & Gas Ass'n.pdf  
No. 12-1146 Signed Filing Documents.pdf

The attached brief and filing documents were HAND filed today with the Supreme Court. Service parties will receive Hard copy service as required by U.S. Supreme Court Rule 29.5.

No. 12-1146 With Nos. 12-1248, 12-1254,

12-1268, 12-1269 & 12-1272

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Utility Air regulatory Group,

Petitioner,

v.

Environmental Protection Agency,

Respondent.

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#### AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on December 16, 2013, three (3) copies of the BRIEF OF TEXAS OIL & GAS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, AND TEXAS ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

Peter D. Keisler\*

Sidley Austin LLP

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IN THE  
**Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP,  
*Petitioner,*  
v.

ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

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On Writs of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

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BRIEF OF TEXAS OIL & GAS ASSOCIATION,  
TEXAS ASSOCIATION OF BUSINESS, AND  
TEXAS ASSOCIATION OF MANUFACTURERS  
AS *AMICI CURIAE* SUPPORTING PETITIONERS

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### INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three trade associations that represent a variety of petroleum, manufacturing, and business interests throughout the State of Texas. The Texas Oil & Gas Association (TXOGA) is the oldest and largest petroleum trade association in the State of Texas; it represents approximately 5,000 members who, collectively, account for more than 90 percent of all crude oil and natural gas produced in Texas, operate nearly all of the State's refining capacity, and are responsible for the vast majority of the State's pipelines. The Texas Association of Business is a trade association with an over 85-year history of representing Texas businesses large and small. And the Texas Association of Manufacturers is a trade association representing over 450 large and small manufacturing companies located throughout the State of Texas. The *amici* have a substantial interest in the question presented herein, which relates to the proper regulation of Greenhouse Gas (GHG) emissions by stationary sources under the Clean Air Act.<sup>1</sup>

There are actually two issues fairly encompassed within the question on which this Court granted *certiorari*.<sup>2</sup> The first issue, addressed by a number of

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<sup>1</sup> Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than *amici*, their members, or their counsel—made a monetary contribution specifically for the preparation or submission of this brief.

<sup>2</sup> The Court granted *certiorari* to resolve the following question: “Whether EPA permissibly determined that its regulation

the Petitioners, including the Utility Air Regulatory Group (No. 12-1146), relates to whether GHG emissions qualify as “air pollutants” under Title I of the Clean Air Act, such that they may be regulated under Title I’s permitting programs. The second issue, address by Petitioners American Chemistry Council, *et al.* (No. 12-1248), concerns whether, if GHG emissions do qualify as “air pollutants” under Title I, GHG emissions from a stationary source trigger those permitting requirements.

*Amici* submit this brief in support of the Petitioners; they do so focusing exclusively on the second issue—specifically, whether GHG emissions from a stationary source trigger permitting requirements under Title I’s Prevention of Significant Deterioration (PSD) Program.<sup>3</sup>

The Environmental Protection Agency sought to resolve the issue of PSD applicability through a series of rulemakings that culminated in the so-called

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of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.”

<sup>3</sup> The Clean Air Act imposes separate permitting obligations on certain stationary sources under Title V of the Act. *See* 42 U.S.C. §§ 7661–7661c. That said, Title V “does not impose substantive new requirements.” 40 C.F.R. § 70.1(b). Rather, it mandates that a source certify compliance with other requirements under the Act, including the PSD Program. *See, e.g.*, 42 U.S.C. § 7661a(a). Although this brief does not specifically address Title V, the scope of eligibility for permitting under the PSD Program would affect a stationary source’s derivative obligations under Title V.

Tailoring Rule. But there was nothing routine about this administrative action. Through the Tailoring Rule, EPA invoked *tools of last resort* to rewrite perfectly clear portions of the Clean Air Act—*i.e.*, explicit numerical permitting thresholds of 100 and 250 tons per year. In this circumstance, the Agency cannot claim that it is owed deference; it instead bears the burden of demonstrating that there were *no other permissible interpretations* available to it before rewriting the Act. In other words, if there is at least one other permissible interpretation that would avoid the absurdities claimed by EPA, the Agency was *compelled to adopt such an interpretation* rather than rewrite the Act. EPA cannot meet this burden.

As *amici* explain more fully below, EPA was presented with numerous opportunities to adopt a permissible interpretation of the Clean Air Act—one that would have avoided the absurd results identified by the Agency, but without rewriting perfectly clear provisions of the Act. This alternative interpretation turns on the *pollutant-specific nature* of the PSD Program—a program that was designed to ensure that *specific areas* of the country would remain in attainment with national ambient air quality standards (NAAQS) for *specific, criteria pollutants*—currently, ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead, *but not GHGs*. See 40 C.F.R. §§ 50.1–50.12. Under a pollutant-specific interpretation of the PSD Program, a stationary source is required to get a PSD permit if it is in a *location* attaining a NAAQS for a criteria pollutant, and it will emit threshold quantities (100/250 tons per year) of *that criteria pollutant*.

Consistent with congressional intent, under this interpretation, EPA would continue to issue several hundred PSD permits each year. *See* Addendum A, *infra*, at 28. And under this interpretation, a stationary source that satisfies the pollutant-specific triggering requirement would have to install “best available control technology [(BACT)] for each pollutant subject to regulation under” the Act, 42 U.S.C. § 7475(a)(4). Thus, although a pollutant-specific approach would limit the number of stationary sources that are covered by the PSD Program, as intended by Congress, a source that is covered by the PSD Program might still have to install BACT for GHG emissions.

Rather than give meaning to the targeted nature of the PSD Program, EPA chose in 1980 to adopt an interpretation that would require a stationary source to apply for a PSD permit any time it emitted threshold quantities of *any* air pollutant subject to regulation anywhere under the Act, as long as the source is located in an area attaining a NAAQS for *any* pollutant, even if that source does not emit that criteria pollutant at all. For many years the absurdity inherent in EPA’s approach lay dormant, but when the Agency first applied it to GHG emissions, the fallacy of this approach became patently obvious. Whereas Congress only intended for the Agency to issue *several hundred* PSD permits each year, the Agency’s interpretation would mean that *tens of thousands* of sources of GHG emissions would have to apply for a permit every year, including small and nonindustrial sources like schools, hospitals, and apartment buildings.

The revelation of such an absurdity should have caused EPA to reevaluate its underlying interpretation of the PSD Program, but instead, it used the occasion to “tailor” perfectly clear provisions of the Clean Air Act. The upshot of EPA’s approach is that it gets to select for itself which sources of GHG emissions are required to apply for permits under the Act, in direct contravention of the numerical thresholds mandated by Congress. And EPA has assumed for itself the authority to modify this approach, going forward, in its *unbounded discretion*.

EPA’s choices can be analogized to the questions that face a traveler during a long journey. Many years ago, EPA set about to traverse the interpretative path that is the Clean Air Act. In 1980, it came to a fork in the road. From where it stood, there appeared to be two equally viable options. And as with any binary choice, the Agency was forced to select between those two options and move forward. Unfortunately, after nearly 30 years down its chosen path, EPA came to learn that it had reached an interpretative dead end; the path that it selected placed it at the precipice of absurdity. And yet, rather than return to the fork and then head down the path that would have avoided this absurdity, the Agency did the one thing it could not do; it rewrote the Clean Air Act to avoid an absurdity that was a product of its own making.

Such a misappropriation of legislative authority is unprecedented. The supporting judgment of the court of appeals should be reversed.

## BACKGROUND

1. Title I of the Clean Air Act regulates emissions of air pollutants from certain stationary sources. *See* 42 U.S.C. §§ 7401–7515.

Among the programs established under Title I, Part A establishes national ambient air quality standards (NAAQS) for criteria pollutants—pollutants whose presence in the ambient air pose particular risks for public health and welfare. *See id.* § 7408(a). There are currently a very limited number of criteria pollutants: ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. *See* 40 C.F.R. §§ 50.1–50.12. Under Section 109 of the Act, EPA must promulgate a NAAQS that sets safe levels for each criteria pollutant. *See* 42 U.S.C. § 7409. And under Section 107, EPA must designate areas of the country as either in attainment or in nonattainment with each NAAQS. *See id.* § 7407(d).

Importantly, area designations are NAAQS-specific and, therefore, “pollutant-specific” as well. *E.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1980); *see also* 42 U.S.C. § 7407(d). Thus, a single geographic area may be in attainment with one NAAQS while in nonattainment with another.

One of the goals of Title I was to help ensure that each area of the country is in attainment with each NAAQS. Among its means of achieving that goal, Congress established two complementary permitting programs: one for areas in nonattainment, and a second for areas in attainment with each NAAQS. Both permitting programs are run principally by the

States through implementation programs. *See* 42 U.S.C. § 7410(a)(2)(C).

For areas in nonattainment, Congress established the Nonattainment New Source Review (NNSR) Program in Part D of Title I of the Act. To help these areas achieve attainment, Congress required certain stationary sources in those areas to obtain NNSR permits that impose the “lowest achievable emissions rate” to control emissions of the criteria pollutant whose NAAQS the area is not attaining. *See id.* §§ 7501(3), 7502.

The other permitting program, the PSD Program of Part C of Title I, was enacted to ensure that areas in attainment would remain so. *See Alabama Power*, 636 F.2d at 349; *see also* 42 U.S.C. § 7470; S. REP. NO. 95-127, at 29 (1977) (stating that the PSD Program was designed to “protect national ambient air quality standards”). The first substantive provision of the PSD Program, Section 161 of the Act, links the program to attainment areas. It requires State or federal implementation plans to “contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated . . . as attainment” pursuant to Section 107. 42 U.S.C. § 7471.

The principal means by which the PSD Program helps to achieve continued attainment with each NAAQS is a preconstruction permitting regime. Section 165 of the Act requires a permit before construction begins on any “major emitting facility . . . in any area to which this part applies.” *Id.* § 7475(a).

Securing and satisfying a PSD permit are demanding obligations. To get one, a facility must demonstrate, among other things, that its emissions will not cause air quality to exceed any NAAQS—which is to say, a facility must demonstrate that its emissions will not cause an attainment area to become a nonattainment area for any criteria pollutant. *See id.* § 7475(a)(3). In addition, after a PSD permit is issued, a facility must install “best available control technology for each pollutant subject to regulation under” the Act, which may include both criteria and non-criteria pollutants. *Id.* § 7475(a)(4); *see also id.* § 7479(3) (defining “best available control technology”).

All parties agree that Congress only intended for the PSD Program to apply to “facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for” air pollution. *Alabama Power*, 636 F.2d at 353. In addition, Congress recognized that “[t]he numbers of sources that meet these criteria . . . are reasonably in line with EPA’s administrative capability.” *Id.* at 354.

Thus, given the burdens of applying for, then implementing, PSD permits, the threshold question is which sources need them. A “major emitting facility” potentially subject to PSD permitting is defined as one with “major” emissions—more than 100 or 250 tons per year—of “any air pollutant.” 42 U.S.C. § 7479(1). But not all major emitting facilities need PSD permits. Under the PSD Program’s triggering provision, Section 165(a), only those “in any area to

which this part applies” need obtain one. *Id.* § 7475(a).

2. At issue here are two potential interpretations of the PSD Program’s triggering provision.

In interpreting the PSD Program’s statutory trigger, EPA has long placed controlling weight on the phrase “major emitting facility.” Ignoring the pollutant-specific nature of the PSD Program, along with the statutory phrase “in any area to which this part applies,” EPA has insisted that any stationary source that exceeds the 100- or 250-tons-per-year thresholds for *any* air pollutant subject to regulation *anywhere* under the Act must obtain a PSD permit. *E.g.*, EPA, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Final Rule*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980).

But there is another way to read the PSD Program’s statutory trigger. Under this alternative interpretation, a major emitting facility is required to obtain a PSD permit only if it is *located* in an area attaining the NAAQS for a criteria pollutant, and it will emit threshold quantities of *that criteria pollutant*. Simply put, the PSD Program can (and should) be read to impose a pollutant-specific, situs requirement.

EPA’s interpretative choice—a pollutant-indifferent approach—posed no problem for many years. That is, even under EPA’s approach, the Agency only issued several hundred PSD permits each year. EPA, *Prevention of Significant Deterioration*

*tion and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31,514, 31,537 (June 3, 2010).

But this all changed when EPA promulgated the so-called Tailpipe Rule, which regulated GHG emissions under Title II of the Act in response to this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). See EPA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010). Because GHG emissions were now a regulated pollutant somewhere under the Act, EPA claimed that it was required to issue permits to stationary sources that exceeded the 100- or 250-tons-per-year thresholds established in the definition of a "major emitting facility" located within the PSD Program. See Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. By so doing, EPA estimated that it would now field *more than 82,000* PSD permit applications each year, covering many sources that, heretofore, had never been subject to regulation under the Act. *Id.* at 31,538. Moreover, EPA acknowledged that the review of this crushing number of applications would exceed its administrative capability and could lead to delays in issuing permits of "a decade or longer." *Id.* at 31,557.

EPA freely admitted that such an explosion of PSD permits would be "inconsistent with Congress's expressed intent," but it claimed that such an outcome was compelled by a "literal application" of the Clean Air Act. EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rules*, 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009). Indeed, EPA claimed that it was precluded

from reconsidering its underlying interpretation of the PSD Program's triggering provision. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,517 (claiming that, "under *Chevron* Step 1," the Agency could not reconsider the scope of the PSD permitting program).

To remedy the absurdity imbued in its interpretation, EPA promulgated a rulemaking, the so-called Tailoring Rule, which invoked administrative tools of last resort—the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines—to rewrite and delay the application of the PSD Program's otherwise clear 100- and 250-tons-per-year thresholds. *Id.* at 31,516. EPA proposed to reduce the number of PSD permits that the Tailpipe Rule would require by "tailoring" the emissions thresholds for stationary sources of GHG emissions, raising them far, far above the statutory thresholds set out in the definition of a "major emitting facility." *See id.* at 31,560.

Commenters in this and related rulemakings, including Petitioners American Chemistry Council, *et al.* (No. 12-1248), proposed that EPA adopt the narrower, pollutant-specific interpretation of the PSD permitting trigger, which would avoid the absurdities upon which EPA relied to justify changing the statutory thresholds.<sup>4</sup> Indeed, because GHG emissions are not criteria pollutants, no area of the country is designated as in attainment with such a NAAQS. Thus, under this narrower interpretation, no newly constructed source with major emissions of only GHGs would have to obtain a PSD permit, and no existing major source undertaking a modification

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<sup>4</sup> *See infra* note 6 (citing comments to related rulemakings).

would have to get a PSD permit solely because of its increased GHG emissions.

But EPA rejected these proposals, reaffirmed its interpretation of the PSD permitting trigger, and settled on 100,000 tons per year as the new, GHG-specific threshold. *Id.* at 31,560–62. Even under these super-elevated thresholds, EPA still expects the new number of annual PSD permit applications to surpass the old. *See id.* at 31,536–41; *see also* Addendum A, *infra*, at 28.

The Tailoring Rule was implemented in two phases—with more promised. During the first phase, which lasted until June 30, 2011, no construction of a major source required a PSD permit solely because of GHG emissions. *See id.* at 31,516. That said, during this phase, the PSD Program still regulated GHG emissions insofar as sources that were required to get a PSD permit were required to adopt BACT for GHG emissions. During the second phase of the Tailoring Rule, which took effect on July 1, 2011, the new GHG-specific thresholds kicked in. EPA has stated that it will propose additional phases for the Tailoring Rule in order to expand PSD permitting to “smaller sources.” *Id.* at 31,566. All the same, the Agency stated that, in addressing “permitting requirements for smaller sources,” it will “tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities.” *Id.* Thus, it is possible that in applying this cost-benefit approach, EPA may never get around to fully implementing its interpretation of the PSD Program to sources of GHG emissions that would otherwise satisfy the 100- and 250-tons-per-year thresholds.

**ARGUMENT****EPA REPEATEDLY IGNORED A PERMISSIBLE INTERPRETATION OF THE CLEAN AIR ACT AND INSTEAD RELIED ON TOOLS OF LAST RESORT TO IMPROPERLY REWRITE CLEAR STATUTORY TEXT.**

EPA squandered numerous opportunities to adopt a permissible interpretation of the Clean Air Act—one that would have avoided the absurd results that EPA claimed as a justification for rewriting perfectly clear provisions of the Act. Back in 2009, the pollutant-specific approach was raised and discussed by stakeholders at the very first meeting of the Climate Change Work Group of the EPA Clean Air Act Advisory Committee (CAAAC).<sup>5</sup> The pollutant-specific approach was discussed further with the Agency and the Work Group, formally presented in a *White Paper*, and raised in a series of public comments to the Agency, including in comments to the rulemaking at issue here.<sup>6</sup>

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<sup>5</sup> See Permits, New Source Review and Toxics Subcomm. of CAAAC, *Interim Phase I Report of the Climate Change Work Group* 3–4 (Feb. 3, 2010) (available at [http://www.epa.gov/oar/caaac/climate/2010\\_02\\_InterimPhaseIReport.pdf](http://www.epa.gov/oar/caaac/climate/2010_02_InterimPhaseIReport.pdf)).

<sup>6</sup> See Charles H. Knauss, *White Paper for EPA Climate Change Workgroup: Scope of the PSD Problem to Be Addressed: Why There Is No Automatic PSD Trigger or “NAPT” Simply Because GHGs Become Regulated Under the Clean Air Act* (Jan. 8, 2010, rev. Feb. 8, 2010), reprinted in Joint App’x at 1495–1502, *Am. Chem. Council v. EPA*, No. 10-1167 (D.C. Cir. filed July 29, 2010) (Nat’l Ass’n of Mfrs., et al., *Petition to Reconsider, Rescind, and/or Revise EPA’s Prevention of Significant Deterioration Regulation* (July 6, 2010) (available at

Instead, EPA rejected the ideas of its own advisory committee and chose to invoke the “absurd results,” “administrative necessity,” and “one-step-at-a-time” doctrines to rewrite and delay the application of the PSD Program’s otherwise clear 100- and 250-tons-per-year thresholds. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. And yet, the Agency was too quick to invoke these administrative tools.

The doctrines on which EPA relies are truly tools of last resort. As this Court recently reaffirmed in a related context, instead of “reading new words into [a] statute” to avoid absurd results, the statute should be interpreted so that “no absurdity arises in the first place.” *Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012). Here, as in *Kloeckner*, it is EPA’s

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[http://www.nam.org/~media/08BC270F7B3A4E9498F4142084843460/Petition\\_for\\_EPA\\_to\\_Reconsider\\_PSD\\_Regulations.pdf#page=23](http://www.nam.org/~media/08BC270F7B3A4E9498F4142084843460/Petition_for_EPA_to_Reconsider_PSD_Regulations.pdf#page=23)); *see also* Air Permitting Forum, *et al.*, *Comments on EPA’s Proposed Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Tailoring Rule*, EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (raising the same approach discussed in the *White Paper*); Alliance of Auto. Mfrs., *Comments on EPA’s Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, EPA-HQ-OAR-2009-0517-5083 (Dec. 28, 2009) (same); Air Permitting Forum, *Comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Motor Vehicle Rule)*, EPA-HQ-OAR-2009-0472-7253 (Nov. 27, 2009) (same); Air Permitting Forum, *Comments on the Proposed Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (PSD Interpretive Memorandum) (Proposed Reconsideration)*, EPA-HQ-OAR-2009-0597-0085 (Dec. 7, 2009) (same).

“own misreading that creates the need to ‘fix’” the PSD Program. *Id.* at 607.

A pollutant-specific interpretation of the PSD Program’s triggering provision avoids the absurdities claimed by EPA. As explained in detail below, under this alternative interpretation, EPA will continue to field only several hundred PSD permit applications each year. *See* Addendum A, *infra*, at 28.

In rejecting this approach, EPA adopted a heightened showing of congressional intent nowhere supported by *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), or its progeny. According to EPA, a “literal reading” of the Act supported its pollutant-indifferent approach, and because it could find no “explicit statements in the legislative history that Congress intended to limit PSD applicability to sources of NAAQS pollutants,” the Agency was *precluded* from adopting the pollutant-specific approach. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562. But this standard turns *Chevron* on its head. It allowed EPA to reject a *permissible* interpretation of the statute, and substitute for it an interpretation that required the Agency to rewrite perfectly clear statutory provisions, all because the Agency could not say for sure that the pollutant-specific approach was compelled. As this Court explained in a different context, “That the only cure [proposed by the Government] is worse than the disease suggests the Government is simply wrong.” *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1692 (2013); *see also Chevron*, 467 U.S. at 843 (holding that, where a statute is ambiguous, an agency does not have license to rewrite the statute any way it might deem fit; it must adopt an

interpretation “based on a permissible construction of the statute”).

The end result of EPA’s approach is that it gets to select for itself which sources of GHG emissions are required to apply for permits under the Act. But the Clean Air Act does not grant EPA the authority to determine for itself which sources warrant regulation under the PSD Program; it includes very specific emissions thresholds that the Agency is powerless to rewrite.

**A. The Agency Cannot Use Tools of Last Resort in the Face of Permissible Interpretations of the Clean Air Act.**

EPA seemed to acknowledge the difficulties it would face in invoking administrative tools of last resort, but it never truly grappled with them. *See* Final Tailoring Rule, *supra*, at 75 Fed. Reg. at 31,542. For instance, while acknowledging that this Court has “held that the literal meaning of a statutory provision is not conclusive ‘in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters,’” *id.* (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)), EPA went on to note that the doctrine is not really “rare” because it has been discussed in “legions of court decisions,” *id.* (quoting *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991)).

Yet, the true import of the “absurd results,” “administrative necessity,” and “one-step-at-a-time” doctrines is not the frequency with which these doctrines have been discussed by the courts; it is that

they are exceedingly difficult to invoke. In *Logan v. United States*, for example, this Court explained that statutory terms “may be interpreted against their literal meaning where the words ‘*could not conceivably have been intended to apply*’ to the case at hand.” 552 U.S. 23, 36 (2007) (emphasis added). EPA has all but admitted that it cannot satisfy that standard here.

Even if EPA’s pollutant-indifferent interpretation could be said to be supported by a “literal reading” of the Act, Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562, the same can be said about a pollutant-specific approach. But, unlike EPA’s approach, the pollutant-specific approach does not produce absurd results. The Agency was required to consider the absurdity of its approach at *Chevron*’s first step. *See Chevron*, 467 U.S. at 843 n.9 (noting that an agency must “employ[] traditional tools of statutory construction,” which includes the absurdity canon, at *Chevron*’s first step). Instead, EPA ruled out a *permissible* interpretation of the PSD Program’s triggering provision—an interpretation that would not have worked an absurd result—*not* because it was contrary to congressional intent, but rather, because EPA could find no “explicit statements in the legislative history that” such an interpretation was *mandated* by Congress. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562. That was error. *See Chevron*, 467 U.S. at 843 (holding that, even if a statute can be read to support more than one permissible interpretation, the agency must select a *reasonable* interpretation of the statute); *see also Alabama Power*, 636 F.2d at 359 (explaining that, under the related doctrine of administrative necessity, an agency may be

relieved of the obligation “to do an impossibility,” but the agency bears the “heavy burden” of demonstrating the existence of such an impossibility); *accord Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983).<sup>7</sup>

The invocation of cases like *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), should carry a stigma. See Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,542 & n.25. Before an agency may rewrite perfectly clear provisions in a statute, it should be required to demonstrate that *no other permissible alternative construction* was available to the agency that would have avoided the claimed absurdity. See *Kloeckner*, 133 S. Ct. at 606–07; see also *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (emphasizing that “interpretations of a statute which would produce absurd results are to be avoided if al-

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<sup>7</sup> The EPA’s approach also fails the administrative “one-step-at-a-time” doctrine developed by the D.C. Circuit. Under that doctrine, an agency may achieve a statutory mandate in a “piecemeal fashion,” but it must work towards the goal of full compliance with that congressional mandate. *E.g.*, *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409–10 (D.C. Cir. 2013); see also *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (explaining that “it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all”). EPA has not met that burden here. By its own admission, the Agency has stated that, under its interpretation of the PSD Program’s triggering provision, it is not sure that it will ever achieve full compliance with the statutory thresholds. See Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,566 (stating that, in addressing “permitting requirements for smaller sources,” the Agency will “tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities”).

ternative interpretations consistent with the legislative purpose are available”). As demonstrated in the section that follows, EPA cannot make that showing here.

**B. A Pollutant-Specific Interpretation of the Triggering Provision of the PSD Program is a Permissible Interpretation of the Clean Air Act that Avoids the Absurd Results Claimed by EPA.**

EPA had before it a completely permissible interpretation of the PSD Program’s triggering provision that would have avoided the absurd results claimed by the Agency—a pollutant-specific approach. This approach not only maintains fidelity with the text and structure of the Act, but it also would continue to achieve Congress’s overarching goal in enacting the PSD Program—to help ensure continued attainment of NAAQS for criteria pollutants.

Under Section 165 of the Act, not all newly constructed or modified “major emitting facilit[ies]” are required to get a PSD permit; rather, a PSD permit is only required of a “major emitting facility . . . in any area to which this part applies.” 42 U.S.C. § 7475(a). A “major emitting facility” is one with major emissions—100 or 250 tons per year—of “any pollutant.” *Id.* § 7479(1). “[T]his part [Part C] applies” to an area only with respect to specific criteria pollutants for which the area is in attainment with a governing NAAQS, *see id.* § 7471. And a criteria pollutant includes ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead, *but not GHG emissions*, 40 C.F.R. §§ 50.1–50.12. Ignoring the import of these phrases in tandem, EPA has

placed exclusive emphasis on the definition of “major emitting facility,” construing the permitting obligations of the PSD Program to apply to any facility emitting major amounts of “*any* air pollutant subject to regulation” *anywhere* under the Act. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562 (emphasis added). But there is another way to read these phrases in tandem: A stationary source is required to get a PSD permit if it is in a *location* attaining a NAAQS for a criteria pollutant, and it will emit threshold quantities (100/250 tons per year) of *that criteria pollutant*.

A pollutant-specific approach is fully consistent with the text of the PSD Program. Besides Section 165(a), Congress used the phrase “in any area to which this part applies” only three other times throughout the Clean Air Act, all in PSD Provisions: Section 163(b)(4), Section 165(a)(3)(A), and Section 165(c). *See* 42 U.S.C. §§ 7473(b)(4), 7475(a)(3)(A), 7475(c). Congress’s use of this phrase in Section 163(b)(4) is particularly instructive. There, Congress provided that “[t]he 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” the lowest of the concentrations permitted under the “primary” or “secondary” NAAQS for that pollutant. *Id.* § 7473(b)(4) (emphasis added). In this context, “in any area to which this part applies” plainly modifies “any air pollutant,” and limits the meaning of that latter phrase to criteria pollutants. *Id.* In contrast, if the phrase “in any area to which this part applies” was pollutant indifferent, as EPA claims, then Section 163(b)(4) would apply to *non-criteria*

pollutants. Yet, EPA cannot set a “maximum allowable concentration” for such pollutants, because non-criteria pollutants have no primary or secondary NAAQS. Thus, the phrase “any area to which this part applies” should be read to impose a pollutant-specific approach throughout the PSD Program, including in that program’s triggering provision, Section 165(a). *See id.* § 7475(a).

A pollutant-specific approach also comports with the overall structure of Title I. Beyond the pollutant-specific nature of the NAAQS Program generally, the PSD Program was specifically designed to complement the NNSR Program. That latter program was intended to “ensur[e] attainment of the applicable national ambient air quality standard” for an area that is “designated ‘nonattainment’ with respect to [criteria] pollutant[s]” designated under Section 107. 42 U.S.C. § 7501(1), (2). It would make little sense if, in enacting these complementary programs, Congress provided that the trigger for the NNSR Program is pollutant-specific, but the trigger for the PSD Program is pollutant-indifferent.

And a pollutant-specific approach is fully consistent with the overarching purpose of the PSD Program as well. Congress designed the PSD Program to implement what its unabbreviated name provides—to “*prevent significant deterioration* of air quality in each region . . . designated pursuant to [Section 107] as attainment,” 42 U.S.C. § 7471 (emphasis added)—and to complement and reinforce the pollutant-specific NAAQS Program, *see* S. REP. NO. 95-127, at 29 (1977) (stating that the PSD Program was designed to “protect national ambient air quality

standards”). Indeed, one of the basic requirements for obtaining a PSD permit is for a qualifying facility to demonstrate that it will not cause an attainment area to become a nonattainment area for any NAAQS. *See* 42 U.S.C. § 7475(a)(3).

Critically, the pollutant-specific approach avoids the immediate absurdities claimed by EPA. Under such an approach, “not a single additional PSD permit would be required.” Charles H. Knauss & Shannon S. Broome, *EPA’s Missed Opportunity to Ground Its GHG Tailoring Rule in the Statute: What the Situs Argument Would Mean for the Future of the PSD Program*, 42 ENVTL. L. REP. 10,424, 10,430 (May 2012) (available at <http://elr.info/sites/default/files/docs/42.ELR.10424.pdf>). As the table reprinted in an addendum to this brief depicts, unlike EPA’s interpretation of the PSD Program’s triggering provision, which would require EPA to issue an estimated 82,173 permits each year, a pollutant-specific approach would maintain the status quo at 688 permits annually. *See* Addendum A, *infra*, at 28.

Moreover, because a stationary source that satisfies the pollutant-specific requirements discussed above would still have to install “best available control technology for each pollutant subject to regulation under” the Act, 42 U.S.C. § 7475(a)(4), a covered facility may have to install BACT for GHG emissions even under a pollutant-specific approach. Thus, a pollutant-specific approach would sensibly limit the number of stationary sources that are covered by the PSD Program—without doing violence to the program as a whole.

EPA did not refute any of these observations. Instead, beyond claiming that it was required to find that a pollutant-specific approach was *compelled* by the “legislative history” of the Clean Air Act Amendments of 1977, *see* Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562, EPA argued that, because Section 165(a)(4) requires a PSD permit holder to adopt BACT for “each pollutant subject to regulation” under the Act, Congress intended for the PSD *triggering provision* to be pollutant indifferent as well, *id.* at 31,561. But EPA puts the cart before the horse. There is no logical reason why the PSD Program’s permitting trigger must be coextensive with the substantive requirements of that program. Indeed, Congress adopted just such a non-coextensive approach under Section 112 of the Act. There, Congress determined that only “major sources”—those that may emit at least 10 tons per year of a hazardous air pollutant—would be subject to stringent “maximum achievable control technology” (MACT) standards, but once a source so qualifies, it is subject to MACT for all hazardous air pollutants, including pollutants for which it is not capable of emitting above the 10-ton threshold. *See* 42 U.S.C. § 7412.

In addition, EPA’s approach renders superfluous Congress’s inclusion of the phrase “in any area to which this part applies.” Even before EPA adopted its overly-broad definition of the PSD Program’s triggering provision, *every area of the country had been—and continues to be—in attainment with at least one NAAQS*. *See, e.g.*, Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,561. If EPA’s broad interpretation of the trigger is the only permissible one, then Congress could have simply omitted the phrase “in any area to

which this part applies.” EPA’s chosen path therefore violates the canon that superfluity—*i.e.*, “an interpretation of a congressional enactment which renders superfluous another portion of that same law”—should be avoided. *E.g.*, *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Regardless of whether a pollutant-specific approach is compelled by the text, structure, and purpose of Title I of the Clean Air Act, it is plainly a permissible approach. As a result, EPA was not free to reject it over an approach that required the Agency to rewrite other provisions of the Act.

**C. The Agency’s Decision to Rewrite Perfectly Clear Statutory Provisions Constitutes an Impermissible Consolidation of Legislative and Executive Functions, Warranting Instead Application of the Canon of Constitutional Avoidance.**

An absurdity of the magnitude claimed by EPA—the expansion of PSD permitting from 688 to an estimated 82,173 sources annually—should have caused the Agency to reevaluate its underlying interpretation of the PSD Program. Indeed, the Agency itself recognized that the results of its interpretation were “so contrary to what Congress had in mind—and [would] in fact so undermine[] what Congress attempted to accomplish with the PSD requirements”—that they were appropriately characterized as “absurd.” Proposed Tailoring Rule, *supra*, 74 Fed. Reg. at 55,310.

And yet, faced with an absurdity of its own making, the Agency instead arrogated for itself the au-

thority to rewrite perfectly clear statutory text. It increased by over 400-fold the 100- and 250-tons-per-year thresholds, settling upon 75,000 and 100,000 tons per year. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. And the Agency stated that, in addressing future “permitting requirements for smaller sources,” it would “tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities.” *Id.* at 31,566. Thus, the Agency claimed virtually unfettered discretion to make and implement legislative judgments about which sources should be subject to permitting for GHG emissions. Such a course is both unprecedented and unconstitutional.

To the Framers of our Constitution, separating the powers of government was a means to prevent a potentially deleterious end—the “accumulation of all powers, legislative, executive, and judicial, in the same hands.” FEDERALIST NO. 47, at 244 (G. Willis ed. 1982) (J. Madison). According to Thomas Jefferson: “The concentrati[on of these powers] in the same hands[] is precisely the definition of despotic government.” FEDERALIST NO. 48, at 252 (J. Madison quoting T. Jefferson). And James Madison—associating any such accumulation with “tyranny”—rejected any notion that our Constitution is “chargeable with the accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation.” FEDERALIST NO. 47, at 244.

These statements might appear hyperbolic to the modern American, but the Framers undoubtedly imbued our Constitution with structural safeguards that have continued vitality to this day. For in-

stance, this Court struck down the line-item veto as unconstitutional precisely because it gave to “the President the unilateral power to change the text of duly enacted statutes.” *Clinton v. City of New York*, 524 U.S. 417, 447 (1998). A similar outcome is warranted here.

The traditional canon of constitutional avoidance should have compelled EPA to adopt a narrower interpretation of the PSD Program’s triggering provision. Under this canon, “[i]f an otherwise acceptable construction of a statute would raise serious constitutional problems” (as does an agency’s decision to unilaterally rewrite clear statutory text), “and where an alternative interpretation of the statute is ‘fairly possible,’” the statute should be construed “to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001). Here, EPA was faced with *more than* a “fairly possible” alternative interpretation, but instead elected to cling to an interpretation that not only produced absurd results, but also served as a justification for the Agency to rewrite the Clean Air Act and assume for itself the authority to decide which stationary sources are subject to permitting for GHG emissions.

Because EPA failed to apply the canon of constitutional avoidance, this “Court is obligated to” do so. *Id.* That canon places yet another thumb on the scale against the interpretation adopted by EPA.

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As Judge Kavanaugh remarked in his dissent from the denial of rehearing *en banc* in these cases: “When an agency is faced with two initially plausible

readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out.” J.A. 174. Settled principles of administrative and constitutional law counsel against providing EPA with such a precedent here.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 16, 2013

*Counsel for Amici Curiae*

Table: Effects of the Interpretation of the Permitting Trigger on Annual PSD Permitting

	Pre-GHG Permitting Under the PSD Program	Post-GHG Permitting Under A Pollution-Indifferent Approach	Tailoring Rule Step-1: Existing Sources Subject to BACT	Tailoring Rule Step-2: 100,000 Major Source; 75,000 Major Modification	Pollutant-Specific Approach to PSD Permitting
Annual Number of PSD New Construction Actions	240	19,889	240	242	240
Annual Number of PSD Modification Actions	448	62,284	448	1,363	448
Facilities Potentially Subject to BACT for GHGs Annually	0	82,173	688	1,605	688

ADDENDUM A  
28

\* All columns except the last are based on estimates articulated in the Tailoring Rule, 75 Fed. Reg. at 31,540.

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No. 12-1146 With Nos. 12-1248, 12-1254,  
12-1268, 12-1269 & 12-1272

UTILITY AIR REGULATORY GROUP,  
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

**AFFIDAVIT OF SERVICE**

I HEREBY CERTIFY that on December 16, 2013, three (3) copies of the BRIEF OF TEXAS OIL & GAS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, AND TEXAS ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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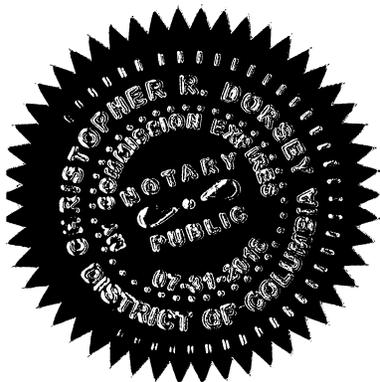
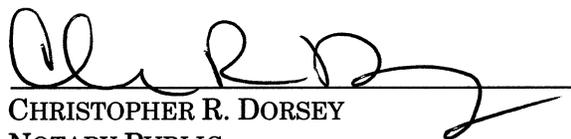
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 NOTARY PUBLIC  
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My commission expires July 31, 2018.

No. 12-1146 With Nos. 12-1248, 12-1254,  
12-1268, 12-1269 & 12-1272

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IN THE  
**Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP,  
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent.*

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**On Writs of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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**BRIEF OF TEXAS OIL & GAS ASSOCIATION,  
TEXAS ASSOCIATION OF BUSINESS,  
AND TEXAS ASSOCIATION OF MANUFACTURERS  
AS AMICI CURIAE SUPPORTING PETITIONERS**

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**CERTIFICATE OF COMPLIANCE**

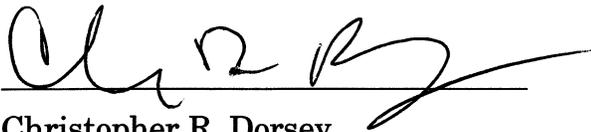
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News from Attorney General Eric T. Schneiderman

FOR IMMEDIATE RELEASE  
December 16, 2013

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A.G. SCHNEIDERMAN & COALITION STATES: CLEAN AIR ACT MANDATES FEDERAL ACTION TO CUT CLIMATE-CHANGE POLLUTION FROM POWER PLANTS

Existing Fossil-Fuel Power Plants Are The Single Largest Source Of Climate-Change Pollution; Opponents Of Action Grasping At Legal Straws To Forestall Common-Sense Pollution Controls

Schneiderman: EPA Needs To Take Prompt Action Required By Law To Limit Pollution From Power Plants And Must Afford States Flexibility In Implementation

NEW YORK - In comments submitted today to the federal Environmental Protection Agency, Attorney General Eric T. Schneiderman and a coalition of attorneys general from 11 other states and the District of Columbia argue that, in order to substantially reduce dangerous climate-change pollution from existing fossil-fuel power plants, the agency must both set strong emission limits and give states flexibility on how they choose to meet those limits.

The comments lay out the legal requirements for the EPA to take action against climate-change pollution under the federal Clean Air Act. They are a rebuttal to claims by those who oppose cutting

climate-change pollution from existing power plants, and who wrongly argue that the Clean Air Act bars the EPA from moving forward with planned regulations.

“Climate change represents the greatest environmental threat of our time, posing the risk of catastrophic harm to the health and safety of all New Yorkers and to our economy,” Attorney General Schneiderman said. “Despite the real and present danger of unabated climate-change pollution, opponents continue to grasp at legal straws to forestall common-sense controls on its single largest source -- existing fossil-fuel power plants. As our coalition makes plain, opponents of EPA action are wrong on the law. The Clean Air Act is clear in requiring that EPA set strong limits on climate-change pollution emissions from existing power plants and in giving states the flexibility they need to best meet them.”

In 2007, the U.S. Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gases that contribute to climate change are covered by the Act's definition of air pollutants. The court further ruled that EPA must determine whether these gases cause or contribute to air pollution that may endanger public health or welfare. Subsequently, EPA determined that greenhouse gases endanger the health and welfare of Americans. In October of this year, the Supreme Court refused to reconsider a lower court decision that affirmed this “endangerment” determination.

The coalition's comments detail EPA's legal obligation under the Act to regulate climate-change pollution from power plants, thereby directly countering the erroneous legal arguments of opponents of EPA action -- particularly those who claim that EPA lacks the authority to set substantive limits on existing power plant emissions of climate-change pollution.

The Act mandates that the agency regulate emission sources that cause or significantly contribute to air pollution that endangers public health or welfare. As fossil-fuel power plants are the single largest source of climate-change pollution in the United State -- emitting roughly 40 percent of the nation's total emissions -- EPA is obligated to regulate the climate-change pollution emissions of these plants.

Accordingly, in September 2013, EPA proposed limits on climate-change pollution from new power plants. Under the Act, because EPA is regulating these emissions -- and because the pollutants that contribute to climate change are not being regulated as “criteria” or “hazardous” air pollutants under other sections of the Act -- the agency is obligated to prescribe regulations limiting emissions from existing power plants as well.

Through this regulatory framework, EPA establishes emission guidelines based on the best system for reducing climate-change pollution from existing power plants, while giving states flexibility to determine how best to achieve these or greater reductions. The coalition's comments stress the importance of EPA maintaining this flexibility. Many states have already responded to the threat of climate change by moving forward independently to implement programs to reduce climate-change pollution from their electricity sectors. New York and other states have used a variety of approaches to achieve important reductions, including market-based cap-and-trade systems, such as the "Regional Greenhouse Gas Initiative" in which New York participates, planned retirements of coal-fired power plants, renewable portfolio standards, demand management and energy-efficiency programs.

It is critically important for EPA to use its expertise to set strong and achievable emission targets. There is compelling scientific evidence that significant reductions in climate-change pollution must occur to prevent increases in the frequency, magnitude and scale of adverse health, safety and economic impacts. These impacts include:

- \*More heat-related deaths and illnesses;
- \*Extreme weather, including storms, floods, and droughts;
- \*Higher smog levels, increasing the rate of asthma, pneumonia, and bronchitis;
- \*Coastal land loss due to inundation, erosion, submergence and habitat loss from rising sea levels;
- \*Threats to ecosystems, including the Adirondacks in New York;
- \*Disappearance of plant and animal species and a rise in insect-borne illnesses, destructive fungi and

pests;

\*Threats to our food production, agriculture and forest productivity; and

\*Threats to our energy, transportation and water resource infrastructure.

Joining Attorney General Schneiderman today in submitting the comments to EPA are the Attorneys General of California, Connecticut, Delaware, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington and the District of the Columbia.

This matter is being handled by Assistant Attorneys General Jung W. Kim, Morgan A. Costello and Michael J. Myers, and Chief Scientist Alan Belenz of the Attorney General's Environmental Protection Bureau, under the supervision of Bureau Chief Lemuel M. Srolovic, Executive Deputy Attorney General for Social Justice Alvin Bragg and First Deputy for Affirmative Litigation Janet Sabel.

A copy of today's letter can be read here.

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State of New York Attorney General

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**COMMENTS OF THE ATTORNEYS GENERAL OF NEW YORK,  
CALIFORNIA, MASSACHUSETTS, CONNECTICUT, DELAWARE, MAINE,  
MARYLAND, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT,  
WASHINGTON, AND THE DISTRICT OF COLUMBIA ON THE DESIGN OF  
A PROGRAM TO REDUCE CARBON POLLUTION FROM  
EXISTING POWER PLANTS**

**Executive Summary**

The Environmental Protection Agency is soliciting input from stakeholders in developing a proposed rule under section 111(d) of the Clean Air Act (Act) to address greenhouse gas emissions from existing power plants: the largest source of greenhouse gas emissions in the nation. The Act requires EPA to ensure that States achieve emission reductions from existing power plants necessary to protect human health and welfare from the harms of carbon pollution. As part of its outreach effort in advance of proposing a rule in June 2014, EPA has requested the view of States on several aspects of regulation under section 111(d), including determining the best system of emission reduction and designing criteria by which to evaluate the adequacy of state programs.

The Attorneys General of New York, California, Massachusetts, Connecticut, Delaware, Maine, Maryland, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia submit these comments in response to that request and on related issues concerning EPA's vital obligation to limit greenhouse gas emissions from existing power plants. Although each of the undersigned States has already taken significant steps to reduce greenhouse gas pollution emitted by the power sector, substantial work remains.

Section I of these comments provides background on the importance of EPA's rulemaking to address carbon pollution from existing power plants. First, we discuss the serious and well-recognized harms caused by carbon pollution and associated with climate change. Against this backdrop, we summarize how EPA finally reached the point of regulating greenhouse gas emissions from power plants. We then explain the various programs that, in the absence of EPA action until now, States have implemented to reduce greenhouse gas emissions from the power industry cost-effectively. These approaches include renewable portfolio standards, market-based cap-and-trade systems, planned retirements of coal-fired power plants, demand management and energy efficiency programs.

Section II discusses EPA's legal authority to regulate greenhouse gas emissions from existing power plants under section 111(d), including the text and legislative history supporting such regulation. Because EPA is regulating greenhouse gas emissions from new power plants under section 111(b) and greenhouse gases are not regulated as criteria pollutants or as hazardous air pollutants, EPA must regulate those emissions from existing power plants under

section 111(d). The obligation to act is further supported by EPA's longstanding interpretation of the scope of its authority to regulate under section 111(d), which was not altered by Congress's amendment of the statute in 1990.

Section III concerns the substantive aspects of regulation under section 111(d), including its cooperative federalism framework and EPA's role within this structure. Although some State Attorneys General have sought to relegate EPA to a perfunctory procedural role, EPA's role is far more central. EPA is first tasked with issuing emission guidelines that include minimum substantive emission limitations. In doing so, the Act authorizes EPA to determine the degree of emission limitation achievable when the best *system* of emission reduction, as determined by EPA to have been adequately demonstrated, is applied. To make this determination, EPA must consider a range of systems, including source-based and system-based<sup>1</sup> approaches of emission reduction. Then, EPA prescribes how to measure the achievable emission limitation, for example, with a pounds per megawatt hour emission rate, or a tons per year mass emission limit. Many existing programs that States have employed to begin the urgent task of reducing greenhouse gas emissions from the power sector should inform EPA's determination of the reductions achievable.

Finally, in Section IV, we look at the States' critical responsibilities under section 111(d). EPA sets the required degree of emission reduction, but each State must actually determine how to regulate its existing sources through its own state plan. Because section 111(d) puts the States in the driver's seat to implement and enforce the required emission reductions, EPA must give the States options to demonstrate compliance with its emission guidelines and tell the States how to show that their plans are equivalent to such guidelines. Such alternative mechanisms may include trading and other existing state programs, use of multi-year compliance periods, regional cooperation, and phased reductions if, among other things, the proposed standards are enforceable and the reductions are measurable and timely achieved. In short, the statute gives EPA and the States sufficient flexibility to achieve meaningful reductions of greenhouse gas emissions quickly and in a cost-effective way.

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<sup>1</sup> In its request for input in advance of EPA's proposed section 111(d) rule, EPA referred to two options for addressing carbon pollution from existing power plants, a "source-based approach" and a "system-based approach." CONSIDERATIONS IN THE DESIGN OF A PROGRAM TO REDUCE CARBON POLLUTION FROM EXISTING POWER PLANTS (Sept. 23, 2013), *available at* <http://www2.epa.gov/sites/production/files/2013-09/documents/20130923statequestions.pdf>. EPA explained that "[a] system-based approach evaluates a broader portfolio of measures including those that could be taken beyond the affected sources but still reduce emissions at the source." *Id.* at 1-2. These comments accordingly use the terms "system-based approach" or a "system-wide approach" to mean industry-wide or power sector-wide systems of emission reduction.

## I. The Urgency of Aggressively Addressing the Largest Sources of Carbon Pollution

In *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), the Supreme Court noted that “[t]he harms associated with climate change are serious and well recognized.” As the recent draft U.S. Climate Action Report prepared by the Department of State succinctly states: “The scientific consensus . . . is that anthropogenic emissions of greenhouse gases are causing changes in the climate that include rising average national and global temperatures, warming oceans, rising average sea levels, more extreme heat waves and storms, extinctions of species, and loss of biodiversity.” Climate Action Report 2014, U.S. Biennial Report – Highlights at 2.<sup>2</sup> The release of atmospheric carbon dioxide from human activities is also the primary cause of ocean acidification, which causes changes to ecosystems and marine biodiversity, potentially impacting food security and the economy.<sup>3</sup> A recent report confirmed that “[t]he ocean continues to acidify at an unprecedented rate in Earth’s history,” with a projected increase of 170 percent in ocean acidity by 2100 compared with preindustrial levels if carbon dioxide emissions are not reduced.<sup>4</sup> Significant reductions in greenhouse gas emissions must occur to prevent increases in the frequency, magnitude and scale of the adverse impacts of climate change pollution, which include:

- more heat-related deaths and illnesses;
- higher smog levels, increasing the rate of asthma, pneumonia and bronchitis;
- extreme weather, including storms, floods and droughts;
- loss of water supplies due to increased salinity and saltwater intrusion;
- coastal land loss due to inundation, erosion, submergence and habitat loss from a rising sea level;
- increased risk of wildfire;
- loss of snowpack in California’s Sierra Nevada and the Cascade mountains in Oregon and Washington;
- ocean acidification;
- threats to ecosystems from the Adirondacks in New York to the Sierra Nevada in California;
- disappearance of plant and animal species and a rise of insect-borne illnesses, destructive fungi and pests;
- displacement of cold water fish species such as native brook trout in New York;

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<sup>2</sup> Available at <http://www.state.gov/e/oes/climate/ccreport2014/index.htm>.

<sup>3</sup> Ocean Acidification Summary for Policymakers, Third Symposium on the Ocean in a High-CO2 World, available at <http://www.igbp.net/publications/summariesforpolicymakers/summariesforpolicymakers/oceanacidificationsummaryforpolicymakers2013.5.30566fc6142425d6c9111f4.html>.

<sup>4</sup> *Id.*

- warmer stream temperatures and reduced stream flow, threatening Chinook salmon, coho salmon and steelhead trout species in California, Oregon and Washington;
- reduced hydroelectric production from snowmelt-driven shifts in stream flow;
- threats to our food production, agriculture and forest productivity;
- threats to our energy, transportation and water resource infrastructure; and
- increased environmental pressures on certain communities in low-lying areas, particularly in Alaskan indigenous communities.

The Supreme Court's decision not to disturb a federal court of appeals' ruling upholding EPA's determination that greenhouse gas emissions endanger public health and welfare ends the legal debate on climate science, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. denied*, 82 U.S.L.W. 3214 (U.S. Oct. 15, 2013) (No. 12-1272), switching the focus squarely to what the federal government and the States can do to address these emissions.

#### **A. The history of federal regulation of power plant greenhouse gas emissions**

In 2006, after EPA revised its new source performance standards (NSPS) for power plants and failed to include standards for greenhouse gas emissions, the States of New York, Connecticut, California, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York filed a petition seeking judicial review of that failure. *New York v. EPA* (D.C. Cir. No. 06-1322). The matter was ultimately remanded to the agency after the Supreme Court's decision in *Massachusetts v. EPA*, and in 2010, the parties entered into a settlement agreement setting a schedule for EPA to propose and promulgate NSPS for greenhouse gas emissions from new and existing power plants.

Although EPA failed to meet that rulemaking schedule, on June 25, 2013, President Obama issued a memorandum to the Administrator of the EPA, in which he directed the Administrator to fulfill her statutory duty under sections 111(b) and 111(d) of the 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." The President established new dates for the Administrator to issue a new proposal for NSPS for greenhouse gas emissions, for the Administrator to propose and finalize emission guidelines for existing power plants, and for the States to submit their implementation plans pursuant to those guidelines.

**“The unique characteristics of carbon pollution and the interconnected nature of the electric power sector call for a broad and flexible approach to designing the program for existing power plants.”**

EPA Overview Presentation of Clean Air Act Section 111 (minute 27:49), *available at* <http://www2.epa.gov/carbon-pollution-standards/what-epa-doing#overview>.

EPA proposed NSPS for greenhouse gas emissions from new power plants on September 20, 2013.<sup>5</sup> As discussed below, the proposal triggered EPA’s obligation to proceed with rulemaking under section 111(d), which governs regulation of air pollutants for existing sources that if new, would be subject to the NSPS. EPA’s authority to act under section 111 is supported by the Supreme Court’s decision in *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (*AEP*), where the Court specifically pointed to section 111 in finding that the Act “speaks directly” to carbon dioxide emissions from power plants and that therefore, the Act “and the EPA actions it authorizes” displace any federal common law right of action to abate carbon dioxide emissions from fossil fuel-fired power plants.<sup>6</sup>

## **B. State efforts to curb power plant greenhouse gas emissions**

Rather than simply wait for federal action, many States moved forward independently to implement programs to reduce greenhouse gas emissions from fossil fuel-fired power plants. Twenty States and the District of Columbia have set greenhouse gas emissions targets, reduced levels of emissions that each State has committed to achieve by a specified time.<sup>7</sup> States have employed different strategies to curb emissions, some of which are highlighted below.

### **Renewable portfolio standards**

Most States now have renewable portfolio standards that require electricity providers to obtain a given amount of their electricity from sources such as wind or solar energy. These standards create demand for new renewable power generation, which can displace generation from existing fossil fuel-fired sources.

<sup>5</sup> EPA had previously proposed an NSPS for greenhouse gas emissions from new power plants on April 13, 2012. 77 Fed. Reg. 22,392 (April 13, 2012). After receiving and reviewing more than a million public comments on the proposal, EPA decided to issue a new proposal. See <http://www2.epa.gov/sites/production/files/2013-09/documents/20130920proposal.pdf>.

<sup>6</sup> Because *AEP* concerned existing power plants, not new ones, the Court’s reference to EPA’s authority under the NSPS provisions of the Act to abate carbon dioxide emissions from fossil fuel-fired power plants must be to regulation under section 111(d).

<sup>7</sup> See <http://www.c2es.org/us-states-regions/policy-maps/emissions-targets>.

Under these programs, state renewable energy targets range from 1.5 percent (Iowa) to 40 percent (Hawaii), with compliance due over a range of time periods. Emission reductions attributable to these standards depend on the level and design of the standards and other state-specific factors, like the carbon intensity of existing sources and changes in demand. New York's effort to meet its renewable target of 30 percent by 2015 has already eliminated millions of tons of carbon dioxide, in addition to other pollutants. The World Resources Institute has projected that even States with relatively modest standards of between 8 and 12.5 percent can achieve reductions in emissions from existing power plants.<sup>8</sup>

### Market-based systems

A number of Northeastern and mid-Atlantic States have joined together to reduce greenhouse gas emissions from existing power plants in their States through a regional cap-and-trade system known as the Regional Greenhouse Gas Initiative (RGGI).<sup>9</sup> Pursuant to each RGGI State's own regulations, regulated power plants must acquire, either at auction or on a secondary market, one emission allowance for each ton of carbon dioxide emitted. RGGI has succeeded in reducing carbon dioxide emissions from the power sector by more than 40 percent below 2005 levels, with further reductions projected. At the same time, these States have used the proceeds from allowance auctions to fund investments in energy efficiency, further reducing demand and generating large net economic benefits (hence the coining of the term a "cap-and-invest" program). For example, a recent analysis of RGGI's costs and benefits in the participating States found that the program produces a net benefit of \$1.6 billion in the region (net present value), based on the first three-year compliance period.<sup>10</sup>

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<sup>8</sup> See Michael Obeiter et al., World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: Ohio 2 (2013), *available at* [http://www.wri.org/sites/default/files/power\\_sector\\_opportunities\\_for\\_reducing\\_carbon\\_dioxide\\_emissions\\_ohio\\_summary.pdf](http://www.wri.org/sites/default/files/power_sector_opportunities_for_reducing_carbon_dioxide_emissions_ohio_summary.pdf); Michael Obeiter et al., World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: North Carolina 2 (2013), *available at* [http://www.wri.org/sites/default/files/power\\_sector\\_opportunities\\_for\\_reducing\\_carbon\\_dioxide\\_emissions\\_north\\_carolina\\_summary.pdf](http://www.wri.org/sites/default/files/power_sector_opportunities_for_reducing_carbon_dioxide_emissions_north_carolina_summary.pdf); Michael Obeiter et al., World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: Michigan 2 (2013), *available at* [http://www.wri.org/sites/default/files/power\\_sector\\_opportunities\\_for\\_reducing\\_carbon\\_dioxide\\_emissions\\_michigan\\_summary.pdf](http://www.wri.org/sites/default/files/power_sector_opportunities_for_reducing_carbon_dioxide_emissions_michigan_summary.pdf); Michael Obeiter et al., World Resources Institute, Power Sector Opportunities for Reducing Carbon Dioxide Emissions: Pennsylvania 2 (2013), *available at* [http://www.wri.org/sites/default/files/power\\_sector\\_opportunities\\_for\\_reducing\\_carbon\\_dioxide\\_emissions\\_pennsylvania\\_summary.pdf](http://www.wri.org/sites/default/files/power_sector_opportunities_for_reducing_carbon_dioxide_emissions_pennsylvania_summary.pdf).

<sup>9</sup> The States that currently participate in RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

<sup>10</sup> See Analysis Group, The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States (2011), *available at* [http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Economic\\_Impact\\_RGGI\\_Report.pdf](http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Economic_Impact_RGGI_Report.pdf).

California's economy-wide cap-and-trade program likewise requires power plants to obtain allowances or credits sufficient to match their emissions. The program is a key element of the State's efforts to reduce emissions to 1990 levels by 2020, as required by the California Global Warming Solutions Act. *See* CAL. HEALTH & SAFETY CODE §§ 38550, 38562(a). California projects the combination of cap and trade, a renewable portfolio standard, energy efficiency standards for consumer and industrial products, and other programs will reduce power sector emissions by at least 25 percent from 2005 levels by 2025. The state board has set a declining cap on emissions at a level deemed necessary to achieve the statute's emissions reductions goals, and thus can use the cap as a backstop in the event other programs in California's portfolio fall short of achieving their projected reductions.

### **Demand management**

States have achieved significant cost-effective emission reductions and saved ratepayers money through efforts to reduce demand for electricity generation. More than half of the States require utilities to adopt Energy Efficiency Resource Standards, reducing demand by a specified amount each year.<sup>11</sup>

### **Retirement planning and plant refurbishment**

Some States have enacted laws to encourage the retirement of old, inefficient power plants. Colorado's Clean Air Clean Jobs Act, HB-1365, required utilities to develop plans to reduce carbon dioxide and other emissions from their coal-fired power plants. The law encouraged utilities drafting those plans to consider retiring those plants and investing in energy efficiency programs, and allowed utilities to recover the costs of such changes. The State's largest utility, Xcel Energy, developed a plan to replace coal-fired power plants with natural gas-fired plants. Xcel projects its plan will reduce its carbon dioxide emission by 28 percent by 2020 and its emissions of other pollutants like sulfur and nitrogen oxides and mercury by more than 80 percent each. A similar law in Minnesota led Xcel to replace two existing coal-fired power plants and refurbish another, leading to a 21 percent reduction in greenhouse gas emissions.

### **Energy efficiency programs**

Other state efforts include energy efficiency standards for consumer products and commercial and industrial equipment, residential and commercial building codes, and incentives for consumers to adopt more efficient technologies, and

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<sup>11</sup> *See* American Council for an Energy-Efficient Economy, *The 2013 State Energy Efficiency Scorecard 19-20* (2013), available at <http://aceee.org/research-report/e13k>.

investment in energy efficiency projects. Massachusetts' energy efficiency programs have been so successful that the Independent System Operator New England (ISO-NE), New England's regional transmission organization which operates the bulk electric power generation and transmission system for New England and administers wholesale electricity markets, has begun to take the programs into account for purposes of its long term load forecasting. For the period 2016 through 2022, ISO-NE is projecting that, with state energy efficiency investments fully included, load growth will remain flat at about 132,000 GWh.<sup>12</sup> Such flat load growth means that customers reduce energy costs by 1) avoiding the cost of energy that would have been used absent energy efficiency; 2) reducing overall energy prices since lower demand results in lower prices for everyone; and 3) avoiding generation, transmission, and distribution infrastructure costs system-wide. By contrast, without including state energy efficiency programs in the projection, load growth is forecasted to increase from 144,000 to 152,000 GWh during that same period.<sup>13</sup> These data show that consumers can dramatically reduce the demand curve if state programs offer the right incentives.

The Massachusetts energy efficiency programs reduced retail sales of electricity in the Commonwealth by 2 percent in 2012; that number is expected to reach 2.5 percent in 2015, resulting in a cumulative annual carbon dioxide emission reduction of three million metric tons in 2015 from electric energy efficiency programs implemented from 2005 through 2015.<sup>14</sup> Because energy efficiency is less expensive than fossil fuel-fired power, the flattening of demand attributable to the Massachusetts efficiency programs represents both substantial savings to consumers and highly cost-effective reductions in carbon dioxide emissions.

Oregon's public purpose charge – 3 percent of the total revenues collected by the state's utilities – provides roughly \$60 million per year to support energy efficiency, renewable energy, and low-income programs in Oregon. This funding supports the Energy Trust of Oregon's electric programs, including a goal of saving over 2,000 GWh of electricity between 2010 and 2014, equivalent to 1 percent of electricity sales in 2013 and 2014.

California has likewise focused on energy efficiency as a means to protect its consumers and reduce air pollution. For decades, California has enforced an expanding network of efficiency standards which help minimize the energy needed

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<sup>12</sup> ISO-NE Final 2013 Energy Efficiency Forecast 2016-2022 (Feb. 22, 2013), Slide 37, *available at* [http://www.iso-ne.com/committees/comm\\_wkgrps/othr/engry\\_effncy\\_frcst/2013frcst/iso\\_ne\\_final\\_ee\\_forecast\\_2016\\_2022.pdf](http://www.iso-ne.com/committees/comm_wkgrps/othr/engry_effncy_frcst/2013frcst/iso_ne_final_ee_forecast_2016_2022.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> Massachusetts Department of Environmental Protection (November 21, 2013).

to power appliances and buildings.<sup>15</sup> Energy savings are projected at nearly 70,000 GWh in 2013 alone.<sup>16</sup> The California Energy Commission estimates that these efficiency standards have generated \$74 billion in savings for California consumers over the last several decades.<sup>17</sup> Energy efficiency is the first resource California looks to as it considers its energy needs, and is the first resource considered in procurement proceedings under California's loading order.<sup>18</sup> Because California has decoupled utility profits from energy sales, its investor-owned utilities have strong incentives to pursue these savings.<sup>19</sup> Academic analysts have concluded that hundreds of thousands of jobs can be created by California's expanding energy efficiency programs.<sup>20</sup>

States' innovative programs provide valuable data and experience for EPA to consider and upon which it should draw in determining the best system of emission reduction from existing power plants.

## II. EPA's Legal Authority to Regulate Greenhouse Gas Emissions from Existing Power Plants

EPA historically has interpreted section 111(d) to mandate regulation of existing sources' emissions of pollutants that are not regulated as criteria pollutants (under sections 108 and 110, 42 U.S.C. §§ 7408, 7410) or as hazardous air pollutants (under section 112, *id.* § 7412) once EPA regulates emissions of those pollutants from new sources under section 111(b). This construction is consistent with the idea that section 111(d) provides a "backstop" to regulation of pollutants under the national ambient air quality standards (NAAQS) or hazardous air pollutant programs. Thus, here power plants emitting greenhouse gases are subject to mandatory regulation under section 111(d) because greenhouse gases are not regulated as criteria pollutants or as hazardous air pollutants and because EPA has

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<sup>15</sup> See generally California Energy Commission, *Tracking Progress: Energy Efficiency* (2013), available at [http://www.energy.ca.gov/renewables/tracking\\_progress/documents/energy\\_efficiency.pdf](http://www.energy.ca.gov/renewables/tracking_progress/documents/energy_efficiency.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.*

<sup>18</sup> See generally California Energy Commission, *Implementing California's Loading Order for Electricity Resources* (2004), available at <http://www.energy.ca.gov/2005publications/CEC-400-2005-043/CEC-400-2005-043.PDF>.

<sup>19</sup> See American Council for an Energy-Efficient Economy, *State Energy Efficiency Database: California* (2013), available at <http://aceee.org/sector/state-policy/california>.

<sup>20</sup> David Roland-Holst, *Energy Efficiency, Innovation, and Job Creation in California* 35 (2008), available at [http://are.berkeley.edu/~dwrh/CERES\\_Web/Docs/UCB%20Energy%20Innovation%20and%20Job%20Creation%2010-20-08.pdf](http://are.berkeley.edu/~dwrh/CERES_Web/Docs/UCB%20Energy%20Innovation%20and%20Job%20Creation%2010-20-08.pdf).

moved forward with regulating greenhouse gas emissions from power plants under section 111(b).

Two recent commentators have sought to use a legislative oddity – the enactment in 1990 of two differently worded amendments to section 111(d) – to argue that EPA is powerless to regulate greenhouse gas emissions from existing power plants.<sup>21</sup> As explained below, however, Congress’s enactment of these two amendments did not change the backstop nature of EPA’s authority to regulate under section 111(d). Instead, Congress revised section 111(d) to correct a cross-reference to section 112 as a result of substantive changes to section 112, not to effectuate sweeping change in the coverage of pollutants regulated under section 111(d).

**A. The language, structure and history of section 111(d) show that greenhouse gas emissions from existing power plants are subject to regulation under this section.**

Under the familiar two-pronged test of *Chevron, U.S.A., Inc. v. NRDC*, courts and agencies “must give effect to the unambiguously expressed intent of Congress.” 467 U.S. 837, 842 (1984) (*Chevron*). 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 842.

At step one of *Chevron*, “traditional tools of statutory construction,” including legislative history and statutory text and structure, are employed to discern legislative intent. *Id.* at 843 n.9. *See, e.g., Zuni Public School Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 89-100 (2007) (considering legislative history and purpose of statute first at step one, then again at step two). The text and structure of section 111(d) and the circumstances surrounding the amendment of section 111(d) make clear that power plant greenhouse gas emissions are subject to section 111(d) regulation.

Before its amendment in 1990, section 111(d) authorized 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.” *See* 42 U.S.C. § 7411(d) (West 1977). At that time, section 112(b)(1)(A) required EPA to list hazardous air pollutants meriting regulation under section 112. *See id.* § 7412(b)(1)(A). Congress amended the Act extensively in 1990 after its approach to regulating hazardous air pollutants “proved to be disappointing” due to EPA’s delay in listing those pollutants under

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<sup>21</sup> William J. Haun, *The Clean Air Act as an Obstacle to the Environmental Protection Agency’s Anticipated Attempt to Regulate Greenhouse Gas Emissions from Existing Power Plants*, THE FEDERALIST SOCIETY (March 2013); Brian H. Potts, *The President’s Climate Plan for Power Plants Won’t Significantly Lower Emissions*, 31 YALE J. REG. ONLINE 1, 9 (Aug. 22, 2013).

section 112.<sup>22</sup> The 1990 amendments overhauled section 112 to identify 188 specific hazardous air pollutants and to regulate their emissions. 42 U.S.C. § 7412 (2012). To conform the language of section 111(d) to the changes made to section 112, Congress also revised section 111(d).

However, in an unusual turn of events, different language in the House and Senate bills amending section 111(d) was enacted into law without being reconciled in conference. In such circumstances, the Statutes at Large, rather than the U.S. Code, are controlling.<sup>23</sup> The Statutes at Large contain both the House and Senate amendments to section 111(d). The Senate amendment, set forth at Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990), simply substituted the reference to the amended section of the Act<sup>24</sup> and provides:

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

The House amendment, set forth at Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990), took a different approach and replaced the simple reference with an explanation:

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.’

Both amendments appear in the House Conference Report, which was enacted by both the House and the Senate, H.R. Conf. Rep. 101-952, at 50, 123 (1990), and the bill signed by President Bush contained both amendments surrounded by brackets with a footnote describing the amendments as “duplicative.” According to the codifier, the provisions did nothing more than merely “in different language, change the reference to section 112.” The Clean Air Act, as Amended, *reprinted in* 1 ENVIRONMENT AND NATURAL RES. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 46 (1998).

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<sup>22</sup> See *Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004) (describing history of hazardous air pollutant provisions between 1970 and 1990).

<sup>23</sup> 1 U.S.C. § 112 (2012). See *United States Nat’l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 448 (1993) (“Though the appearance of a provision in the current edition of the United States Code is ‘prima facie’ evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the ‘legal evidence of laws,’ [1 U.S.C.] § 112, and despite its omission from the Code [a provision] remains on the books if the Statutes at Large so dictates”).

<sup>24</sup> See 42 U.S.C.A. § 7411(d) (West 1977).

**The bill signed by President George H.W. Bush contained both amendments surrounded by brackets with a footnote stating: “The amendments . . . appear to be duplicative; both, in different language, change the reference to section 112.”**

The Clean Air Act, as Amended, *reprinted in* 1 ENVIRONMENT AND NATURAL RES. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 46 (1998).

Consistent with congressional intent and the codifier’s understanding, the revisions to section 111(d) must be read, as a *Chevron* step one matter, as differently worded provisions that simply conformed the reference in section 111(d) to preclude the simultaneous regulation of air pollutants under sections 111(d) and 112. Indeed, the House and Senate amendments are found under the headings “Miscellaneous Provisions” and “Conforming Amendments,” respectively. Pub. L. No. 101-549, §§ 108, 302(a), 104 Stat. 2399, 2467, 2574 (1990).

Despite the statutory language and structure and the legislative history, two recent commentators have argued that the House amendment precludes EPA regulation of greenhouse gas emissions from power plants under section 111(d), because greenhouse gas emissions would fall under the category of *any* pollutant that happens to be emitted from a source category that is being regulated under section 112. Nothing in the legislative history or structure of section

111(d) suggests that Congress intended the amendment to effect a sweeping, substantive change in the scope of regulation under section 111(d).

First, “[s]uch a reading would be inconsistent with the general thrust of the 1990 amendments, which, on balance, reflects Congress’ desire to require EPA to regulate more substances, not eliminate EPA’s ability to regulate large categories of pollutants like non-[hazardous air pollutants].” 70 Fed. Reg. 15,994, 16,032 (March 29, 2005). And where the 1990 amendments provided regulatory relief for specific categories of sources, they did so explicitly, *see, e.g.*, 42 U.S.C. §§ 7412(e)(1), 7412(n)(1), and after much discussion.<sup>25</sup> As the Supreme Court said in another Clean Air Act case, Congress “does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001).

<sup>25</sup> *See, e.g.*, S. Rep. No. 101-228, at 147 (1989), *reprinted in* 5 ENVIRONMENT AND NATURAL RES. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8514-15 (1998) (describing section 112(e) exceptions to general rules for scheduling standard-setting for sources under section 112(d)); Senate Debate on S. 1630 (April 3, 1990), *reprinted in* 4 ENVIRONMENT AND NATURAL RES. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 7139-40 (1998) (discussing Senate Amendment adding section 112(n) requirement of study of mercury emissions from power plants prior to setting standards under section 112).

Second, as the former head of EPA’s enforcement office recently wrote, such an interpretation would make section 111(d) a “dead letter” because it is “difficult—perhaps impossible—to think of an air pollutant that is (a) emitted by stationary sources within the ambit of section 111 but (b) not also emitted by some sources (stationary or otherwise) that *also* emit[] hazardous air pollutants.” Adam Kushner and Judith Coleman, “*Lessons from Mercury: Ensuring Legal Certainty for New GHG Performance Standards from Existing Fossil Fuel Plants*,” EE News 6 (Oct. 24, 2013) (emphasis original).<sup>26</sup> This huge gap in regulation would render section 111(d) ineffective in fulfilling its structural and historical role as a backstop provision and “impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.” *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947). A “cardinal principal of statutory construction” requires courts to reject interpretations like this that would render statutory provisions superfluous. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006) (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

The Federalist Society’s interpretation “would make section 111(d) a ‘dead letter’ because it is “difficult—perhaps impossible—to think of an air pollutant that is (a) emitted by stationary sources within the ambit of section 111 but (b) not also emitted by some sources (stationary or otherwise) that also emits hazardous air pollutants.”

Adam Kushner and Judith Coleman, “Lessons from Mercury: Ensuring Legal Certainty for New GHG Performance Standards from Existing Fossil Fuel Plants,” (Oct. 24, 2013) at 6.

**B. EPA has reasonably interpreted section 111(d) to resolve any ambiguity.**

At a minimum, EPA’s interpretation that gives effect to both the Senate and House amendments by limiting (not eliminating) its section 111(d) authority when it is regulating a source category under section 112 should be upheld because it is a permissible construction of the statute. *Chevron*, 467 U.S. at 843; *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (reiterating that *Chevron* framework applies when agency interprets jurisdictional provision of statute it administers). Under EPA’s

<sup>26</sup> Available at [http://www.eenews.net/assets/2013/10/24/document\\_gw\\_01.pdf](http://www.eenews.net/assets/2013/10/24/document_gw_01.pdf). Indeed, the commentators do not admit this potential breadth insofar as they suggest that the House Amendment precludes regulation of air pollutants emitted by a source category only where the source category to be regulated under section 111(d) is also regulated under section 112. Moreover, the fortuity that pollutant X shares a source with other more stringently regulated pollutants logically should have no bearing on the stringency, or existence of, regulation of pollutant X. See *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 527-28 (D.C. Cir. 2012) (rejecting argument that certain consequences flowed simply because sources listed under one section for their emissions of seven particular hazardous air pollutants also emitted other pollutants).

interpretation, if EPA is regulating source category X under section 112, section 111(d) could not be used to regulate any hazardous air pollutant emissions from that particular source category. 70 Fed. Reg. at 16,031; *see also* 73 Fed. Reg. 44,354, 44,417-18, 44,487, 44,493 (July 30, 2008); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004).

In *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979), the court upheld EPA's approach of seeking to reconcile seemingly inconsistent amendments by giving some effect to both, explaining that:

[where Congress] drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for the agency to devise a middle course between inconsistent statutes so as to give maximum possible effect to both.

Similarly here, EPA's interpretation gives effect to each amendment, maintaining the focus of the previous version of the Act on specific pollutants, as preserved by the Senate amendment, and incorporating the House amendment's reference to specific sources to ensure that section 112 regulated source categories will not be subject to duplicative regulation of hazardous air pollutants under both section 112 and section 111(d). As a *Chevron* step two matter, EPA's interpretation giving effect to both amendments is a reasonable one. *Chevron*, 467 U.S. at 843; *Smiley v. Citibank, N.A.*, 517 U.S. 735, 744-745 (1996).<sup>27</sup>

Thus, because greenhouse gases are not regulated as hazardous air pollutants or criteria pollutants, and because EPA has moved forward with regulation of power plant greenhouse gas emissions under section 111(b), power plant greenhouse gas emissions must be regulated under section 111(d).

### III. The Cooperative Federalism Framework of Section 111(d)

Section 111(d) establishes a framework that gives EPA and the States distinct but complementary roles to regulate air pollutants from existing sources that, if new, would be subject to NSPS. Section 111(d) requires EPA to prescribe regulations that establish a section 110-like procedure under which each State shall submit to EPA a plan establishing, implementing and enforcing standards of performance for such sources. "Standard of performance" is defined as a standard for emissions of air pollutants that reflects the degree of emission limitation

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<sup>27</sup> *See also Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (quoting *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 126 (1985); *Desert Citizens Against Pollution*, 699 F.3d at 527-28 (agreeing with EPA's interpretation that section 112(c)(6)'s cross-reference to sections 112(d)(2) and (d)(4) only meant that seven pollutants specified in section 112(c)(6) were subject to standards required in latter sections, not that all hazardous air pollutants emitted by sources that also emitted seven pollutants were subject to these standards).

achievable through the application of the best system of emission reduction that, considering the cost of achieving the reduction and any nonair quality health and environmental impact and energy requirements, EPA determines has been adequately demonstrated. 42 U.S.C. § 7411(a)(1).

As discussed below, the definition of “standard of performance” calls for EPA to determine the adequately demonstrated best system of emission reduction and the corresponding achievable degree of emission limitation.<sup>28</sup> Once EPA sets the floor in its emission guidelines, each State must submit a plan establishing standards of performance for existing sources and implementing and enforcing such standards. 42 U.S.C. § 7411(d)(1).

Thus, like the section 110 state implementation plan (SIP) framework and procedure, section 111(d) directs EPA to work hand-in-hand with the States to ensure that each State – through its plan – achieves the reductions that EPA has determined are achievable through the application of the best system of emission reduction that has been adequately demonstrated. This cooperative federalism allows EPA to establish the minimum reductions required, while giving the States flexibility to determine how to achieve those reductions (or more).

**A. Section 111(d) requires EPA to establish emission guidelines, including substantive limitations, for existing sources.**

Under section 111(d), EPA issues emission guidelines and, “in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.” *AEP*, 131 S. Ct. at 2537 (citing 42 U.S.C. § 7411(d)). The statutory framework thus requires EPA to “establish guidelines as to what the best system for each such category of existing sources is” and the States to apply those guidelines. H.R. Rep. No. 95-294, at 195, *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1274.

To fulfill its statutory responsibilities, EPA must establish substantive emission limitations for existing sources. Pursuant to section 111(a), EPA must determine the emission reduction achievable through application of the best system of emission reduction it determines is adequately demonstrated, considering costs and other factors. 42 U.S.C. § 7411(a). Based on this determination, EPA uses its expertise to establish standards for new and modified sources under section 111(b) and emission guidelines for the States to follow under section 111(d). For EPA to evaluate the adequacy of state plans under section 111(d)(2), as the statute requires it to do, EPA must first establish a benchmark. That way it can, if necessary, step

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<sup>28</sup> “Emission limitation” is defined in section 302 to mean requirements which limit 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. 42 U.S.C. § 7602.

in where a State either submits an unsatisfactory plan or fails to enforce provisions of an approved plan. 42 U.S.C. § 7411(d)(2).

Another group of State Attorneys General has pointed to the language in section 111(d) that requires EPA to establish a procedure similar to that under section 110 for submission of state plans as limiting the agency's role to a perfunctory one.<sup>29</sup> EPA correctly dismissed that interpretation at the beginning of the section 111(d) program. That interpretation cannot be squared with the statute's directive that EPA evaluate the content of state plans under section 111(d) and "prescribe a plan for a State in cases where the State fails to submit a satisfactory plan." 42 U.S.C. § 7411(d)(2). And if the States alone could determine the standards to be applied, it would not have been necessary for Congress to expressly require EPA to allow the States to consider the "remaining useful life of a source" when applying those standards. Indeed, the very language upon which these commentators rely, requiring EPA to establish a "procedure similar to that provided by section 7410," does not support their interpretation because EPA uses its scientific expertise to establish substantive standards under section 110 (national ambient air quality standards), which the States then develop plans to

implement. Thus, section 111(d) plainly requires EPA to establish minimum emission limitations to guide the States in devising their plans and to provide an objective measure against which EPA may judge the equivalency of the performance standard(s) included in each state plan.

EPA's regulations call for guideline documents to include:

- a description of adequately demonstrated systems of emission reduction,
- the degree of emission reduction achievable with each system,
- the costs and environmental effects of each system,
- an emission guideline reflecting the application of the best system of emission reduction adequately demonstrated for existing sources, and
- the time within which compliance with equivalent emission standards can be achieved.

40 C.F.R. § 60.22(b).

EPA's longstanding interpretation of its authority further affirms that it is, at a minimum, *allowed* to establish substantive guidelines. *See Chevron*, 467 U.S. at 842 (agency's interpretation will be upheld if based on permissible statutory construction). In its rulemaking proposal to establish general procedures under section 111(d), EPA explained that it would publish guideline documents setting minimum emission limitations that reflect the best available demonstrated systems of emission control. 39 Fed. Reg. 36,102 (Oct. 7, 1974).

EPA reiterated in the preamble to its final rule that the agency has the statutory

<sup>29</sup> *Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act*, submitted to EPA under cover letter dated September 11, 2013 by the State of Nebraska Office of the Attorney General ("*Nebraska*").

authority to set minimum emission guidelines for state emission standards included in state plans. 40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975). Responding to industry comments questioning EPA's authority to prescribe more than procedural requirements for state plan adoption and submittal, EPA correctly reasoned that its interpretation was necessary to implement section 111(d) effectively. If EPA had no authority to set minimum substantive guidelines, the States would be able to set "extremely lenient standards" for air pollutants subject to regulation only under Section 111(d) – which would leave "a gaping loophole in a statutory scheme otherwise designed to force meaningful action." *Id.* at 53,343.

Thus, if the Administrator determines that a designated pollutant may cause or contribute to endangerment of public health or welfare, emission standards shall be no less stringent than EPA's emission guidelines.<sup>30</sup> 40 CFR § 60.24(a)(d). EPA has followed this approach in each of the emission guidelines it has promulgated pursuant to section 111(d), repeatedly establishing minimum emission limitations in its final emission guidelines for each State to include in its respective plan.<sup>31</sup> A contrary interpretation would undermine the intent of section 111(d) to provide a backstop for emissions of harmful unregulated air pollutants from existing sources and also effectively would nullify section 111(d)'s provisions concerning EPA's role in determining the best system of emission reduction and in approving state plans.<sup>32</sup>

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<sup>30</sup> EPA's guidelines to the States are not enforceable against a source, but may be used to judge the adequacy of state plans. 40 Fed. Reg. at 53,343.

<sup>31</sup> *See, e.g.*, 40 C.F.R. § 60.31d (establishing emission guideline for sulfuric acid production units at 0.25 grams sulfuric acid mist per kilogram of sulfuric acid produced); 40 C.F.R. § 60.33b (establishing emission guidelines for pollutants emitted by municipal waste combustors); 40 C.F.R. § 60.33e (establishing specified emission limits for pollutants emitted by hospital, medical, infectious waste incinerators); 40 C.F.R. § 1515 (establishing specified emission limits for pollutants emitted by small municipal waste combustion units); 40 C.F.R. § 60.2515 (establishing specified emission limits for pollutants emitted by commercial and industrial solid waste incineration units); 40 C.F.R. § 60.2983 (establishing specified emission limits for pollutants emitted by other solid waste incineration units); 40 C.F.R. § 60.5015 (establishing specified emission limits for pollutants emitted by sewage sludge incineration units).

<sup>32</sup> *Cf. Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 22 (6th Cir. 1975) (EPA acted within its authority in rejecting alternate control strategies in lieu of emission limitations that Kentucky sought to include in its state implementation plan and explaining that under section 110's "dual scheme, the freedom of the States to choose the manner of achieving this goal [of reducing air pollution] was made subject to the absolute requirement that every state plan include emission limitations as an ingredient").

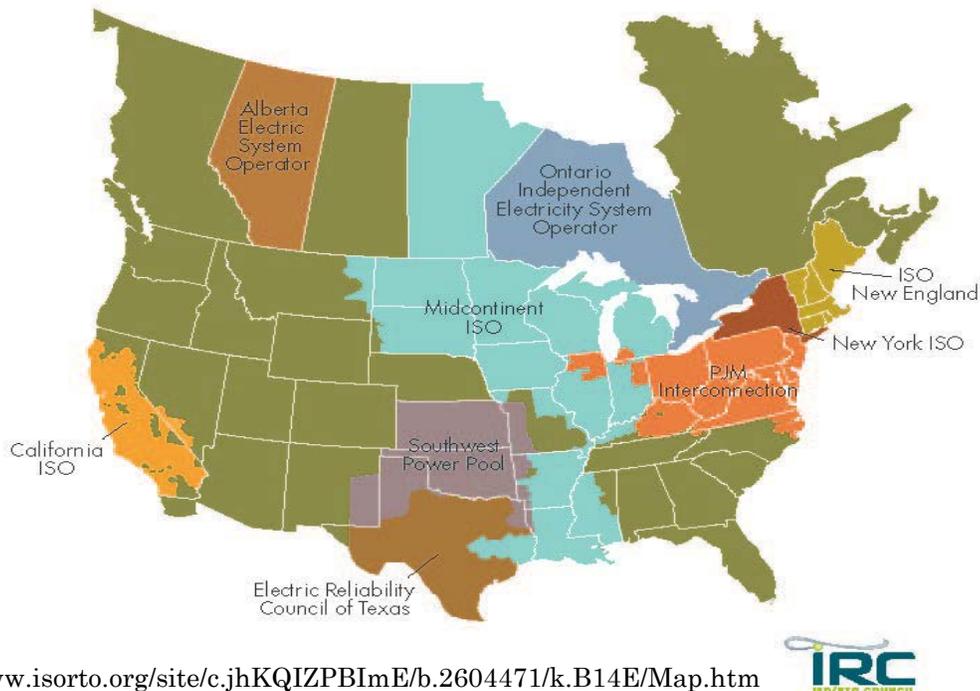
**B. EPA must evaluate the full range of available systems in determining the achievable emission reductions from existing power plants.**

EPA must require emission reductions at a level that is achievable when applying the best system of emission reduction that EPA determines is adequately demonstrated, considering the cost of achieving the reduction and any nonair quality health and environmental impact and energy requirements. 42 U.S.C. § 7411(a); *AEP*, 121 S. Ct. at 2549. Because section 111(d) applies only to existing sources, Congress recognized from the outset a need for flexibility in determining appropriate control measures. See “Clean Air Act Amendments of 1977,” *Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 95–294 at 195, reprinted in 4 “A Legislative History of the Clean Air Act Amendments of 1977,” *Congressional Research Service*, 2662. Therefore, to achieve the greatest level of reductions from existing power plants cost effectively, EPA must evaluate diverse types of systems when considering the best demonstrated system of emission reduction, in keeping with the highly interconnected nature of the existing sources at issue here.

**1. EPA must consider system-based approaches as well as source-based approaches to determine the best system of emission reduction adequately demonstrated and the corresponding emission limitation.**

EPA must consider existing systems of emissions reductions in determining the “best system of emission reduction” for greenhouse gases emitted by power plants. Because the statute does not separately define “system,” the assumption is that “the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252–53 (2004) (quotations and citations omitted). At the time that Congress created the NSPS program in 1970, system was defined as “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose.” Webster’s Third New International Dictionary of the English Language Unabridged 2322 (1968). This broad definition includes not just source-specific systems or approaches to reducing emissions, but also system-wide approaches that have been adequately demonstrated. Source-specific changes that reduce carbon emissions include plant efficiency improvements, heat rate improvements, switching to or co-firing with lower carbon fuels, combined heat and power programs, and carbon capture and sequestration. System-wide approaches would include those programs that shift generation from less efficient to more efficient plants and to renewable energy and programs that reduce the need for generation and could drive or otherwise implicate the source-specific approaches noted above. Such systems would include emissions from all power plants or from multiple power plants within a regional, state or regulatory system to which each power plant must adhere.

Because existing power plants are components of a complex and interconnected electricity grid, or network, EPA must consider system-wide programs that reduce carbon emissions from this sector. Approaches for reducing emissions from existing power plants will be most effective if they reflect the fact that power plants operate not in isolation, but as parts of large, dynamic grid-connected systems.



<http://www.isorto.org/site/c.jhKQIZPBIImE/b.2604471/k.B14E/Map.htm>



For example, ISO-NE, New England's regional transmission organization, includes 300 generating plants and 8,000 miles of transmission lines. ISO-NE serves 6.5 million households and businesses, and its 400 market participants complete wholesale electricity transactions valued annually at ten billion dollars.<sup>33</sup> The interconnected nature of the electricity system is taken into account for purposes of system management; for example, decisions concerning plant retirements and dispatch are made on the basis of system-wide considerations. *See, e.g.,* ISO-NE Non-Price Retirement Determination Letters and Resource Responses.<sup>34</sup>

EPA has previously recognized the interconnected relationship between regional multi-state power pool dispatch decisions and resulting emissions impacts in the participating States. In EPA's SIP call for nitrogen oxides (NO<sub>x</sub> SIP call), EPA approved a redistribution of the NO<sub>x</sub> SIP call budgets for Connecticut, Massachusetts and Rhode Island based on a Memorandum of Understanding

<sup>33</sup> See ISO-NE history, available at [http://www.iso-ne.com/aboutiso/co\\_profile/history/index.html](http://www.iso-ne.com/aboutiso/co_profile/history/index.html).

<sup>34</sup> Available at [http://www.iso-ne.com/genrtion\\_resrcs/reports/non\\_prc\\_retremnt\\_ltrrs/2011/salem\\_retirement\\_election.pdf](http://www.iso-ne.com/genrtion_resrcs/reports/non_prc_retremnt_ltrrs/2011/salem_retirement_election.pdf).

(MOU) entered into by the three States and EPA. 64 Fed. Reg. 49,987, 49,989 (Sept. 15, 1999). EPA noted that the States belonged to the same power pool and that, because “dispatch is determined on the power pool level rather than the State level, dispatch itself may result in redistribution of generation and resulting emissions among the States in the power pool.” *Id.* Therefore, EPA concluded “a redistribution, based on the MOU, of budgets within that power pool is appropriate if the same overall budget results.” *Id.*

“[S]tandards adopted for existing sources under section 111(d) of the Act are to be based on available means of emission control (not necessarily technological).” H.R. Rep. No. 95-294, at 11, *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1088. Thus, in analyzing the best system to reduce greenhouse gas emissions from power plants that is adequately demonstrated, EPA must consider electric power system-based approaches and existing state and regional programs, including those described above, that have successfully reduced carbon dioxide emissions from the power sector as a whole. *See Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433-34 (D.C. Cir. 1973) (explaining that “[it] is the system which must be adequately demonstrated and the standard which must be achievable”). Such reductions, which have resulted in part from system-based approaches that provide incentives for sources to increase efficiency and find reductions elsewhere in the power sector, must be considered by EPA in determining the best system of emission reduction. In addition to recognizing the true nature of electricity generation and supply, such an approach offers the greatest potential for achieving significant greenhouse gas reductions from existing power plants.

**2. EPA may determine that the emission limitation is best measured by mass and best achieved in phases.**

EPA’s emission guideline must reflect the application of the best system of emission reduction as determined by EPA. *See* 40 C.F.R. § 60.22(b). In establishing the emission guideline, EPA may determine that the best metric is a mass-based limit and that existing power plants may achieve increasingly stringent limitations in phases.

Although EPA has typically defined an emission limitation by an emission rate, for example, pounds per megawatt hour (lbs/MWh), EPA is not constrained to do so. The Act defines “emission limitation” as a limit on “the quantity, rate or concentration of emissions of air pollutants on a continuous basis.” 42 U.S.C. § 7602(k). Thus, EPA may find that the best metric for the achievable emission limitation is a mass-based limit or cap on the quantity of emissions, for example, tons/year, as long as the source is continuously subject to the emission limitation or standard. *See* 42 U.S.C. § 7602(k) (defining “emission limitation”). In *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008), the court rejected EPA’s attempt to exempt major sources from normal emission standards under section 112 during startups, shutdowns and malfunctions and explained that “[w]hen *sections 112 and*

302(k) are read together, . . . Congress has required that there must be continuous *section 112-compliant* standards.” Thus, when sections 111(d) and 302(k) are read together, the source must be continuously subject to section 111(d)-compliant standards.<sup>35</sup>

To ensure that sources are subject to continuous emission limitations, section 111(d) standards, whether in emission rate or mass-based form, must be reliable and enforceable. *See Kennecott Copper Corp. v. Train*, 526 F.2d 1149, 1155 (9th Cir. 1975) (finding that intermittent control systems are not reliable or enforceable and therefore violate statute’s requirement that NAAQS be met by continuous emission limitations to maximum extent possible). Thus, although EPA may broadly define a “system” for purposes of determining what level of emission reductions are achievable, state plans must ensure that emission limits can be enforced against covered facilities, as is done through the RGGI program for example.

EPA also may determine that the best demonstrated system of emission reduction can achieve specified limitations in phases. For example, certain renewable energy programs may require investment and time to realize lower emissions, or certain retirement planning and clean energy incentives may mean that greater emission reductions will be achieved later in time. In such circumstances, a phased approach may best reflect the achievable emission limitations. *See* 42 U.S.C. § 7411(d)(1). EPA has discretion under section 111(d) to so determine and to allow States to give affected sources more time to meet more stringent reduction requirements, based on when the reductions may be achieved, provided that the critical goal of achieving significant emission reductions from this industry sector expeditiously is maintained. *Id.*; *see* 70 Fed. Reg. at 28,620.

#### IV. Evaluating Equivalency of State Programs Under Section 111(d)

Once EPA sets the floor in its emission guidelines, each State must submit a plan establishing standards of performance for existing sources and implementing and enforcing such standards. 42 U.S.C. § 7411(d)(1). As under section 110, it is up to the States to make the choices.<sup>36</sup> So long as the States demonstrate that the steps and strategies proposed in their plans meet EPA’s guidelines, the States

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<sup>35</sup> In this way, the definition of “standard of performance” in section 302, which means “a requirement of continuous emission reduction,” is also satisfied. 42 U.S.C. § 7602(l).

<sup>36</sup> In the section 110 context, which provides insight because of section 111(d)’s reference thereto, courts have rejected attempts by EPA to dictate to the States the choices they employ in their SIPs. *See Train v. NRDC*, 421 U.S. 60, 79 (1975) (explaining that although EPA is “plainly charged” with setting NAAQS, EPA has “no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)”; *Union Electric Co. v. EPA*, 427 U.S. 246, 268-69 (1976) (rejecting claims of technological or economic infeasibility as basis for EPA to deny SIP, because “Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent” and that Congress considered risks associated with technology forcing and “decided that the dangers posed by uncontrolled air pollution made them worth taking”).

retain the authority to determine *how* to achieve the overall emission limitations. *See, e.g., Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997) (finding that EPA has no authority under section 110, as amended in 1990, to force a State to adopt particular control measures). At the same time, EPA must ensure that state plans achieve real, quantifiable and enforceable reductions.

Because the States must demonstrate that their plans comport with EPA's guidelines, EPA should provide sufficient guidance regarding the minimum requirements and how the States can show that their strategies will achieve the necessary reductions. Equivalency determinations should be guided by the general principles discussed above: that Congress gave EPA the authority to require the States to achieve specified reductions, that Congress gave the States the authority to set performance standards for existing sources, and that Congress recognized the need for flexibility, including the appropriateness of considering remaining useful life and other factors for particular sources.

**A. The States must be given flexibility in their plans provided that their proposed programs are enforceable.**

Given the daunting challenge of addressing climate change, EPA should fully embrace the flexibility built into the statutory design by accepting a variety of state programs under section 111(d) so long as those programs achieve the emission limitation EPA sets and are enforceable.<sup>37</sup> As discussed above, many States have already implemented a variety of programs that have achieved significant reductions of carbon dioxide emissions from the power sector. These programs include 1) both interstate and intrastate market-based programs that cap carbon dioxide emissions at reduced levels, 2) retirement and refurbishment planning as well as renewable portfolio standards that encourage a shift away from more carbon-intensive electricity production, and 3) demand side management and energy efficiency programs that reduce the amount of electricity needed and thereby cause a decrease in carbon dioxide pollution. Because these types of programs have succeeded in reducing carbon pollution from the power sector, the States should be permitted to rely on these programs in their plans, subject to EPA review, to demonstrate equivalency consistent with section 111(d)'s requirements.

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<sup>37</sup> The National Association of Regulatory Utility Commissioners (NARUC), whose members' fundamental role is to assure that utilities provide reliable electricity at a fair cost, recently recognized the need to address greenhouse gas emissions with flexibility and from a regional perspective, resolving that, among other things, "the guidelines should provide sufficiently flexible compliance pathways or mechanisms that recognize State and regional variations to achieve the most cost-effective emissions reductions in each State;..." *Resolution on Increased Flexibility with Regard to the EPA's Regulation of Greenhouse Gas Emissions from Existing Power Plants*, available at <http://www.naruc.org/Resolutions/Resolution%20on%20Increased%20Flexibility%20with%20Regard%20to%20the%20EPAs%20Regulation%20of%20Greenhouse%20Gas%20Emissions%20from%20Existing%20Power%20Plants.pdf>.

Similarly, if EPA elects to issue a rate-based emission guideline, EPA should provide guidance to the States, for the purpose of demonstrating equivalency of state programs. For example, if EPA issues a pounds-per-megawatt hour carbon dioxide limit on power plant emissions, it should provide guidance on how to translate that rate-based emission guideline into a mass-based standard, for example, tons of carbon dioxide emitted annually from power plants, individually and/or combined in a state or regional system (see below).

EPA should also provide adequate guidelines on appropriate implementation and enforcement mechanisms, such as monitoring and reporting requirements. These guidelines are necessary to ensure that each State meets its obligations and that no “double counting” occurs. One option EPA could consider that would allow for flexibility yet ensure enforceability would be to allow the States to utilize a multi-year compliance period. Under this approach, each source is required to demonstrate full compliance on a multi-year, instead of an annual, basis.

**B. States should be allowed to use trading programs to meet their section 111(d) obligations.**

Cap-and-trade programs are well-suited to address greenhouse gas emissions from existing power plants in light of the ability of such programs to ensure source compliance with emission limitations and the difference in “hot spot” effects caused by greenhouse gas emissions and criteria pollutants. If a cap-and-trade program sets the cap appropriately below current emissions and mandates that all emissions from sources in the category are covered by sufficient allowances, such a program should qualify as a system that requires continuous emission reduction. *See* 42 U.S.C. §§ 7411(a); 7602(l).<sup>38</sup> As discussed below and in the next section, EPA should therefore allow the States to use intrastate and interstate cap-and-trade programs in meeting their section 111(d) obligations.

EPA has previously allowed the States to implement trading programs to satisfy their section 111(d) obligations. For example, in its municipal waste combustor rule, EPA allowed the States to establish a program to enable municipal waste combustor plants to engage in trading of nitrogen oxides emission credits, so long as EPA approved the trading program before implementation. 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995); 40 CFR § 60.33b.

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<sup>38</sup> EPA may consider scenarios in which emissions reductions attributable to renewables generation and increased end use energy efficiency would be credited on the basis of carbon dioxide emissions avoided, and such credits used by covered facilities to achieve compliance with the emission guidelines. *See, e.g.*, Natural Resources Defense Council, Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters (March 2013). In considering these scenarios, EPA should evaluate and articulate any methodology to be used to determine credit eligibility sufficient to satisfy section 111(d)’s existing source emission limitation requirement.

Similarly, in the Clean Air Mercury Rule (CAMR), EPA authorized the States to participate in a cap-and-trade program to meet their section 111(d) obligations. 70 Fed. Reg. at 28,616-17. Although that rule was vacated by the D.C. Circuit on other grounds,<sup>39</sup> there are several aspects of that rulemaking that could inform EPA's thinking here, especially given that greenhouse gas emissions do not pose the type of "hot spot" concerns as pollutants such as mercury.

First, in determining that a cap-and-trade program could be considered the best system of emission reduction, EPA concluded that it was the best system "in the relevant timeframe." 70 Fed. Reg. at 28,617. That is instructive here where in light of the potential options for existing power plants, supply side energy efficiency, fuel switching, and co-firing with cleaner fuels, shifting dispatch to lower emitting facilities, and demand side energy efficiency are some of the emission reduction strategies available "in the relevant timeframe."

Second, EPA allowed each State to choose whether to fulfill its section 111(d) obligations by participating in a cap-and-trade program or selecting some other means to stay within its statewide emissions budget. A similar approach could work here for greenhouse gas emissions. Third, EPA required new units to be subject to the cap-and-trade program and to hold sufficient allowances to cover their emissions. *See* 70 Fed. Reg. at 28,632. EPA let each State choose an allocation method and choose whether to set aside allowances to account for new units. *See id.* at 28,632; 69 Fed. Reg. at 12,406-409. Similarly, the States should have the option of including all power plants, including those that may come on-line after a state plan is approved, within a trading plan for greenhouse gas emissions. A state plan could specify its allocation method and specify how new units will be accommodated.

A source category cap-and-trade program, whether standing alone or as an element of a larger state cap-and-trade program, will drive reductions both at and outside the source category because cap-and-trade is designed to provide an economic incentive for sources to increase efficiency and deploy other means of reducing emissions and for end users to innovate, as well. All reductions attributable to such a market-based approach should be considered for purposes of EPA's best system of emissions reduction determination. Nevertheless, while cap-and-trade drives reductions outside the source, it is not necessary to quantify and account for those reductions for compliance purposes. For all the reasons discussed

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<sup>39</sup> The D.C. Circuit vacated the section 112 delisting rule that EPA relied upon to promulgate CAMR under section 111(d). *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). References to the CAMR in this paper do not reflect any support or endorsement of EPA's attempt through CAMR to regulate hazardous air pollutants under section 111 rather than section 112. As discussed above, a cap-and-trade program involving greenhouse gas emissions does not raise the type of local air pollution concerns that were present with respect to CAMR.

above, EPA should allow the States to use a cap-and-trade system under section 111(d).

**C. The States should be allowed to work together to meet their obligations.**

The States should be allowed to cooperate with each other to achieve the overall reductions and to demonstrate regional compliance, consistent with the Act's general encouragement of cooperative activities by the States and local government for the prevention and control of air pollution. 42 U.S.C. § 7402. Moreover, as a matter of state sovereignty, the States should be given the choice of working in coordination with their sister States to meet their section 111(d) obligations, so long as each individual state plan is enforceable against covered facilities and ensures against both States claiming "credit" for the same emission reductions.

Regional efforts can reduce emissions at least as effectively as individual state efforts, and more cost-efficiently. Regional efforts may be especially appropriate because, as discussed above, existing power plants are components of a complex and interconnected electricity grid, or network, that supplies the nation's energy. Allowing regional cooperation among States that share an electricity grid would also decrease the likelihood of emissions leakage by maintaining an even playing field among those sources within the same regional transmission organization.

EPA in the section 110 context has already recognized that redistribution of NO<sub>x</sub> emissions among three States within a power pool is appropriate if the overall budget remains the same. 64 Fed. Reg. at 49,989.<sup>40</sup> The same rationale applies here to allow the States to cooperate together to achieve overall regional reductions under section 111(d), provided that those reductions are enforceable.

**D. EPA should evaluate allowing the States to implement their state plan reduction requirements in phases.**

EPA should evaluate allowing the States to implement their state plan reduction requirements in phases and require sources to meet specified emission reductions by certain target dates, according to when the reductions are achievable. A phased approach would allow the States to account for planned retirements, or the remaining useful life of sources, and call for more modest reductions sooner and greater reductions later when an old, less efficient source will be replaced, or at least have its electricity production replaced, by a cleaner more efficient source or demand reduction measures. *See* 42 U.S.C. § 7411(d)(1); H.R. Rep. No. 95-294, at 195, *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1274 (explaining that EPA's "guidelines must take into account the remaining useful life of existing sources").

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<sup>40</sup> *See* discussion *infra* pp. 19-20.

However, any phasing must be scrutinized to account for the critical need to reduce greenhouse gas emissions from power plants as expeditiously as possible.

**V. Conclusion**

Section 111(d) gives EPA and the States the necessary authority to make meaningful reductions of harmful greenhouse gas emissions from existing power plants. Existing state programs adequately demonstrate that significant emission reductions from the power sector are achievable. EPA accordingly should apply the best system of emission reduction as reflected by these state programs and require the States to achieve the corresponding emission limitation as expeditiously as possible. By working together, as mandated by section 111(d), EPA and the States can reduce carbon pollution as necessary to protect human health and welfare.

Respectfully submitted,

Dated: December 16, 2013



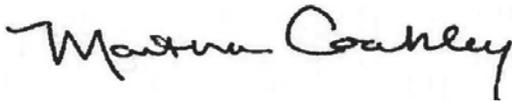
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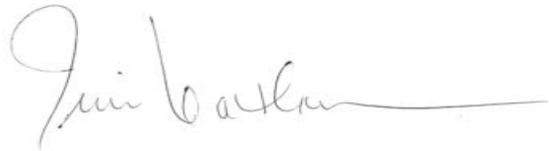
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Attached please find the Brief of Administrative Law Professors and The Judicial Education Project as Amici Curiae in Support of Petitioners for No. 12-1272, Chamber of Commerce of the United States, et al. v. Environmental Protection Agency, et al., which is being sent to the Court today, December 16, 2013, via Federal Express Two Day. The Brief is also being sent via e-mail, this 16th day of December, 2013, to the following parties listed below.

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No. 12-1272  
(Consolidated with  
Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)

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In the  
**Supreme Court of the United States**

CHAMBER OF COMMERCE  
OF THE UNITED STATES, ET AL.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,  
RESPONDENTS.

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**On Writ of Certiorari to the  
United States Court of Appeals for the D.C. Circuit**

---

**BRIEF OF  
ADMINISTRATIVE LAW PROFESSORS  
AND THE JUDICIAL EDUCATION PROJECT AS  
AMICI CURIAE IN SUPPORT OF PETITIONERS**

---

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**QUESTION PRESENTED**

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The disposition of this case requires a careful analysis of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Everyone, including the parties and the court below, recognizes the momentous economic consequences at stake, as well as the difficult statutory and separation-of-powers questions that have arisen over EPA's interpretation of *Massachusetts*. The policy questions stir passionate interest on all sides. At its heart, however, *Massachusetts* was not a "global warming case"; it was an administrative law case. The disposition of this case may depend in no small part on what *Massachusetts* did and did not say on questions of administrative law.

*Amici* law professors (listed in Appendix A) have taught and written extensively on administrative law as well as constitutional and environmental law. The Judicial Education Project is a non-profit educational organization in Washington, D.C., dedicated to defending the Constitution as envisioned by its Framers—a federal government of enumerated,

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<sup>1</sup> The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein. Counsel of record represented certain petitioners in the proceedings below, but is solely representing *amici* before this Court.

limited powers. Through this brief, they seek to inform the Court of the exceptionally important administrative law questions at issue in this extraordinary case.

*Amici* file this brief in support of petitioners the Chamber of Commerce, the State of Alaska, and the American Farm Bureau Federation (Case No. 12-1272). In *amici*'s judgment, those petitioners provide the most comprehensive discussion of the key issues in this case: the proper reading of *Massachusetts*; the correct interpretation of the Clean Air Act; and EPA's deployment of an "absurdity doctrine" that would permit agencies to rewrite congressional statutes and thus violate foundational separation-of-powers principles.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the Court's third encounter with global warming and government policies on greenhouse gases. In its previous rulings, the Court held that EPA has authority to regulate greenhouse gas emissions under the Clean Air Act's "capacious" Act-wide definition of "air pollutant," *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), and that the agency "must ground its reasons for action or inaction in the statute," *id.* at 535. The Court also held that the congressional grant of authority displaces any claim arising under the federal common law of (interstate) nuisance, regardless of whether EPA actually exercises that authority. *American Elec. Power v. Connecticut*, 131 S. Ct. 2527, 2538–39 (2011).

This third encounter with global warming regulation is of a very different kind. It is the Court's first review of EPA's actual exercise of authority to issue binding greenhouse gas regulations, as distinct from the potential existence and displacement effect of that authority *vel non*. That exercise, all parties agree, is of breathtaking proportion, potentially covering millions of heretofore unregulated stationary emission sources with a highly prescriptive, detailed regime of permitting and compliance obligations. JA259–60. All parties also agree that the administration of that regime—the Prevention of Significant Deterioration ("PSD"), 42 U.S.C. §§ 7501 *et seq.*, and Title V, 42 U.S.C. §§ 7661 *et seq.*, programs of the Clean Air Act—would, with respect to greenhouse gases, entail "absurd" consequences that Congress cannot conceivably have

intended. *See* 73 Fed. Reg. 44,354, 44,503 (July 30, 2008) (JA1271–73), *id.* at 44,512 (JA1309–10); 75 Fed. Reg. 31,514, 31,597 (June 3, 2010) (JA632–34); *see also* 74 Fed. Reg. 55,292, 55,306–11 (Oct. 27, 2009). For precisely that reason, EPA claims unprecedented authority to re-write, unilaterally, the numerical permitting thresholds contained in those programs, and to revise the rewritten thresholds whenever it chooses. *See* JA268.

The decisions of EPA and the court below rest on an aggressive interpretation of this Court’s decision in *Massachusetts*. *See, e.g.*, JA973, JA236–37 (the Act’s “plain[] language” is “buttressed” by *Massachusetts*’ interpretation of section 302(g), 42 U.S.C. § 7602(g)); *cf.* JA180 (Kavanaugh, J., dissenting from denial of rehearing en banc) (the panel’s “conclusion [that ‘air pollutant’ must include greenhouse gases for PSD purposes] appears to have been heavily if not dispositively influenced by *Massachusetts v. EPA*.”). Upon casual reading, that understanding may appear to find support in *Massachusetts*’ *dicta*, stripped from the context in which they appear and without accounting for the case’s unusual posture. But it is important to determine with greater care what exactly this Court has and has not held with respect to EPA’s authority and obligations to regulate greenhouse gases. That examination counsels a far more nuanced analysis than the broad-brush reading adopted by EPA and by the court below. Most critically with respect to the question presented here, and contrary to EPA’s contention, *Massachusetts* did *not* hold that greenhouse gases must be “air pollutants” *for all purposes* of the Clean Air Act. This brief addresses

three sets of concerns arising over EPA's misinterpretation.

*First, Massachusetts* should be understood in the context of the posture in which the case arrived at the Court—EPA's denial of a rulemaking petition under section 202(a), 42 U.S.C. § 7521(a), governing emissions from new motor vehicles. While the Court's opinion contains broad (and occasionally ambiguous) pronouncements, its explicit holdings, as well as the relief granted, addressed the questions arising from the specific, discrete agency action under review. The Court's *dicta* provide no warrant for the agency's unprecedented assertion of regulatory authority in this case. (See Section I, below.)

*Second*, EPA's overreading of *Massachusetts* upends familiar *Chevron* canons. See *Chevron USA Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). On its migration from an “endangerment finding” to the comprehensive regulation of stationary sources, EPA employs the *Chevron* “step one” inquiry not as a comprehensive interpretive endeavor but as a simplistic “magic word” canon: so far as greenhouse gases are concerned, “air pollutant” must have the same meaning throughout the entire Clean Air Act. Confronted with the absurd consequences of that approach, EPA then claims authority to re-write unambiguous, numerical emission thresholds that govern the coverage of stationary sources under the PSD and Title V programs. In this deployment, *Chevron* canons produce the separation-of-powers

problems that those canons, properly applied, serve to contain. (See Section II, below.)

*Third*, in an administrative law context, the overreading of this Court's decisions poses special and particularly acute dangers. Separation-of-powers problems are never far afield, and agencies have powerful incentives to seize on judicial pronouncements as a warrant to expand their authority. This case poses those problems in spades. (See Section III, below.)

## ARGUMENT

### **I. This Court's Decisions Do Not Command EPA's Position Or The Ruling Below.**

EPA and the court below overread *Massachusetts* in three key respects. *First*, *Massachusetts* did not directly impose any affirmative regulatory obligations on EPA. In fact, the Court specifically disavowed any such holding. *Second*, *Massachusetts* did not hold that the generic Act-wide definition of "air pollutant" requires that the term have the identical meaning for all purposes and programs throughout the statute. The contrary interpretation puts *Massachusetts* on a collision course with *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). In that case, the Court held that EPA had discretion to interpret the term "modification" of a stationary emission source differently for different parts of the Act—despite an explicit statutory cross-reference that, on its face, appeared to mandate an identical construction. *Id.* at 576; see *id.* at 574 ("A given term in the same statute may take on distinct characters from

association with distinct statutory objects calling for different implementation strategies.”). *Third*, *Massachusetts* did *not* eliminate EPA’s discretion with respect to regulating greenhouse gases; rather, it exhorted EPA “to exercise discretion within defined statutory limits.” 549 U.S. at 533.

**A. *Massachusetts* Imposed No Direct Regulatory Obligations On EPA.**

In EPA’s rendition, *Massachusetts* assumes the air of a *mandamus* ruling or, perhaps more modestly, a case compelling agency action unlawfully withheld. 5 U.S.C. § 706(1); *see, e.g.*, JA295, 1072–73; JA195 (*Massachusetts* “held that EPA had a ‘statutory obligation’ to regulate harmful greenhouse gases”). In truth, *Massachusetts* presented no such scenario and imposed no such obligation.

There was nothing to compel or mandate in *Massachusetts*—other than agency compliance with the correct legal standard—because EPA *had* taken a final action: it had denied a petition for rulemaking under section 202(a)(1). The review of that final action was an “arbitrary and capricious” case. *Massachusetts*, 549 U.S. at 505; *cf. American Elec.*, 131 S. Ct. at 2533 (summarizing *Massachusetts*’ holding). This Court deemed the agency’s action reviewable under the deferential standard applicable to denials of petitions for rulemaking (as distinct from full notice-and-comment rules). *Massachusetts*, 549 U.S. at 527 (citing *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987)).

From beginning to end, from the questions presented to the relief granted, *Massachusetts*

addresses the agency's reasons for its final action and the statutory provisions bearing on the adequacy of those reasons. The Court's opinion begins with a precise statement of petitioners' "two questions concerning the meaning of 202(a)(1)" of the Clean Air Act:

whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

*Massachusetts*, 549 U.S. at 505. The Court's opinion answers the first question in the affirmative and the second in the negative. Admittedly, neither part of the opinion is free from ambiguity. The difficulties arise from the peculiar posture of the case.

As to petitioners' first question, the Court rejected the categorical position, then advanced by EPA, that greenhouse gases cannot be "air pollutants" for purposes of the Clean Air Act—not ever, not for any regulatory program. *Massachusetts*, 549 U.S. at 513 (stating the agency's position). While proffered in response to a rulemaking petition under a specific section (§ 202(a)(1)) of the Act, EPA's position could not and did not rest on an interpretation of *that* section. Instead, the agency maintained that greenhouse gases did not fall under the Act-wide definition of "air pollutant" in section 302(g). Repeatedly emphasizing the "broad," "sweeping," and "capacious" language of that provision, *Massachusetts* held that EPA's position was foreclosed: Section 302(g) "unambiguous[ly]"

includes greenhouse gases. *Massachusetts*, 549 U.S. at 529.

So far as *amici* are aware, no petitioner contests that holding. The far more difficult question is whether including greenhouse gases within section 302(g)'s "capacious" definition compels the same conclusion with respect to all of the Clean Air Act's other provisions. A few sentences in the Court's opinion, ripped out of context, may seem to suggest an affirmative answer. *E.g.*, *Massachusetts*, 549 U.S. at 532 ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has statutory authority to regulate the emission of such gases from new motor vehicles."). But the Court's contemporaneous decision in *Duke Energy Corp.* held that "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." 549 U.S. at 574. A more careful reading of *Massachusetts* dispels the notion that the term "any air pollutant" must have the same meaning for all statutory purposes.

Petitioners' second question concerned the agency's claimed discretion to decline to exercise regulatory authority. The Court held that the agency had "offered no reasoned explanation," only "a laundry list of [policy] reasons not to regulate." *Massachusetts*, 549 U.S. at 533–34. And it held that "EPA must ground its reasons for action or inaction in the statute." *Id.* at 535. Legal scholars and lower courts have struggled to discern the Court's precise holding on this point. The discretion-limiting

language may refer to the agency’s determination of whether an air pollutant meets section 202(a)(1)’s “endangerment” standard or (also) to the agency’s decision about whether to make that judgment in the first instance. *See, e.g.,* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 78–80, 83–87 (2007) (discussing the ambiguity in detail). In *amici*’s estimation, *Massachusetts* is best read for the more limited proposition that “*once EPA has responded to a petition for rulemaking, its reasons for action must conform to the authorizing statute.*” *Massachusetts*, 549 U.S. at 533 (emphasis added).<sup>2</sup> Both EPA and the D.C. Circuit have adopted that reading. JA194–95; JA1072–73; *but see Natural Res. Defense Council v. FDA*, 872 F. Supp. 2d 318, 333–34 (S.D.N.Y. 2012). Either way, *Massachusetts* channels *but does not erase* EPA’s discretion to take *or decline* to take action on an endangerment finding under section 202, let alone other regulatory programs.

The Court’s opinion in *Massachusetts* powerfully supports a circumspect interpretation. It ends, in its last sentences, with a concise statement of the relief granted, tailored to the questions presented:

We need not and do not reach the question whether on remand EPA must make an

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<sup>2</sup> On a more aggressive interpretation, *Massachusetts* might be read as holding that EPA *must* make an “endangerment finding” whenever it receives a petition to that effect. *Cf. Massachusetts*, 549 U.S. at 549 (Scalia, J. dissenting). For reasons stated in the text, *Massachusetts* ought not be read in such a novel construction.

endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reason for action or inaction in the statute.

*Massachusetts*, 549 U.S. at 534–35 (citation omitted); see also S. Ct. R. 14.1(a).

Put politely, it is a stretch to convert this summary of the Court's holding—which disclaims any judicially imposed agency obligation to make an endangerment finding, let alone to regulate—into an affirmative “statutory obligation’ to regulate.” JA195.<sup>3</sup> Even if *Massachusetts* made it likely that some federal regulation of greenhouse gas emissions would follow, the Court's holding imposed no legal obligation even with respect to the mobile source program at issue in the case, not to mention the Clean Air Act at large.

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<sup>3</sup> The “statutory obligation” quoted by the court below appears in the following sentence: “Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.” *Massachusetts*, 549 U.S. at 534 (citing 68 Fed. Reg. at 52,930–31). The sentence summarizes the agency's position at the time. It cannot plausibly be read as an affirmative judicial command to regulate; rather, it simply says that scientific uncertainty is not a sufficient reason for inaction. In the two-page section containing the quoted language, *Massachusetts* repeatedly declined to decide whether EPA must act even by making an endangerment finding under section 202(a), let alone regulate. *Id.* at 533; *id.* at 534 (“We need not and do not reach the question whether on remand EPA must make an endangerment finding . . .”).

And yet: overreading *Massachusetts*, EPA has constructed, and the court below has upheld, the propositions that (1) an air pollutant that “fit[s] well” under a “capacious,” statute-wide definition *must* be an “air pollutant” for all purposes of that Act; and (2) a ruling that limits an agency’s discretionary authority to reasons grounded “in the statute” eliminates agency discretion altogether. JA201–05, 221–22, 236–38. Both propositions suffer from a common fallacy, that of the excluded “third” or “middle.” Both reach far beyond the limited holdings of *Massachusetts*. Both run up hard against bedrock tenets of administrative law. Both should be rejected.

**B. *Massachusetts* Did Not Hold That Greenhouse Gases Are “Air Pollutants” For All Purposes Of The Act.**

EPA’s “Triggering Rule,” which is also referred to as its “Timing Rule,” 75 Fed. Reg. 17,004 (Apr. 2, 2010) (JA705), is a critical step in a sequence of rulemaking proceedings orchestrated by EPA in the wake of *Massachusetts*. EPA made an “Endangerment Finding” under section 202(a), which in turn prompted the imposition of greenhouse gas emission standards for new motor vehicles. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (JA793); 75 Fed. Reg. 25,324 (May 7, 2010) (JA683). EPA then issued its Triggering Rule, prompting the imposition of greenhouse gas emission standards for stationary sources under the Clean Air Act’s PSD and Title V programs—which, if administered in accordance with the Act’s unambiguous terms, would extend the expensive, cumbersome PSD permitting

requirements to even very small sources and render both programs unworkable by overwhelming the capacity of state and federal permitting authorities. EPA failed to properly consider that statutory absurdity in its Triggering Rule. JA705. Instead, it issued a “Tailoring Rule,” effectively rewriting the statutory emission standards. See 75 Fed. Reg. 31,514 (June 3, 2010) (JA268). EPA’s central defense of this remarkable assertion of authority, and the holding of the decision below, is that *Massachusetts* compelled the result.

EPA determined that the statutory “permit triggers” of sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a), 7479(1), *required* the imposition of PSD requirements for “major” greenhouse gas emission sources. Section 169(1), the agency noted, governs sources that (potentially) emit in excess of specified amounts of “any air pollutant.” Thus, in the agency’s view, once it classified greenhouse gases as regulated pollutants under section 202(a), the statute’s plain language compelled the regulation of those pollutants under the PSD program. JA333–36. The court below did not deem that determination merely “permissible”; it held that the agency *had no other choice*. JA236 (“[W]e agree with EPA that its longstanding interpretation of the PSD permitting trigger is statutorily compelled.”). In support of that conclusion, the court cited the Act’s “plain language” and this Court’s ruling in *Massachusetts*. *Id.*

Strikingly, however, the court below in fact disavowed the proposition that the statute’s “plain language” means, literally, *any* air pollutant. The phrase, the court explained (agreeing with EPA’s

position) must in this context mean any *regulated* air pollutant: any other interpretation would be “absurd.” JA237–38. Similarly, EPA has in several other instances adopted a narrowing definition, where adherence to an “any means any” position would render statutory provisions and programs senseless. *See, e.g.*, 40 C.F.R. pt. 51, App. Y, sec. II.A. (in the context of the Act’s visibility program, 91 Stat. 685, “any pollutant” means “any visibility-impairing pollutant”).<sup>4</sup>

Under this interpretation, “any air pollutant” thus means each and every pollutant in any statutory context—except when it doesn’t. And both the ironclad rule (“any means each and every”) and the exception (“any pollutant” means “any regulated pollutant”) are supposedly commanded by the statute. Manifestly, a “plain language” analysis cannot yield such a result. JA175–79 (Kavanaugh, J., dissenting from denial of rehearing en banc). *Massachusetts*—and the perceived gloss it put on the statute—is the *only* basis for EPA’s and the lower court’s “must regulate” interpretation of the permit triggers. Yet the agency’s interpretation of *Massachusetts* merits no *Chevron* deference, *see*

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<sup>4</sup> The court below provided an extended statutory interpretation purporting to explain why “any pollutant” in that context must be understood in a narrower sense. JA238–41. Regardless of what one makes of the discussion, it confirms that statutory interpretation requires close attention to the context, not a mechanical importation of terms from one portion of a statute into another. *Duke Energy*, 549 U.S. at 574–76.

*Negusie v. Holder*, 555 U.S. 511 (2009) and, in any event, the agency misreads *Massachusetts*.

Upon casual reading, *Massachusetts* may seem to permit or perhaps even encourage EPA's expansive reading. See, e.g., *Massachusetts*, 549 U.S. at 528 (emphasizing the "sweeping definition of 'air pollutants'" in section 302(g)); *id.* at 529 ("On its face, the definition [of air pollutants in section 302(g)] embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"); *id.* at 532 (greenhouse gases "fit well within" the definition); *id.* at 531 ("[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter."); *id.* at 529 ("The statute is unambiguous."). The lower court laid great stress on these pronouncements and, in particular, *Massachusetts's* suggestion that the statute is unambiguous. JA237 ("Crucially for purposes of the issue before us [the interpretation of the section 165(a) and section 169(1) permit triggers], the Court concluded that 'the statute is unambiguous.'" (quoting *Massachusetts*, 549 U.S. at 529)). Respectfully, that inference is unwarranted.

Each and every one of the just-quoted, broad and inclusive formulations appears in the Court's analysis of the meaning of *section 302(g)*. The Court's references to "the statute" must be understood in that context, lest they become meaningless: it is difficult to imagine an entire statute that is unambiguous *per se*, across the board, and in every respect. The precise question before the Court was whether EPA was right in insisting "that

carbon dioxide is not an ‘air pollutant’ within the meaning of [section 302(g)],” and the Court’s answer was that “[t]he statutory text forecloses EPA’s reading.” *Massachusetts*, 549 U.S. at 528. The statutory text is section 302(g), as distinct from section 202(a) or, for that matter, the PSD permitting triggers. Whether a particular statutory phrase like “any air pollutant” is unambiguous in any given regulatory context or necessarily imported into that context is a separate question; it remains a matter of statutory interpretation.

Unlike EPA’s and the lower court’s attempt to read *Massachusetts* as a mandate for a-contextual literalism, the reading just described renders *Massachusetts* consistent with the Court’s holding and opinion in *Duke Energy*—decided the same day, under the same statute. The Court held in that case that EPA had discretion to interpret the term “modification” of a stationary emission source differently for different parts of the Act—despite an explicit statutory cross-reference (added by a standalone technical amendment) that, on its face, appeared to mandate an identical construction. *Duke Energy*, 549 U.S. at 576. Even in that context, the Court held that “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Id.* at 574; *see also id.* at 575-76 (“There is, then, no ‘effectively irrebuttable’ presumption that the same defined term in different provisions of the same statute must ‘be interpreted identically.’ Context counts.” (citation omitted)). If an explicit cross-reference from one program to another cannot strictly command an identical

interpretation, a statute-wide definition of “air pollutant” cannot do so either—least of all when an agency’s insistence to the contrary produces a statutory “absurdity” and a corresponding claim of authority to rewrite the statute.

To put the point directly: while *Massachusetts* unequivocally rejected EPA’s categorical contention that greenhouse gases *could not* be “air pollutants” for any purposes of the Act, *Massachusetts*, 549 U.S. at 528, the Court did not thereby embrace EPA’s current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes and programs of the Clean Air Act without regard to the statutory or real-world consequences of such an interpretation. To spell out the omitted “third” in EPA’s analysis: It is entirely possible and plausible that an air pollutant that is *included* by the capacious definition of section 302(g) is an air pollutant for some *but not all* purposes of the Act. Section 302(g) unambiguously embraces greenhouse gases within the Act-wide pollutant definition. EPA’s statutory authority, much less its statutory obligation, to regulated greenhouse gases under any particular Clean Air Act program is a very different question—which the Court left explicitly undecided even with respect to section 202(a), let alone other programs. *Id.* at 535. The Court’s decision in *American Electric Power* likewise assumed EPA’s potential *authority* to regulate greenhouse gas emissions from fossil-fuel fired power plants (rather than motor vehicles) but explicitly contemplated the possibility that EPA might lawfully “decline to regulate carbon-dioxide emissions altogether at the

conclusion of its [pending] rulemaking.” 131 S. Ct. at 2538–39.

To be sure, *Massachusetts* rejected the notion that EPA has “authority to narrow that definition [of section 302(g)] whenever expedient by asserting that a particular substance is not an [air pollution] ‘agent.’” 549 U.S. at 529 n.26. And while a “whenever expedient” prohibition is not much of a restraint on an agency’s discretion, the Court rejected several of EPA’s proffered reasons for declining jurisdiction over greenhouse gases. Crucially, however, that discussion focuses not on regulation under the Clean Air Act at large but on regulation *under section 202(a)*. Nothing in *Massachusetts* suggests that EPA would be foreclosed from ever applying a narrowing construction when necessary to harmonize the Clean Air Act’s provisions and avoid results that Congress could not have intended.

Significantly, the Court rejected EPA’s reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), on two grounds. *First*, the Court concluded that unlike an FDA ban on tobacco products, “EPA jurisdiction would lead to no such extreme measures.” *Massachusetts*, 549 U.S. at 531. That determination is readily explained by the posture of the case. The *Massachusetts* petitioners solemnly averred that they were seeking no relief beyond a reconsideration of the rulemaking petition. *See* Br. for Petitioner at 3, *Massachusetts*, 549 U.S. 497, 2006 WL 2563378. The Court awarded only that limited relief, *Massachusetts*, 549 U.S. at 534–35, and it carefully noted EPA’s discretion to delay action and to consider compliance costs *under section*

202(a)(2). *Id.* at 531. *Second*, the Court observed that, in contrast to congressional actions suggesting that FDA lacked authority to regulate tobacco, “EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases *from new motor vehicles.*” *Id.* (emphasis added). Moreover, the Court rejected EPA’s contention that EPA regulation of greenhouse gases might conflict with the authority of the Department of Transportation to set mileage standards, a consideration that is obviously irrelevant outside the context of regulating mobile sources. *Id.* at 531–32. The discussion strongly suggests that the unambiguous, statute-wide definition of “air pollutant” does not compel EPA to regulate merely because the same term appears in another operative provision.

As a technical matter of administrative law, it is arguable that *Massachusetts* leaves the question of whether greenhouse gases must be regulated as air pollutants open even with respect to new motor vehicle emissions under section 202(a). What is not arguable is that *Massachusetts* emphasized that neither “extreme measures” and “counterintuitive” results nor statutory conflicts would ensue from regulating “greenhouse gases from new motor vehicles.” *Id.* at 531. In sharp contrast, everyone agrees that applying the numerical emission thresholds in the PSD and Title V programs to stationary source greenhouse gas emissions *would* entail “extreme measures” and directly conflict with Congress’s intent.

The numerical statutory thresholds are not only completely unambiguous; they also reflect a deliberate and careful legislative compromise. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 350, 353–54 (D.C. Cir. 1979) (per curiam). Congress carefully structured the PSD and Title V programs to “minimize disruption,” *id.* at 350, and carefully selected the numerical thresholds to “identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation’s air.” *Id.* EPA does not dispute that the statutory thresholds, as applied to greenhouse gases, would entail precisely the disruption that Congress sought to avoid. The agency’s response—an exemption for smaller emitters in the form of a statutory rewrite, subject to future upward revision, see JA268—conflicts not only with the plain language of the statute but also with the legislature’s unmistakable intent. Congress designed the statutory thresholds as a safe harbor for smaller emitters, not an EPA-administered holding pen.

The short of it is that *Massachusetts* does not impose a generalized “statutory obligation” to regulate” greenhouse gases, least of all by means of an administrative rewrite of the statutory language. And because the confessedly “extreme measures” and the “absurdity” that attend the regulation of stationary sources were neither presented nor considered in *Massachusetts*, it is pure speculation

what the Court *might* have said about those matters.<sup>5</sup> In this very different case and context, reliance on *Massachusetts* beyond its specific holding is misplaced. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (“general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,” and “[i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision”).

**C. *Massachusetts* Directed EPA To Exercise Discretion In Accordance With The Statute.**

The same misreading of *Massachusetts* characterizes the agency’s and the lower court’s discussion of whether EPA must act in the first instance. It is uncontested that EPA’s interpretation of *Massachusetts* would produce “absurd” consequences: EPA not only admitted but affirmatively relied on that absurdity in defense of its Tailoring Rule. JA286. And yet on EPA’s account and that of the court below, agency discretion to take that statutory absurdity into account disappears at

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<sup>5</sup> Responding to Judge Brown’s dissent from the denial of rehearing *en banc*, the panel disputes this characterization, observing that a respondent’s brief adverted to the potential consequences for stationary source regulation. JA142–43. Respectfully, that is exceedingly thin gruel. Not one word in *Massachusetts* discusses the question. Whether individual justices considered the consequences *in foro interno* is haruspicy, not legal argument. Cf. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013).

each critical juncture. Just as EPA supposedly lacked discretion to give a narrowing construction to the statutory term “air pollutant,” so too it supposedly was barred from considering statutory absurdity in conducting its endangerment finding and in deciding whether to make such a finding.

The court below described the absurdity as a scarecrow of petitioners’ imagination. *See, e.g.*, JA205 (“However absurd Petitioners consider [EPA’s re-write of the PSD emission thresholds] . . . it is still irrelevant to the endangerment inquiry.”); *cf.* JA144 (ascribing “what he considers absurd results” to “Judge Kavanaugh”). The court ignored that EPA itself admitted that its decision to trigger regulation under the PSD and Title V programs produced absurd results. JA286. Instead, the court again rested on what it viewed as *Massachusetts*’ interpretation of the statute. Thus, an endangerment finding requires “scientific judgment,” “not policy discussions.” JA202 (citing *Massachusetts*, 549 U.S. at 534); JA204 (“The statute speaks in terms of endangerment, not in terms of policy . . .”). In the court’s opinion, petitioners’ arguments concerning the statutory absurdity that would result from an “any means any” interpretation of the permit triggers were merely additions to the “laundry list” of policy reasons already rejected in *Massachusetts*. JA204.

To be sure, *Massachusetts* did limit EPA’s discretion in responding to a rulemaking petition and rejected the agency’s “laundry list of reasons not to regulate.” 549 U.S. at 533. And it is fair to say that this Court’s discussion is in some tension with the

pronouncement earlier in the opinion that agency denials of rulemaking petitions are subject to a deferential standard of review: the Court's dismissal and rejection of the agency's prudential reasons to defer regulation has a "hard look"-ish flavor. *See id.* at 532–34; *cf.* Freeman & Vermeule, 2007 Sup. Ct. Rev. at 97–98. Even so, *Massachusetts* did not erase EPA's discretion. Rather, it exhorted the agency "to exercise discretion within defined statutory limits." *Massachusetts*, 549 U.S. at 533.

Again, the lower court's interpretation commits the fallacy of the excluded "third." A consideration of statutory absurdity is not a "scientific" inquiry or judgment. But it is not a mere "policy discussion" either; it is a matter of statutory interpretation. Even the hardest of looks cannot be viewed as a command to drive an agency into statutory absurdity, and nothing in *Massachusetts* dictates that result. In fact, EPA's failure to consider absurdity at each stage of the rulemaking process is an abuse of the discretion *Massachusetts* affirmatively preserved and commanded. 549 U.S. at 533; *id.* at 535 ("EPA must ground its reasons for action or inaction in the statute.").

## **II. Under *Chevron*, Statutes Should Be Interpreted To Avoid Separation-Of-Powers Problems.**

In an administrative law context, the reasons for strict adherence to Supreme Court holdings and conventional canons of law—rather than the tenor or atmospherics of the Court's decisions—are particularly compelling. Separation-of-powers concerns are never far afield. False steps may put

post-*Chevron* administrative law and the separation-of-powers doctrine in conflict, and both at risk. The panel's curt response to Judge Kavanaugh's and Judge Brown's dissents from the denial of rehearing *en banc* suggests the gravity of the problem.

The dissenting judges stressed the profound implications of allowing EPA to seize authority to revise statutory thresholds and decide when to regulate greenhouse gas emissions from stationary sources. Surely, both urged, a decision of that import must be decided by Congress, not judges; and *Massachusetts* should not be read to hold otherwise. JA168 (Brown, J., dissenting) ("the matter properly belongs before Congress, not courts or agencies"); JA188 (Kavanaugh, J., dissenting) ("the bedrock underpinnings of our system of separation of powers are at stake"). The panel agreed that the "underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance." JA145. And it agreed that "the question here is: Who Decides?" *Id.* (quoting JA187 (Kavanaugh, J., dissenting)).

But the panel failed to afford those questions the careful consideration they deserve. Instead, according to the panel, "Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning." *Id.* Cite to *Chevron, id.*, and to all a good night. With respect, that reply falls far short of engaging with the dissenters' arguments and the real stakes in this case. And it is not consistent with *Chevron*.

**A. *Chevron* Is A Doctrine Of Statutory Interpretation, Not Of “Magic Words.”**

Time and again, EPA and the court below rely on *Massachusetts*' averment that “[t]he statute”—*i.e.* the definition of “air pollutant” in section 302(g)—is “unambiguous.” *E.g.*, JA194, 237, 240, 241, 959, 973, 1163 n.230.

“Unambiguous” is shorthand for the question whether Congress “has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842–43. Still, “unambiguous” in this sense is, well, ambiguous. *See, e.g.*, Gary Lawson, *Federal Administrative Law* 608–10, 640 (6th ed. 2013). It may mean “obvious and indisputable,” as when a statute says that it applies to anyone who emits in excess of, say, 250 tons per year of some pollutant. Or, “unambiguous” may mean a high degree of confidence: it’s the meaning of the legal term that we (judges) can be sure of, once we have applied and exhausted traditional tools of statutory construction. *See, e.g., United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843–44 (2012); *see also Dole v. United Steelworkers*, 494 U.S. 26, 35–40 (1990) (applying traditional tools of statutory construction and examining the statute as a whole to avoid a “counterintuitive” statutory interpretation).

EPA is of three minds on the subject. It maintains that it may re-write a numerical statutory standard—an *obviously, indisputably* “unambiguous” term—in its own discretion, based on interpretive canons. JA285–88. On the other hand, the agency insists that it cannot and must not do any interpretive work on the term “air pollutant” in the

statutory permit triggers—supposedly because the statutory language is “plain” and *Massachusetts* says so. On the third hand, the agency says that the very same term, in the very same provisions, may and must be read in a narrowed sense (“any *regulated* pollutant”).

The agency cannot have it all three ways. The better understanding of *Massachusetts* is that section 302(g) unambiguously includes greenhouse gases. What the term means in any given regulatory context remains a matter of statutory construction in accordance with conventional canons. Among those canons are the propositions that agencies must construe their organic statutes so as to avoid resort to extravagant canons, *Duke Energy*, 549 U.S. at 576; that their duty extends to interpreting the statute as a whole, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); and that an interpretation of an individual clause that produces absurdity in another part of the statute is not a permissible interpretation, *Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012). In neglecting to apply any of these canons, EPA failed to ground its reasons for action in the statute.

#### **B. EPA’s Position Up-Ends *Chevron*’s Rationale.**

*Chevron* is rooted in concerns about delegation. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 329 (2000); John F. Manning, *The Non-Delegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000). *Massachusetts*, fairly read, is entirely consistent with that orientation. EPA may not categorically and arbitrarily decline to exercise jurisdiction conveyed by a carefully worded,

“capacious” statutory term, or turn a blind eye to statutory provisions that deliberately signal “breadth” and a congressional intent to permit agency adjustments to new evidence and circumstances. *Massachusetts*, 549 U.S. at 532. But the actual exercise of that broad authority remains subject to ordinary demands of statutory interpretation.

In the interpretation of EPA and the court below, *Massachusetts* upended this constitutionally grounded regime. Once it is determined that a broad term (“air pollutant”) *authorizes* the agency to regulate greenhouse gases, the agency *must* do so—even when the regulatory enterprise is confessedly absurd and in conflict with Congress’s plain intent. On the basis of that reading, the agency has taken a plain-vanilla *Chevron* ruling to produce, rather than avoid, a separation-of-powers problem.

The problem, moreover, is not a mirage or 2L AdLaw puzzle; it is real. For example, EPA has claimed authority to exempt biogenic sources of greenhouse gases from regulation, on the theory that, while such emissions are unambiguously subject to regulation, actual regulation would be “absurd” and excessively burdensome for the agency. *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013) (rejecting EPA’s position). And there is method to this madness: while EPA’s Tailoring Rule, for now, exempts smallish greenhouse gas emitters from regulation on the grounds of “absurdity” and “administrative necessity,” the agency explicitly reserves authority to regulate those sources at some future point, in some way, in conformity with the

statute or maybe not: absurdity, “one step at a time.” JA403. In feigned obeisance to what it claims to be the unambiguous commands of the Clean Air Act and *Massachusetts*, the agency is simply “making it up as it goes along. That is not how the administrative process is supposed to work.” *Center for Biological Diversity*, 722 F.3d at 415 (Kavanaugh, J., concurring).

*Massachusetts* provides no warrant for any of this. The decision did not settle the vexing, perplexing question of fitting an unanticipated “air pollutant” (greenhouse gases) into a statute built for different purposes. Rather, it commanded EPA to be serious—to “ground its reasons for action *or inaction* in the statute.” *Massachusetts*, 549 U.S. at 535 (emphasis added). Precisely when and where the regulatory grant is broad (and where the structure of the statute does not easily accommodate, in all contexts, an unanticipated problem), an agency must take special care to conform its programs to the operative terms of the statute, to respect its unmistakable commands, and to make sense of the statute as a whole. *Kloeckner*, 133 S. Ct. at 596; *Duke Energy*, 549 U.S. at 576; *Pilot Life Ins. Co.*, 481 U.S. at 51.

### **III. No Agency Has Authority To Rewrite Unambiguous Statutory Requirements.**

This case presents a recurrent problem—that of a Supreme Court of unquestioned authority but limited capacity to “say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to make its rulings “stick” throughout a vast judicial system in competition with institutions that may

have very different ideas and incentives. Constitutional commands, professional norms, and Supreme Court decisions ameliorate the difficulty to some extent. Lower courts and administrative agencies are supposed to discern, fairly construe, and then follow this Court's *holdings*—as opposed to *dicta*, atmospherics, or the perceived trajectory of the Court's jurisprudence. See, e.g., *Kokkonen v. Guardian of Life Ins. Co.*, 511 U.S. 375, 379 (1994); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Invariably, however, agencies and lower courts will look for “signals” beyond the Court's strict holdings. In light of the sheer mass of government business and lower court decisions on one hand and the Court's limited capacity to exercise review in all but a handful of administrative law cases on the other, it is entirely predictable that agencies and lower courts will look for such signals—and that this Court should economize on its monitoring function by sending them. *Massachusetts* has been widely understood in that light. Freeman & Vermeule, 2007 Sup. Ct. Rev. at 51–52.

Alas, the enterprise carries a grave risk that the signals may be misunderstood. In the administrative context, that risk often becomes a separation-of-powers risk. It is particularly severe in politically charged cases where the Court's decisions are of an action- or agency-forcing nature, as opposed to a decision that limits agencies or lower courts. In the vernacular, a “cut it out” command can be disobeyed only at some peril of discovery. In contrast, a “get going” command is not readily distinguishable from a “the sky is the limit” signal of encouragement. It can

be invoked as authority from here to eternity, barring only congressional intervention or a further Supreme Court ruling, to the effect of “that is not what we meant.”

This Court is hardly unfamiliar with “go ahead” rulings that, under the force of bureaucratic empire-building, mushroomed into regulatory regimes far beyond the Court’s intent or imagination. Most instructive perhaps in the present (environmental) context is the Court’s decision in *United States v. Riverview Bayside Homes*, 474 U.S. 121 (1985). In that case, the Court upheld a regulation by the U.S. Army Corps of Engineers that, in a departure from the agency’s earlier position, interpreted the statutory term “waters of the United States,” contained in the Clean Water Act, to cover not only navigable waters but also certain wetlands connected to those waters. Predictably, government agencies (the Corps as well as EPA) relied on the decision to further expand their jurisdiction over wetlands that, though unconnected to waters of the United States, were said to have a migratory bird “nexus.” The Court resolutely rejected that step. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“SWANCC”), 531 U.S. 159, 171 (2001) (“We thus decline respondents’ invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*.”). Even after that decision, lower courts continued to uphold the Corps’ sweeping assertions of jurisdiction over ephemeral channels and drains. Five years later, the Court again rejected the government’s essentially boundless view of its jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006); *id.* at 779 (Kennedy, J., concurring in

judgment); *cf. id.* at 758 (Roberts, C.J., concurring) (“Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power.”); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (“Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view.” (citing *Rapanos* and *SWANCC*)).

The precise legal questions in this case differ from those at issue in *SWANCC* and *Rapanos*. Still, the parallels are instructive. Here as there, the starting point is a generous judicial interpretation of a statute-wide term defining the scope of the agency’s jurisdiction. Here as there, the agency has seized on the Court’s initial holding and perceived signal as an “essentially limitless grant of authority.” Here as there, the agency has refused to give reasonable meaning to its organic statute and instead claimed authority to decide in its own discretion whom and what it will regulate, in what way. Here as there, an administrative agency has been and will be careful not to push its authority to the point of triggering congressional intervention.

Here, however, unlike there, the agency has mobilized this Court’s ruling not simply to expand its authority but to re-write the statute; and the stakes are infinitely higher. This Court’s administrative law cases—from *Chevron* to *Mead* to *City of Arlington*, and every decision in between—are

grounded in the premise that any exercise of agency authority is to be constrained by and assessed in light of “the statute’s text, its context, the structure of the statutory scheme, and canons of textual construction.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring). As this Court has explained, these principles of administrative law establish “a stable background rule against which Congress can legislate.” *Id.* at 1868 (majority opinion). “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” *Id.*

The entire edifice collapses if, as EPA maintains, administrative agencies have free rein to unilaterally rewrite unambiguous statutory text whenever their preferred policies require an interpretation that results in absurd consequences. *See, e.g., Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment (construing statutes to avoid absurd results “demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way”). When an agency interprets a statute at war with the statutory text in a fashion that leads to absurd results and nullifies central statutory provisions, the only permissible answer is that the agency’s interpretation must be wrong and that some other interpretation is required. *Cf. National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (accepting interpretation that harmonizes statutory provisions but “does not override express statutory mandates”).

The Court should firmly reject EPA's extraordinary attempt to dismantle basic safeguards of administrative law and claim authority to rewrite statutory text. Instead, the Court should clarify that EPA must heed *Massachusetts'* holding and comply with settled principles of administrative law.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Attached please find the Brief of Economists Thomas C. Schelling, Vernon L. Smith, and Robert W. Hahn as Amici Curiae in Support of Petitioners for No. 12-1272, Chamber of Commerce of the United States, et al. v. Environmental Protection Agency, et al., which is being sent to the Court today, December 16, 2013, via Federal Express. The Brief is also being sent via e-mail, this 16th day of December, 2013, to the following parties listed below.

Case No. and title:

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**In The Supreme Court of the United States**

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CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA, ET AL.,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY,  
ET AL.,

*Respondents.*

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**On Writ of Certiorari  
to the United States Court of Appeals for the  
District of Columbia Circuit**

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**BRIEF OF ECONOMISTS THOMAS C.  
SCHELLING, VERNON L. SMITH, AND  
ROBERT W. HAHN AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONERS**

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* professors of economics Thomas C. Schelling, Vernon L. Smith, and Robert W. Hahn all have significant experience analyzing the costs, benefits and effects of regulation, including environmental regulation.

Thomas C. Schelling is a Distinguished University Professor Emeritus at the University of Maryland. Among the vast body of scholarly literature Professor Schelling has produced over more than sixty years, he has written extensively on environmental and energy regulation, including the regulation of greenhouse gas emissions. He was awarded the Nobel Prize in Economics in 2005.

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Consumers' Research Inc., has made a monetary contribution intended to support the preparation or submission of this brief. *Amici* professors received no compensation for offering the views expressed in this brief. Consumers' Research Inc. expresses no opinion on the views reflected herein.

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*Amici* are convinced that the regulatory regime at issue, of which the challenged rule is an intrinsic part, is likely to produce unnecessary, and potentially substantial, costs on the public. Accordingly, we write in support of the Petitioners and respectfully suggest, to the extent settled economic analysis has a role to play in adjudicating the legality of the challenged rule, that the analysis counsels against the implementation of the regulatory regime proposed by EPA.

To be sure, as economists, *amici* lack the expertise to assess the legal issues in the case. We do understand that the Environmental Protection Agency ("EPA") contends that the Clean Air Act and this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), *compelled* the programs at issue. If that is correct, proper resort may be to the Legislature, not to this Court. If, however, the

regulations are not so compelled (as Petitioners contend), and if a proper disposition permits or requires a more comprehensive accounting and precise consideration of the costs and/or benefits of the rules at issue, we believe there is a wide gulf between the proposed regulations and available, more sensible approaches to the issue the agency would like to address.

### SUMMARY OF ARGUMENT

Economists who study the costs and benefits of environmental regulation typically begin by assessing whether the regulatory subject is best addressed by one of two potential modes (setting aside cases in which no regulation is necessary or appropriate): (i) “command-and-control” regulation, with governing rules set forth by a central authority; and (ii) “incentive-based” regulation, which is less prescriptive regarding the approaches firms and individuals may use to meet a given social objective. Over time, the majority of economists who analyze these questions have concluded that the second mode, based on incentives, best serves the interests of regulator and regulated alike, by enhancing the likelihood that regulatory goals will be achieved at the lowest cost to society.<sup>2</sup>

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<sup>2</sup> This brief takes as an *assumption* that policymakers have elected to regulate greenhouse gases, and analyzes, based on that assumption, whether the mode of regulation chosen by EPA is superior versus an incentive-based system. We do not suggest that any one mode of regulation is superior to another in all cases.

To address the issue of GHGs, however, EPA has selected the former mode, that of command-and-control. If implemented, this regulatory choice will impose substantial, yet avoidable, costs on society, while reducing the potential that the problem identified will be resolved.

Specifically, in the wake of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA first found—pursuant to Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)—that CO<sub>2</sub> and other GHGs may “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA then proposed and subsequently finalized a series of substantive regulations, among them: a “Tailpipe Rule,” which imposes stringent emissions standards for new motor vehicles; a “Triggering Rule,” which stated that the Tailpipe Rule's regulation of motor vehicle emissions triggered stationary source regulations under the Act's PSD and Title V provisions; and a “Tailoring Rule,” which will govern the application of the Clean Air Act's PSD and Title V stationary source permitting programs to GHG emitters and emissions. See *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule); *EPA, Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule); *Prevention of Significant*

*Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule).

We understand that the Court has agreed to review the legality of the “Triggering Rule” only. That said, we discuss below the subject rules collectively, to provide the Court with a broader understanding of the potential economic impact of the regulatory regime of which the Triggering Rule is a key part, and because we understand that the Tailoring Rule may have no practicality if the Triggering Rule is struck.

Taken together, then, the contemplated regime is a classic example of command-and-control regulation; it imposes performance standards on automobile manufacturers. The Triggering and Tailoring Rules will impose technology standards (*i.e.*, installation of the “best available control technology,” or BACT), on stationary sources of GHG emissions. *See* 42 U.S.C. § 7479(1).

These types of command-and-control mechanisms were standard features of early environmental and health and safety statutes (like the Clean Air Act, enacted in 1970 and amended in relevant part here in 1977). Since the 1970’s, however, economists and policy analysts, following a long period of “blackboard” analysis and careful empirical studies, found that command-and-control regulation often yields disappointing results that are unduly costly. Indeed, in a notoriously contentious profession, that finding has held up strikingly well. Economists now overwhelmingly agree that well-designed incentive-based systems, either in the form of taxes or

transferable property rights (e.g., “cap and trade” or carbon taxes) tend to produce better outcomes at far lower cost. See, e.g., Arthur C. Pigou, *Economics of Welfare* (1920), and J.H. Dales, *Pollution, Property, and Prices* (1968). Some of the reasons are briefly summarized below.

To be sure, this consensus position does not cover every environmental problem. For example, incentive-based regulatory systems may be ineffective in dealing with highly concentrated, *localized* pollution or other unwanted externalities; in such “hot spots,” only a direct control (perhaps up to an outright ban) may be appropriate. But the limited exceptions to the general proposition that incentive-based regulation dominates command-and-control regulation in environmental matters do not apply here.

Indeed, if *any* problem is well-suited to using market-based environmental approaches, it is the control of CO<sub>2</sub> for addressing climate change. That is because, as EPA acknowledges, GHGs are “sufficiently long-lived in the atmosphere” that “they become ‘well-mixed,’” and “essentially uniform.” See U.S. Env'tl. Prot. Agency, EPA-HQ-OAR-2009-0171, Response to Public Comments No. 10: Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (2009). Put another way, emissions *anywhere* affect GHG concentrations *everywhere*. Because the harms they cause are unrelated to local conditions, each ton of emissions has approximately the same impact regardless of the location of its source. Under the

circumstances, a market-based approach to emissions control is preferred.

A leading textbook, originally written for law students by then-Professor Breyer, concisely summarizes some of the major reasons:

All serious proposals for a regulatory regime to reduce [GHG] emissions ... would rely on either a carbon tax or a cap and trade regime ... [T]he benefits of economic incentives are especially salient here: The costs of reduction vary enormously, and therefore the savings to be had from getting reductions from those able to do so least expensively are likewise enormous ... At the same time, perhaps the most significant problem with economic incentives—the danger of “hot spots”—does not arise because GHGs are “perfectly mixed” pollutants; where they are emitted simply [does] not matter.

Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 293 (7th ed. 2011).<sup>3</sup>

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<sup>3</sup> Observation of the mismatch between climate change problems and command-and-control measures is not limited to economists and policy experts. To our knowledge, no legislature in the world has seriously contemplated a large command-and-control system for regulating GHGs. In fact, then-EPA Administrator Lisa Jackson stated in 2010 that “the *best* way to address” GHG emissions “is through a gradual move to a *market-based program* like cap and trade.” *The President’s Proposed EPA Budget For FY 2010 Before The S. Comm. On Env’t & Public Works*, 111th Cong. (2009) (statement of Lisa Jackson, Administrator, Environmental Protection Agency)(emphasis added).

Notwithstanding this modern, and largely settled, understanding regarding the economics of GHG regulation, we understand that absent reversal of the decisions below, the regulatory process will proceed and generate a complex, highly prescriptive command-and-control regime. This brief highlights why the mismatch between the problem identified and solution proposed is likely to impose significant, yet avoidable costs on the public without attendant benefits.

### **ARGUMENT**

In Part I below, we describe the command-and-control nature of the regulatory program, of which the Triggering Rule is a part, and the special problems they may give rise to with respect to controlling emissions of GHGs. In Part II, we explain why GHG problems are better addressed using incentive-based regulation. We conclude by respectfully suggesting that the Court, if it agrees that economic analysis is germane to determining the legality of the challenged measures, consider that there are more effective, lower costs regulatory options available to EPA than the regime chosen.

#### **I. The Contemplated Regime For The Regulation Of Stationary GHG Emissions Is Economically Inefficient.**

The Tailpipe, Triggering, and Tailoring Rules constitute command-and-control regulation of a sweeping nature. Economic theory suggests that the measures are likely to impose outsized costs on society.

**A. EPA Has Imposed A Command-and-Control Approach For Regulating Greenhouse Gases.**

We understand that EPA has not yet implemented its regulatory program, and aspects of each regulation remain in development. Nonetheless, we are able to offer certain observations based on prior analysis, and what is known about the program presently. Scholars have studied extensively the existing PSD program, and other programs using command-and-control approaches to environmental regulation. Insights gleaned from this work cast light on what a GHG regulatory program might look like.

EPA has also offered guidance on how the proposed regime is intended to operate. *See* PSD and Title V Permitting Guidance for Greenhouse Gases, EPA-457/B-11/001, (March 2011) (“Permitting Guidance”), <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>. At its core, the Regime’s stationary source aspects would impose “best available control technology” (BACT) standards by means of the statutory permitting process. We understand that, in the ordinary case, once a major source has become subject to PSD, the source must apply BACT, demonstrate compliance with air quality related values and PSD increments, address impacts on special Class I areas (for example, national parks), and assess impacts on soils, vegetation, and visibility. *Id.* at 6. Nonetheless, we understand that EPA expects to eliminate the impact on soils, vegetation, and visibility as well as on special Class I areas for GHG emissions because with current technology, these measurements for GHGs

are not feasible. *Id.* at 48. Hence, emission levels with BACT will be the EPA's primary assessment tool for GHGs.

Furthermore, we understand EPA plans to use the same BACT determination method for GHGs as for other pollutants. Under that plan, the permitting authority determines the emissions limitation based on the maximum degree of emissions reduction possible when BACT is employed at that source. This includes a five-step process for determining the BACT for a given source: (i) the identification of all control technologies; (ii) the elimination of technically infeasible options; (iii) the ranking of remaining technologies in descending order of effectiveness; (iv) the evaluation of the most effective controls; and (v) the selection of the BACT.<sup>4</sup>

The process described above constitutes classic command-and-control regulation. The regulator leaves the regulated entity with relatively little scope for how to comply with a regulation.

### **B. The Contemplated Regime Is Unprecedented, Sweeping, And Costly.**

An economic assessment of the impact of the GHG rules must take account of the rules' *scope*. EPA's permitting guidance document explains that the intended approach will impact how energy consumption is regulated, manufacturing processes

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<sup>4</sup> Under step four, the permit applicant must demonstrate that technical considerations, or energy, environmental, or economic impacts make a technology not achievable. Absent such a showing, the most effective alternative would be selected.

are regulated, and permits are evaluated and awarded. As this guidance makes clear, the command-and-control approach is far-reaching.

Indeed, the new regulations appear to sweep new categories of equipment, facilities, manufacturing methods, and emission types into the regulatory mix. In each case, expansion of the regulatory regime imposes significant costs that should be considered.

In particular, we understand that under current EPA rules, permitting authorities may consider source-wide energy efficiency strategies throughout an entire production process or multiple processes. *See* Permitting Guidance, at 23. As contemplated by the GHG rules, BACT will apply to more pieces of equipment than with traditional emissions.

We also understand that the new regime will allow EPA to regulate energy consumption in a large number of facilities, and that many aspects of a facility's manufacturing methods are subject to change. The expansion, therefore, of the PSD program for GHG emissions will increase the costs for permitting authorities in determining the proper level of emissions and application of BACT. Permitting itself is made more costly through new substantive and procedural requirements.

Moreover, for GHGs, permitting authorities will assess how reducing GHG emissions at the facility will affect the demand for energy from the electrical grid and offsite emissions as well. *See* Permitting Guidance, at 24. In fact, EPA intends to rely increasingly on energy efficiency determinations in regulating GHG emissions. *Id.* at 29. This constitutes a significant change from the existing regime for

conventional pollutants, for which EPA has interpreted the BACT requirements as *not* applying to *secondary* emissions that occur as a result of the construction or operation of the source but come from offsite locations. *Id.* at 24.

The combination of source-wide regulation, energy efficiency determinations, and the consideration of offsite emissions significantly increases the scope of EPA regulation beyond the parameters within which the PSD program was designed. The impact of the new regime will grow accordingly.

## **II. Incentive-Based Regulation Is A Superior Method For Regulating Greenhouse Gases.**

Command-and-control regulation may be sensible in some settings—for example, in dealing with acute local pollution problems. Concerns of this sort may help to explain the command-and-control mechanisms of the original Clean Air Act, which addressed local, rather than transboundary (let alone global) pollution problems. *See* Thomas Merrill, “Golden Rules for Transboundary Air Pollution,” 46 *Duke L. J.* 931 (1997).

For GHG regulation, however, such reservations have no place. In that context, the economist’s critique of command-and-control regulation applies with full, unqualified force.

### **A. Incentive-Based Approaches Are Often Preferable To Command-And-Control Approaches For General Air Pollution Problems.**

The pathologies of command-and-control regulation and especially of technology standards are

described in many economic textbooks, with only minor variations. Five shortcomings receive consistent mention.<sup>5</sup>

*First*, uniform BACT requirements ignore variations among regulated entities in their costs of reducing pollution. This wastes “many billions of dollars annually” compared with incentive-based approaches for environmental protection. Ackerman, 13 Colum. J. Env'tl. L. at 173.<sup>6</sup>

*Second*, BACT requirements impose higher regulatory burdens on new products and processes, discourage new investment, and penalize growth. Higher environmental standards are imposed on new products and processes, in part, because there is “no risk of shutdown.” *Id.* New investment is discouraged because of uncertainty associated with the “length of regulatory proceedings to win approval.” *Id.* Economic growth is reduced because disproportionate burdens are imposed on “more productive and profitable industries.” *Id.* at 174.

*Third*, BACT requirements “do not provide strong incentives for the development of new,

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<sup>5</sup> Our exposition here follows Bruce A. Ackerman & Richard B. Stewart, “Reforming Environmental Law: The Democratic Case for Economic Incentives,” 13 Colum. J. Env'tl. L. 171 (1988). In addition to its concise exposition, the article was written principally about air pollution controls, but before global warming became a prominent concern—dispelling any notion that that such concern drives its analysis.

<sup>6</sup> Ackerman and Stewart use the term “BAT,” but we understand that BAT and BACT may be used interchangeably.

environmentally superior strategies and may actually discourage their development.” *Id.* These innovations are essential for long-run economic growth. As we note below, such innovation is particularly important for addressing the challenge of reducing GHG emissions.

*Fourth*, BACT regulations require “centralized, uniform determination of complex scientific, engineering and economic issues involving the feasibility of controls on hundreds of thousands of pollution sources.” *Id.* The information burdens on administrators are substantial. Furthermore, the high costs of control make it more attractive for industry to litigate and attempt to delay regulation.

*Fifth*, a BACT “strategy is inconsistent with intelligent priority setting.” *Id.* Agencies have limited resources. Given the “very large administrative and compliance costs” *Id.* at 175, associated with BACT, “agencies will seek to limit the number of substances on the agenda for regulatory action.” *Id.*

### **B. The Unique Characteristics Of GHGs Exacerbate The Problems Of Command-and-Control Regulation.**

We argued in the preceding section that, for at least five reasons, incentive-based regulation was preferred to command-and-control regulation for a large array of air pollution problems. In this section we explain that incentive-based regulation is especially attractive in the case of limiting GHG emissions, for at least four reasons.

*First*, in the case of GHGs, it is likely that a (substantially) larger number of sources will need to

be controlled. Accordingly, there will be an increase in administrative costs of writing and implementing BACT regulations that could be avoided with incentive-based regulation.

*Second*, as the number of sources to be regulated grows larger, the variation in the costs of control (versus most conventional pollution problems) broadens. This suggests that the cost savings in moving from a command-and-control regulation could be substantial, and greater than for many conventional air pollution problems. These savings are likely to be especially large when regulators (as is the case for BACT standards for stationary sources of GHGs), are not designing regulations to get the most bang for the buck, but instead are instructed to regulate “to the hilt.” Ackerman, 13 Colum. J. Envtl. L. at 174.

*Third*, the inherent *uncertainty* in both costs and benefits associated with GHG reductions favors incentive-based regulation over command-and-control. Uncertainty—as to costs *and* benefits—increases the difficulty for regulators seeking to judge whether a policy gives rise to net benefits to society. At a minimum, the use of a well-designed market-based approach reduces the likelihood that a particular targeted emissions reduction in GHGs will fail a benefit-cost test. This flows from the fact that while any *benefits* from such a targeted emission reduction would be the same under both an incentive-based approach and the command-and-control approach, *costs* are likely to be far lower under the incentive-based approach.

*Finally*, the nature of climate change as a *political* (and not simply environmental, or economic) issue suggests that substantial reductions in control costs over time will be required to make GHG reductions politically acceptable. Such cost innovations are much more likely to occur with a well-designed market-based approach than with the BACT approach, in light of the profit incentives inherent to well-designed market-based measures. *See Ackerman*, 13 Colum. J. Envtl. L. at 181.

**C. The Incremental Approach Adopted By EPA Is Likely To Be Problematic.**

There is nothing wrong *in principle* with piecemeal regulation. A well-designed incentive-based system may well have that feature, as when a carbon tax is phased in to avoid shocks to the economy, and to examine and learn from the effects over time. For any such incremental approach, however, the first step must be a *reasonable* step. We are concerned that the approach taken by EPA may be unreasonable.

For example, EPA's "tailored" PSD program, triggered by the challenged rule, envisions the imposition of technology controls for a new set of pollutants in a wide range of industries and, eventually, for facilities that have never been subject to Clean Air Act permitting requirements. The program, therefore, acts more like a "sledgehammer" than a "scalpel," and in doing so may be counter-productive. Ideally, one would want emission reductions to be achieved (first) by industries and firms that can do so at the least cost. The point of a broad-based incentive-based system is to force the

trade-offs and to incentivize lowest-cost reductions across firms and industries. The program contemplated does not appear to allow for this process. Moreover, the PSD program is not meant to address the key issue of keeping economic costs as low as possible, which should be central to an overarching policy for limiting GHG emissions.

## CONCLUSION

The overarching regulatory regime, of which the challenged rule is a core part, however well-meaning, is unsound economically when compared with measures that would be designed to maximize social welfare. While the issue of global warming may be the subject of controversy, economic analysis attendant to the regulation of GHGs is not. Accordingly, we respectfully suggest, to the extent settled economic analysis has a role to play in adjudicating the legality of the challenged rule, that the analysis counsels against the implementation of the regulatory regime proposed by EPA.

Respectfully submitted,

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December 16, 2013

*Attorney For Amici Curiae*

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<plehner@nrdc.org>  
Cc:  
Bcc:  
Subject: triclosan  
Date: Mon Dec 16 2013 16:33:57 EST  
Attachments:

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Sounds like a good step forward. Thanks for NRDC's efforts on this!

[http://www.nytimes.com/2013/12/17/health/fda-to-require-proof-that-antibacterial-soaps-are-safe.html?hp&\\_r=0](http://www.nytimes.com/2013/12/17/health/fda-to-require-proof-that-antibacterial-soaps-are-safe.html?hp&_r=0)

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Cc:  
Bcc:  
Subject: RE: A.G. SCHNEIDERMAN & COALITION STATES: CLEAN AIR ACT MANDATES FEDERAL ACTION TO CUT CLIMATE-CHANGE POLLUTION FROM POWER PLANTS  
Date: Mon Dec 16 2013 16:42:20 EST  
Attachments:

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Mike, Thank you. Mike, David, Joanne – Would it make sense to compare notes at the end of the day today or tomorrow am? Best wishes, Vickie

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, December 16, 2013 1:40 PM  
To: Doniger, David (ddoniger@nrdc.org); Vickie Patton; joanne.spalding@sierraclub.org  
Subject: FW: A.G. SCHNEIDERMAN & COALITION STATES: CLEAN AIR ACT MANDATES FEDERAL ACTION TO CUT CLIMATE-CHANGE POLLUTION FROM POWER PLANTS

FYI.

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Subject: A.G. SCHNEIDERMAN & COALITION STATES: CLEAN AIR ACT MANDATES FEDERAL ACTION TO CUT CLIMATE-CHANGE POLLUTION FROM POWER PLANTS

News from Attorney General Eric T. Schneiderman

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A.G. SCHNEIDERMAN & COALITION STATES: CLEAN AIR ACT MANDATES FEDERAL ACTION TO CUT CLIMATE-CHANGE POLLUTION FROM POWER PLANTS

## Existing Fossil-Fuel Power Plants Are The Single Largest Source Of Climate-Change Pollution; Opponents Of Action Grasping At Legal Straws To Forestall Common-Sense Pollution Controls

Schneiderman: EPA Needs To Take Prompt Action Required By Law To Limit Pollution From Power Plants And Must Afford States Flexibility In Implementation

NEW YORK - In comments submitted today to the federal Environmental Protection Agency, Attorney General Eric T. Schneiderman and a coalition of attorneys general from 11 other states and the District of Columbia argue that, in order to substantially reduce dangerous climate-change pollution from existing fossil-fuel power plants, the agency must both set strong emission limits and give states flexibility on how they choose to meet those limits.

The comments lay out the legal requirements for the EPA to take action against climate-change pollution under the federal Clean Air Act. They are a rebuttal to claims by those who oppose cutting climate-change pollution from existing power plants, and who wrongly argue that the Clean Air Act bars the EPA from moving forward with planned regulations.

“Climate change represents the greatest environmental threat of our time, posing the risk of catastrophic harm to the health and safety of all New Yorkers and to our economy,” Attorney General Schneiderman said. “Despite the real and present danger of unabated climate-change pollution, opponents continue to grasp at legal straws to forestall common-sense controls on its single largest source -- existing fossil-fuel power plants. As our coalition makes plain, opponents of EPA action are wrong on the law. The Clean Air Act is clear in requiring that EPA set strong limits on climate-change pollution emissions from existing power plants and in giving states the flexibility they need to best meet them.”

In 2007, the U.S. Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gases that contribute to climate change are covered by the Act's definition of air pollutants. The court further ruled that EPA must determine whether these gases cause or contribute to air pollution that may endanger public health or welfare. Subsequently, EPA determined that greenhouse gases endanger the health and welfare of Americans. In October of this year, the Supreme Court refused to reconsider a lower court decision that affirmed this “endangerment” determination.

The coalition's comments detail EPA's legal obligation under the Act to regulate climate-change pollution from power plants, thereby directly countering the erroneous legal arguments of opponents of EPA action -- particularly those who claim that EPA lacks the authority to set substantive limits on existing power plant emissions of climate-change pollution.

The Act mandates that the agency regulate emission sources that cause or significantly contribute to air pollution that endangers public health or welfare. As fossil-fuel power plants are the single largest source of climate-change pollution in the United State -- emitting roughly 40 percent of the nation's total emissions -- EPA is obligated to regulate the climate-change pollution emissions of these plants.

Accordingly, in September 2013, EPA proposed limits on climate-change pollution from new power plants. Under the Act, because EPA is regulating these emissions -- and because the pollutants that contribute to climate change are not being regulated as “criteria” or “hazardous” air pollutants under other sections of the Act -- the agency is obligated to prescribe regulations limiting emissions from existing power plants as well.

Through this regulatory framework, EPA establishes emission guidelines based on the best system for reducing climate-change pollution from existing power plants, while giving states flexibility to determine how best to achieve these or greater reductions. The coalition's comments stress the importance of EPA maintaining this flexibility. Many states have already responded to the threat of climate change by moving forward independently to implement programs to reduce climate-change pollution from their electricity sectors. New York and other states have used a variety of approaches to achieve important reductions, including market-based cap-and-trade systems, such as the “Regional Greenhouse Gas

Initiative" in which New York participates, planned retirements of coal-fired power plants, renewable portfolio standards, demand management and energy-efficiency programs.

It is critically important for EPA to use its expertise to set strong and achievable emission targets. There is compelling scientific evidence that significant reductions in climate-change pollution must occur to prevent increases in the frequency, magnitude and scale of adverse health, safety and economic impacts. These impacts include:

- \*More heat-related deaths and illnesses;
- \*Extreme weather, including storms, floods, and droughts;
- \*Higher smog levels, increasing the rate of asthma, pneumonia, and bronchitis;
- \*Coastal land loss due to inundation, erosion, submergence and habitat loss from rising sea levels;
- \*Threats to ecosystems, including the Adirondacks in New York;
- \*Disappearance of plant and animal species and a rise in insect-borne illnesses, destructive fungi and pests;
- \*Threats to our food production, agriculture and forest productivity; and
- \*Threats to our energy, transportation and water resource infrastructure.

Joining Attorney General Schneiderman today in submitting the comments to EPA are the Attorneys General of California, Connecticut, Delaware, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington and the District of the Columbia.

This matter is being handled by Assistant Attorneys General Jung W. Kim, Morgan A. Costello and Michael J. Myers, and Chief Scientist Alan Belensz of the Attorney General's Environmental Protection Bureau, under the supervision of Bureau Chief Lemuel M. Srolovic, Executive Deputy Attorney General for Social Justice Alvin Bragg and First Deputy for Affirmative Litigation Janet Sabel.

A copy of today's letter can be read here.

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State of New York Attorney General

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Nos. 12-1146 and Consolidated Cases

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Utility Air Regulatory Group et al.,

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v.

U.S. Environmental Protection Agency, et al.,

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I HEREBY CERTIFY that on December 16, 2013, three (3) copies of the BRIEF OF THE STATES OF KANSAS, KENTUCKY, MONTANA, OHIO, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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**In the Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP, ET AL.,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Respondents.*

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**On Writ of Certiorari  
To the United States Court of Appeals  
For the District of Columbia Circuit**

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**BRIEF OF THE STATES OF KANSAS,  
KENTUCKY, MONTANA, OHIO,  
WEST VIRGINIA, AND WYOMING  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

*Amici* States of Kansas, Kentucky, Montana, Ohio, West Virginia, and Wyoming have direct and substantial interests in this case. The decision below, affirming the Environmental Protection Agency's (EPA) new pre-construction permitting regime for greenhouse gas (GHG) emissions, will impose immense administrative costs upon the States that carry out the program. According to EPA's own estimates, if greenhouse gas emissions trigger pre-construction permitting requirements for industry under the Clean Air Act's plain terms and volumetric thresholds, then States would be forced to review *millions* of permit applications, costing the States *billions* of dollars. J.A. 550-51. Furthermore, EPA's regulatory regime will impose immense costs on the States' economies, as explained in this brief.

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<sup>1</sup> The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund to its preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

“Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011). That was the Court’s common-sense explanation of the absurdity of regulating greenhouse gas emissions, in small increments, through *ex ante* permit requirements. “Of necessity,” the unanimous Court observed, “Congress selects different regulatory regimes to address problems.” *Id.* And it did not select a permit-based regime to micromanage small emissions of greenhouse gases.

Yet that is precisely how EPA now interprets Title I of the Clean Air Act. According to EPA, Congress unambiguously intended “air pollutant” to include greenhouse gas emissions, for purposes of the Prevention of Significant Deterioration (PSD) and Title V permitting programs. Therefore, EPA reasons, Congress required States to impose *ex ante* permit requirements for greenhouse gas emissions of as little as 100 or 250 tons per year. EPA concludes that only EPA can save the States and the public from the burdens that Congress has imposed upon them. EPA further declares that it must accomplish this by unilaterally replacing Congress’s statutory volumetric thresholds with more lenient standards devised by the agency itself, to be tightened or loosened at any future time in EPA’s sole discretion.

As the State and Industry Petitioners explain, EPA’s interpretation is unfaithful to the Act’s text, purpose, structure, and history. The *amici* States respectfully submit this brief to offer further

perspective on the ramifications of EPA's statutory interpretation at the heart of this case; to explain how EPA's misuse of the "absurd results" doctrine highlights the fundamental error of EPA's underlying statutory interpretation; and to restore the PSD and Title V programs to what Congress itself saw to be their "basic purpose": protecting air quality from local pollutants. J.A. 427.

The Clean Air Act recognizes that "air pollution control at its source is the primary responsibility of States and local governments," not the Federal government. 42 U.S.C. § 7401(a)(3). And in carrying out that responsibility, the States know firsthand the impacts of EPA's vast expansion of the Act's pre-construction permit programs, the PSD and Title V programs. As explained below, those impacts include not just the program's economic costs within the States, but also the immense burdens that EPA's PSD and Title V programs will impose on the State agencies tasked with administering them. These impacts on the States threaten the Act's very nature as a "cooperative federalism" program.

These burdens, and the other "absurd results" invoked by EPA in its attempt to justify the "Tailoring Rule," are all problems of EPA's own making. They would not have occurred if EPA had not insisted upon construing the Act in a manner unsupported by the Act's text, purpose, structure, and history. And they reflect EPA's attempt to aggrandize its own power and discretion, at the expense of the States.

## ARGUMENT

### I. “Any Air Pollutant,” As That Term Is Used In The Clean Air Act’s Pre-Construction Permitting Framework, Does Not Include Greenhouse Gas Emissions

The Clean Air Act imposes a pre-construction permitting requirement for power plants and other stationary sources, a requirement that is triggered by the emission of “any air pollutant” above statutorily defined threshold amounts by a “major emitting facility.” 42 U.S.C. §§ 7479(1), 7475(a). As EPA itself notes, this program, known as Prevention of Significant Deterioration (PSD), was originally intended to protect local air quality: “the basic purpose of the PSD program . . . is to safeguard maintenance of the NAAQS”—that is, the National Ambient Air Quality Standards. J.A. 427 (citing S. Rep. No. 95-127, at 27 (1977), *reprinted in 3 A Legislative History of the Clean Air Act Amendments of 1977*, at 1371, 1401 (1979) (hereinafter “*Legislative History*”)).

But, according to EPA, in this statutory context the term “any air pollutant” unambiguously includes greenhouse gas emissions, now that such emissions are “regulated” for purposes of the Act’s automobile emissions program in a separate title of the Act. EPA rejects the notion that the Act’s stationary source program covers only emissions that actually deteriorate local air quality. See, e.g., J.A. 478 n.44.

As the D.C. Circuit recognized, EPA’s interpretation of the statute does not actually reflect the statute’s “literal statutory definition.” J.A. 237. Specifically, EPA construes the statutory term, “any

air pollutant,” to refer only to any “regulated” air pollutant, even though the statute “nowhere requires that ‘any air pollutant’ be a *regulated* pollutant.” *Id.* Nevertheless, even after departing from the statute’s literal text, both EPA and the court below conclude that the Clean Air Act commands this and only this interpretation. *Id.* at 235-41. Their analysis misapplies *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), obstructs Congress’s clear intent, and undermines the law’s long-understood meaning.

**A. *Massachusetts v. EPA* Does Not Dictate EPA’s Favored Interpretation**

In affirming EPA’s interpretation of “any air pollutant,” 42 U.S.C. § 7479(1), the D.C. Circuit largely ascribed its conclusion to this Court’s decision in *Massachusetts v. EPA*: “we are faced with a statutory term—‘air pollutant’—that the Supreme Court has determined unambiguously includes greenhouse gases.” J.A. 237 (citing *Massachusetts*, 549 U.S. at 529, and 42 U.S.C. § 7602(g)).

But *Massachusetts v. EPA* did not interpret the term “any air pollutant” in the context of the Clean Air Act’s PSD and Title V framework for stationary sources (*i.e.*, 42 U.S.C. § 7479(1)). Rather, the Court in that case interpreted “air pollutant” strictly in the separate context of the Act’s Title II framework for motor vehicle regulations. *Massachusetts*, 549 U.S. at 506, 532.

The distinction between Titles I and II is not pedantic; rather, the differences between them are crucial to the task of interpreting each of the Titles, even when both employ the term “air pollutant.” Sometimes “the same phrase used in different parts

of the same statute means different things.” *Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010); cf. *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 954 n.7 (D.C. Cir. 2013) (noting that “[e]ven within the Federal Register Act, the term ‘promulgated’ seems to have different meanings in different contexts”).

And, in fact, this Court already has recognized that the Clean Air Act is precisely such a law, in a case decided on the same day as *Massachusetts v. EPA*. In *Environmental Defense v. Duke Energy Corp.*, the Court held that a single word in the statute could mean two different things: “modification” has one meaning for purposes of the Act’s PSD program, and another meaning for the Act’s “new source performance standards” program. 549 U.S. 561, 573-76 (2007). The Court recognized that “most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.” *Id.* at 574 (brackets omitted).

This is true “even when the terms share a common statutory definition, if it is general enough.” *Id.* (In *Environmental Defense*, for example, the statute provided only one definition of “modification.” *Id.* at 576.) The “natural presumption that identical words used in different parts of the same act are intended to have the same meaning” is “not rigid”; it “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.” *Id.* at 574. A “given term in the same statute may take on distinct characters from association

with *distinct statutory objects* calling for *different implementation strategies.*” *Id.* (emphasis added).

Those are precisely the considerations that belie EPA’s and the lower court’s conclusions that *Massachusetts v. EPA*’s interpretation of “air pollutant” for mobile sources unambiguously commands an identical interpretation for stationary sources. The two programs regulate “distinct statutory objects,” each “calling for different implementation strategies.” *Id.*

Furthermore, such practical considerations were central to the Court’s task of interpreting “air pollutant” for the motor vehicle program in *Massachusetts v. EPA*. There, the Court concluded that to include greenhouse gas emissions as “air pollutants” for motor vehicle regulations would not lead to “extreme” consequences. 549 U.S. at 531. The Court’s certainty reflected the successful petitioners’ assurances that the Court’s decision regarding the Act’s application to motor vehicles would have *no* bearing on the separate question of whether EPA could also regulate stationary sources:

The federal program for controlling air pollution from motor vehicles was first created in 1965, five years before the 1970 Act created the NAAQS program.[<sup>2</sup>] *The programs were not merged, and they retain significant independent status and effects.* Organizationally, mobile sources are regulated under Title II of the Act,

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<sup>2</sup> And twelve years before the 1977 Act created the statutory PSD framework.

which is separate from Title I . . . Furthermore, *the two programs cover different pollutants.*”

Brief for Petitioners at 28, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120) (emphasis added).<sup>3</sup>

In short, the Court in *Massachusetts v. EPA* tested its statutory interpretation against what it saw to be the practical consequences of that interpretation, in the narrow context of motor vehicle regulations under Title II of the Act. In that case, as in *Environmental Defense v. Duke Energy*, “[c]ontext counts.” 549 U.S. at 576.

Context counts here, too. As EPA administers the Clean Air Act’s PSD and Title V framework, it should interpret the Act in light of the consequences of its interpretation, not in spite of them.

**B. EPA’s Interpretation Of The PSD And Title V Frameworks Is Incompatible With Congress’s Express Intent And Evident Understanding Of The Law**

EPA’s attempt to stretch Title I’s PSD and Title V frameworks to include greenhouse gas emissions contradicts more than just the assurances of *Massachusetts v. EPA*’s pro-regulation petitioners. It also contradicts the expectations of the Congress that enacted the PSD program in the first place. If

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<sup>3</sup> The petitioners in that case went so far as to assert that critics’ concerns that Title II mobile-source regulation might trigger Title I stationary-source regulation were merely an attempt to “change the subject,” a “classic debater’s trick.” *Id.*

legislative history is relevant to the task of interpreting statutes in Step One of *Chevron's* two-step process,<sup>4</sup> then this factor is fatal to EPA's statutory interpretation in this case.

EPA did not demonstrate that its interpretation of the statute "give[s] effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). The legislative record of Congress's 1977 enactment of the PSD program lacks any evidence of congressional intent to cover greenhouses gas emissions, or any evidence that Congress understood the Act to accomplish this result.<sup>5</sup>

Instead, the legislative history is replete with statements of Congress's understanding and intention that the PSD program would apply only to a small set of large industrial facilities and local NAAQS pollutants. The PSD program's *ex ante*

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<sup>4</sup> In *Chevron* Step One's evaluation of whether the statute's commands are unambiguous, the Court applies "the traditional tools of statutory construction." *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). Some courts have included among those tools not just "text, structure, [and] purpose," but also "legislative history." See, e.g., *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (relying on legislative history that "makes quite clear" what "Congress's purpose" was).

<sup>5</sup> And as the State Petitioners explain, Congress repeatedly rejected efforts to expressly place greenhouse gas emissions within EPA's PSD jurisdiction, in the years after the 1977 Act. See Texas Br. 16.

permit requirement might be feasible “for very large sources, such as new electrical generating plants or new steel mills,” the Senate Report explains, but it would “prove costly and potentially unreasonable if imposed on construction of storage facilities for” smaller sources that “have the potential to emit 100 tons of pollution annually.” S. Rep. No. 95-127, at 96 (1977), *reprinted in 3 Legislative History* at 1470.

Congress intended and understood the PSD framework’s 100 or 250 tons per year thresholds to exempt all but the largest emitters; the Act’s regulatory reach would not extend to smaller sources, such as “dairies, farms, highways, hospitals, schools, grocery stores, and other such sources.” Senate Debate on S. 252, June 8, 1977, *in 3 Legislative History* 705, 725. But, as the State Petitioners note, those are the types of small companies and organizations that would be subject to statutory PSD and Title V permitting requirements if greenhouse gases are deemed “air pollutants” for Title I of the Act. See Texas Br. at 3.

To deem greenhouse gas emissions to be “air pollutants” triggering PSD permitting requirements is wholly incompatible with these statements of congressional intent. For that reason, even EPA admits that its inclusion of greenhouse gas emissions “result[s] in a program that would have been unrecognizable to the Congress that designed PSD” and “intended that PSD be limited to a relatively small number of large industrial sources.” J.A. 454-55. EPA’s interpretation, by contrast, results in PSD and Title V programs that would govern virtually all industrial sources, because “virtually all sources emit

at least 100 [tons per year of carbon dioxide] annually.” *Id.* at 456 n.39.

When EPA’s interpretation collides with Congress’s intent, the solution cannot be to allow EPA to unilaterally “tailor” the Clean Air Act’s volumetric thresholds by degrees of magnitude, and subsequently to expand them in the agency’s sole discretion. Rather, the proper solution is to enforce the Act as written, reasonably interpreting the term “any air pollutant” in a way that respects the Act’s unambiguous volumetric thresholds and the congressional intent they embody.

This solution, unlike EPA’s, would “follow the cardinal rule that a statute is to be read as a whole.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). It would honor “one of the most the basic interpretive canons,” that a “statute should be construed so that effect is given to *all* its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U.S. 303, 314-15 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). And in honoring not just the absurd results doctrine but also these other canons of construction, it would avoid treating the absurd results doctrine as “conclusive,” to the detriment of other equally important canons of construction. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *see also id.* at 95 (“Specific canons ‘are often countered . . . by some maxim pointing in a different direction.’”) (quoting *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001)).

Again, “Congress selects different regulatory regimes to address different problems.” *Am. Elec. Power Co.*, 131 S. Ct. at 2538. In this case, Congress

did not select the PSD regulatory regime to address greenhouse gas emissions.<sup>6</sup>

## **II. EPA's Preconstruction Permit Program Will Impose Immense Costs Upon The States And The Public**

As the primary administrators of EPA's PSD and Title V permit programs, the States know firsthand the immense costs that would be imposed if "air pollutant" were to include greenhouse gases for purposes of those programs. Indeed, the States bear much of those costs directly.

If greenhouse gas emissions are covered by the PSD and Title V programs, then the Clean Air Act's 100 and 250 tons per year thresholds "would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program." J.A. 355. In

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<sup>6</sup> The unanimous Court's analysis in *American Electric Power Co. v. Connecticut* is relevant for another reason. After noting the implausibility of attempting to regulate greenhouse gas emissions through an *ex ante* permit regime, the Court focused on EPA's other regulatory priority, the pending "New Source Performance Standards" rulemaking pursuant to 42 U.S.C. § 7411. See 131 S. Ct. at 2538-39. That focus was instructive, because the Court declined to mention at all EPA's pending PSD and Title V permit rulemaking, which had been the predominant focus of the Government's brief in that case. See Brief for Tenn. Valley Auth. at 47-50 (PSD), 50-51 (NSPS), *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174).

the absence of “streamlined permit procedures,” the result would be “administrative strains” leading “to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs.” *Id.* at 356. Worse still, “the addition of enormous numbers of additional sources would provide *relatively little benefit* compared to the costs to sources and the burdens to permitting authorities.” *Id.* (emphasis added).

EPA’s own estimates of the new costs and administrative burdens are shocking:

On the PSD side, annual permit applications would increase by over 300-fold, from 280 to almost 82,000; costs to the permitting authorities would increase more than 100-fold, from \$12 million to \$1.5 *billion*; and the permitting authorities would need to hire, train, and manage 9,772 FTEs [*i.e.*, full-time equivalent workers]. For title V, total permit applications would increase by over 400-fold, from 14,700 to 6.1 million; costs to the permitting authorities would increase from \$62 million to \$21 *billion*; and the permitting authorities would need to hire, train, and manage 229,118 FTEs.

J.A. 550-51 (emphasis added). In short, EPA’s interpretation of the PSD and Title V statutes would have Congress commanding States to accomplish “an impossible administrative task.” *Id.*

The States already are beginning to bear burdens of reviewing greenhouse gas emissions in administering the Clean Air Act for stationary sources. In *amicus* West Virginia, for example, the

inclusion of greenhouse gas emissions as “Best Available Control Technology,” for PSD and Title V permits triggered by non-greenhouse-gas pollutants, already has increased the State’s administrative burden by approximately five to ten percent, according to the State’s internal estimates. If EPA’s interpretation of the PSD and Title V frameworks withstands judicial review and carbon dioxide itself triggers PSD and Title V permitting requirements, then West Virginia will also incur the much more substantial costs of reviewing additional permit applications triggered by greenhouse gas emissions.

Those costs will increase over time, especially as EPA revises its tailoring rule downward in years to come, toward the statutory 100 or 250 tons per year thresholds—a trajectory that EPA purports to commit to its own exclusive discretion. See, *e.g.*, J.A. 288 (“we cannot say at this point how close to the statutory thresholds we will eventually reach . . . we do not find it necessary to answer these questions in this rule, and instead we expect to resolve them through future rulemaking”).

Of course, regulators are not the only ones who bear the cost of regulation. People and businesses will bear the greatest burdens of this new regulatory program. According to EPA, if greenhouse gas emissions are “pollutants” for PSD purposes, then the annual number of PSD permit applications would increase from 280 to 82,000 sources per year, and “commercial and residential sources—the great majority of which are small businesses—would each incur, on average, almost \$60,000 in PSD permitting expenses.” J.A. 455. “This result,” EPA adds, “would be contrary to Congress’s careful efforts to confine

PSD to large industrial sources that could afford these costs.” *Id.*

Moreover, EPA’s interpretation would place 6.1 *million* sources above the 100 tons per year threshold for purposes of the Title V permit program. J.A. 485. At a per-application cost of \$23,175 (for commercial or residential sources) or \$46,350 (for industrial sources), EPA’s interpretation would cost “a staggering \$49 billion per year over a 3 year period”—much of these costs incurred for “relatively little benefit.” *Id.* at 487.

The imposition of PSD’s and Title V’s *ex ante* permitting requirements could also deter or greatly delay the development of new facilities. The permitting process can take up to nearly two years, not counting judicial review of a permit decision. See J.A. 303 (Title V permits). EPA recognizes that under a GHG permitting regime, “the number of PSD permits will be about twice what we estimated at proposal, and the average processing time for both PSD and title V permits will be two or three times greater than what we estimated at proposal.” J.A. 385-86. Those delays would be further exacerbated by the time it would take State and local permitting authorities to hire and train an immense new workforce: “it would take the permitting authorities 2 years, on average, to hire the staff necessary to handle a ten-fold increase in PSD permits and a 40-fold increase in title V permits, and that 90 percent of their staff would need additional training in all aspects of permitting for GHG sources.” *Id.* at 386. All told, the opportunity costs of permit delays caused by such a vast new regulatory program may be incalculable, but they are certainly enormous.

EPA has not attempted to calculate the total costs that would be imposed by its broad interpretation of “air pollutant” for PSD and Title V purposes. But its analysis suggests that if greenhouse gases are deemed “air pollutants” under these statutes, then the costs of such a program would be astonishing. EPA estimates that just the first two and a half years of applying the PSD and Title V programs to facilities exceeding the statute’s 100/250 tons per year emissions thresholds would cost over \$193 *billion*. J.A. 647.

Yet EPA candidly admits that if greenhouse gas emissions are “air pollutants” within the meaning of the PSD and Title V statutes and if Congress’s volumetric thresholds were enforced, then “the addition of [these] enormous numbers of additional sources would provide *relatively little benefit* compared to the costs to sources and the burdens to permitting authorities.” J.A. 356 (emphasis added).

Ultimately, the administrative burdens and economic costs may threaten the sustainability of the Clean Air Act’s “cooperative federalism” character. Congress created the Act’s PSD and Title V programs to be “an experiment in cooperative federalism.” *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); see also *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (same). But by expanding the PSD and Title V programs to cover greenhouse gas emissions, and thus forcing States to bear millions or billions of dollars in new administrative burdens, EPA risks transforming these programs from “cooperative federalism” to national micromanagement.

Just weeks after promulgating the Timing and Tailoring Rules, EPA published a proposed “SIP Call,” indicating that thirteen EPA-approved State implementation plans (SIPs) were inadequate to implement EPA’s new greenhouse gas requirements. 75 Fed. Reg. 53892 (Sept. 2, 2010). That list included several of the Petitioner and *Amici* States in this case. *Id.* at 53899. EPA finalized that rule just months later, demanding that the States update their SIPs to cover greenhouse gas emissions. 75 Fed. Reg. 77698 (Dec. 13, 2010). When Texas failed to revise its SIP to EPA’s satisfaction, EPA replaced Texas’s SIP with a Federal Implementation Plan (FIP). 76 Fed. Reg. 25178 (May 3, 2011).

Of course, EPA’s power to impose a FIP and displace a State’s program, in a particular case, does not by itself signal the end of cooperative federalism; after all, the Clean Air Act does provide for FIPs. But as a practical matter, the magnitude of the burden that the States face under EPA’s re-interpretation of the PSD and Title V programs, among others, places the Act’s cooperative federalism “experiment” under unprecedented strain. Cf. Patrick Morrissey, Attorney General of West Virginia, *et al.*, *Last Call For Cooperative Federalism? Why EPA Must Withdraw SIP Call Proposal On Startup, Shutdown, and Maintenance*, Washington Legal Foundation Legal Backgrounder (Sept. 13, 2013). Many States, including Petitioners and *Amici* States, have apprised EPA that the “recent increase in the level of federal regulatory activity under the Clean Air Act has generated a corresponding increase in concerns among the States regarding the preservation of their role in environmental protection.” Jon Bruning, Attorney General of Nebraska, *et al.*, *Perspective of*

*18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act 1-2* (Sept. 11, 2013).

The Act requires none of these problems. When EPA's interpretation of "any air pollutant" would require States to carry out "an impossible administrative task," J.A. 551, EPA should consider seriously the possibility that its interpretation of the statute is fundamentally wrong.<sup>7</sup>

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<sup>7</sup> Such caution is particularly warranted when the agency is establishing a regulatory model that may be difficult or impossible to later replace with market-based reforms. EPA noted in its 2008 advance notice of proposed rulemaking that market mechanisms, "when well-suited to the environmental problem, offer important advantages over non-market-oriented approaches." 73 Fed. Reg. 44354, 44409 (July 30, 2008). But the institution of non-market regulatory regimes can entrench interests that become very difficult to overcome. See, e.g., Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 Tul. L. Rev. 845, 915 (1999) ("Deregulation . . . may come about only if the distributive consequences to entrenched interest groups and politicians is large enough to offset the rents they are sacrificing."); Nathaniel O. Keohane *et al.*, *The Choice of Regulatory Instruments in Environmental Policy*, 22 Harv. Envtl. L. Rev. 313, 365 (1998) ("aggregate demand for a market-based instrument is likely to be greatest (and the opportunity costs of legislator support is likely to be least) when the environmental problem has not previously been regulated").

### **III. The “Absurd Results” Doctrine Does Not Allow EPA To Save Itself From Absurdities Of Its Own Making, Nor Does It Free EPA To Alleviate The “Absurdity” By Any Means That It Chooses**

In re-interpreting the PSD and Title V statutes to include greenhouse gas emissions as “air pollutants,” EPA recognized that its interpretation was incompatible with the statutory 100/250 tons per year thresholds triggering the statutes’ permitting requirements. J.A. 447-502. But EPA’s nominal effort to cabin and correct this absurdity, through the Tailoring Rule, fails to consider that these were absurd results of EPA’s making, not Congress’s. Cf. J.A. 454-55 (“It is not too much to say that applying PSD requirements literally to GHG sources at the present time . . . would result in a program that would have been unrecognizable to the Congress that designed PSD”).

As explained below, an agency cannot invoke the “absurd results” doctrine to remedy absurdities of the agency’s own making, any more than the patricidal defendant can invoke the court’s mercy as an orphan. And in the rare cases where the doctrine’s application actually is warranted, it requires a court to select the alternative statutory construction that does the *least* violence to Congress’s enacted text. EPA’s failure to heed both of these doctrinal limitations illustrates the fundamental constitutional problems inherent in allowing agencies a free hand to re-write statutes to solve problems that the agency itself created.

**A. The “Absurd Results” Doctrine Does Not Apply When The “Absurdity” Results From The Agency’s Untenable Interpretation Of The Statute**

The “absurd results” doctrine is a narrow exception to the normal rules of statutory construction. Courts and agencies must “begin with the understanding that Congress says in a statute what it means and means in a statute what it says there[.]” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). Thus, “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Id.* (quotation marks omitted).

The absurd results exception that the Court noted parenthetically is limited strictly. The Constitution commits the legislative power to Congress, not to agencies or courts. Thus, resort to the absurd results doctrine to “override the literal terms of a statute” is appropriate “only under rare and exceptional circumstances.” *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); see also *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 441 (2002) (“the Court rarely invokes such a test to override unambiguous legislation”). In those rare cases where Congress’s intentions are embodied in generally stated laws that, if applied literally, would direct results plainly at odds with Congress’s intent and understanding of the law, it falls to the courts to employ a limiting construction to avoid such results.

But in doing so, the courts must take care not to put the cart before the horse. The absurd results

doctrine applies only when the absurdity in question is the product of a statute's *unambiguous* direction. When an interpretation of ambiguous text produces absurd results, those results should signal that the statute's "proper scope" has been misconstrued to begin with. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989).<sup>8</sup>

In this case, EPA's interpretation of the statute produces results so absurd that they would be "unrecognizable to the Congress that designed" the statute. J.A. 454-55. But EPA fails to take the next obvious step of asking whether these results cast doubt upon its interpretation of "air pollutant" for purposes of PSD and Title V. The fact that Congress could not possibly have intended the specific 100/250 tons per year threshold to apply to greenhouse gases proves that the agency misinterpreted the Act's general "any air pollutant" phrase, not that Congress

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<sup>8</sup> See also *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125-26 (1985) (because the "broadest sense" of a statutory phrase leads to a nonsensical result, that statutory phrase "has no plain meaning" for purposes of *Chevron's* Step One); *Chapman v. United States*, 500 U.S. 453, 476 (1991) (Stevens, J., dissenting) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result."); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 144 (2004) (Stevens, J., dissenting) ("Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.").

intended EPA to have broader discretion to address the matter in spite of the statutes.

EPA should have relinquished its preferred interpretation and accepted an interpretation that makes sense of the *whole* statutory scheme. Here, as elsewhere, “EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 485 (2001). If EPA had interpreted “any air pollutant” in the PSD context as covering only regulated pollutants that deteriorate local air quality—which EPA itself recognizes was “the basic purpose” of the PSD and Title V statutes (J.A. 427)—then the results would not have been absurd.

**B. The Absurd Results Doctrine Requires A Court To Select The Limiting Construction That Does The Least Violence To The Statute**

Proceeding from the mistaken premise that the term “air pollutant,” in the PSD and Title V context, necessarily includes greenhouse gas emissions, the agency attempts to redress the absurd consequences of its interpretation by effectively amending Congress’s statute. And the court of appeals, proceeding from the mistaken premise that *Massachusetts v. EPA* controlled the interpretation of “air pollutant” in this context, agreed. In a profound understatement, the court acknowledged the strain that EPA’s interpretation of “air pollutant” puts on the cohesiveness of the PSD and Title V programs as a whole: “That EPA adjusted the statutory thresholds to accommodate regulation of

greenhouse gases emitted by stationary sources may indicate that the [Clean Air Act] is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases.” J.A. 205.

Even if the court and EPA were correct that Congress’s choice of terms, rather than EPA’s interpretation of those terms, is what gave rise to the absurd results, the appropriate remedy would be to adopt the narrowing construction that “does *least* violence to the text.” *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in the judgment).<sup>9</sup> This ensures the doctrine’s core purpose of preserving legislative intent in the face of a result Congress could not possibly have intended. See *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring); see also *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (“When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.”).

In this case, if EPA had been correct that the absurd results were of Congress’s making rather

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<sup>9</sup> See also *id.* at 533 (Blackmun, J., dissenting) (urging an interpretation that does least violence to the Congress’s intent); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (invalidating a rule that avoided absurd results but was “gravely inconsistent with the text and structure of the statute,” rejecting the agency’s “adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery”).

than EPA's, then the best option would have been the simplest one: not to negate plainly stated numerical thresholds, but rather to adjust the construction of "any air pollutant" to cover only "pollutants" that actually deteriorate local air quality—which, EPA itself notes, was "the basic purpose" of Congress in enacting the statute. J.A. 427. Such construction "adds a qualification that the [phrase] does not contain but . . . does not give the [phrase] a meaning . . . it simply will not bear." *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring in the judgment). As the lower court acknowledged, "nothing in the [Clean Air Act] requires regulation of a substance simply because it qualifies as an 'air pollutant' under this broad definition." J.A. 238. Moreover, the term "air pollutant" is, "in some contexts, capable of narrower interpretations." *Id.* at 251. Extending the narrower interpretation to the very same term in § 7479(1) requires the least statutory revision and is the most consistent Congress's decision to legislate one set of thresholds for all "air pollutants." It would avoid all of the unintended consequences that flow from EPA's interpretation of the Act.

But instead of choosing the narrowest alternative construction of "any air pollutant," EPA insisted on the *broadest* possible construction of that term, despite the cascade of absurdities that result and the more drastic regulatory fixes necessary to remedy them. To shoehorn its interpretation of "any air pollutant" into this context, EPA substituted its own greenhouse-gas-specific emissions limit for

Congress's clear thresholds, completely negating the thresholds that Congress had carefully devised.<sup>10</sup>

Moreover, in insisting upon its interpretation of the Act's more general term ("air pollutant") and adjusting the Act's specific numerical thresholds, EPA ignored this Court's caution that the absurd results doctrine allows only for slight adjustment to a statute's "[g]eneral terms," *United States v. Kirby*, 74 U.S. 482, 486 (1868), not wholesale revisions of its *specific* terms. This limitation, too, is intended to preserve the supremacy of congressional intent, by limiting the potential for courts and agencies to encroach on legislative intent. See *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).<sup>11</sup>

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<sup>10</sup> See also D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 *BYU J. Pub. L.* 73, 97 (2012) (concluding that EPA's approach in this case "does the most violence to the statutory language by changing the clear numbers of the statute"); Katherine Kirklin O'Brien, *Beyond Absurdity: Climate Regulation and the Case for Restricting the Absurd Results Doctrine*, 86 *Wash. L. Rev.* 635, 653 (2011) ("EPA's Tailoring Rule may represent the broadest interpretation of the absurd results doctrine to date, as it revises unambiguous, numerical statutory standards").

<sup>11</sup> As the Court explained in *Holy Trinity Church*:

This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the

In this case, by contrast, EPA has substituted its own will for that of Congress in the most egregious way—by construing a general statutory term so as to force an alteration of Congress’s specific numerical standard—an alteration that “satisf[ies] the policy preferences of the [agency],” but that presumes to decide unilaterally “battles that should be fought among the political branches and the industry.” *Barnhart*, 534 U.S. at 462 (2002).

EPA cannot say that all of this was done in the interests of preserving Congress’s literal words, “any air pollutant.” For even after rewriting the emissions threshold, EPA’s position still relies upon construing “any air pollutant” to mean any “*regulated* pollutant,” in order to avoid bringing facilities within the purview of PSD based solely on their emissions of harmless chemicals. J.A. 237-38.<sup>12</sup>

In sum, EPA surveyed the plausible alternative constructions of the statute, and chose the one that does the most violence to the Act—and that maximizes EPA’s own power and discretion at the

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words, makes it unreasonable to believe that the legislator intended to include the particular act.

*Holy Trinity Church*, 143 U.S. at 459.

<sup>12</sup> That construction of “air pollutant” also results in the Act requiring the “useless” exercise of collecting “continuous [GHG] air quality monitoring data” for every designated area, even though GHGs dissipate into the global atmosphere and do not measurably alter ambient air quality. See Brief of Util. Air Regulatory Group at 27.

expense of the States. If the Act itself gives rise to absurd results, all of those unintended consequences can and must be avoided by a limiting construction of “any air pollutant” to refer only to pollutants that actually deteriorate local air quality.

\* \* \*

This case demonstrates the risk inherent in expanding the absurd results doctrine to allow agencies to revise congressional statutes as EPA did here. An agency motivated to regulate in a manner inconsistent with the express intent of Congress has a clear incentive to identify “plain meanings” and “absurd results” in the legislative text where the text may in fact be ambiguous and the alleged absurdities illusory. As Publius noted, executive departments exercise not “merely judgment,” but “force,” *The Federalist* No. 78 (Alexander Hamilton). For that very reason, courts must take care to “keep agencies tethered to Congress and to our representative system of government.” David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 *Harv. Envtl. L. Rev.* 1, 7 (2010). EPA has “programs it is eager to execute. But those programs will be legitimate—and will be sustained in court—only if their implementation conforms to the rule of law.” *Id.* at 8.

When EPA nullifies Congress’s plainly stated volumetric thresholds and replaces them with new thresholds of the agency’s own making, EPA becomes the author of the laws it administers. This “violat[e]s a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.” *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013)

(Scalia, J. concurring in part and dissenting in part)  
(citing Montesquieu, *Spirit of the Laws* bk. XI, ch. 6,  
pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)).

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 16, 2013

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Nos. 12-1146 and Consolidated Cases

UTILITY AIR REGULATORY GROUP *ET AL.*,  
*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,  
*Respondents.*

**AFFIDAVIT OF SERVICE**

I HEREBY CERTIFY that on December 16, 2013, three (3) copies of the BRIEF OF THE STATES OF KANSAS, KENTUCKY, MONTANA, OHIO, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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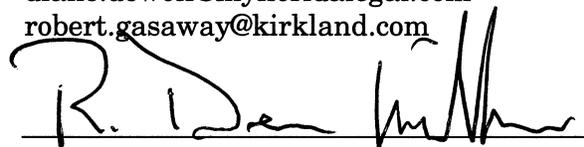
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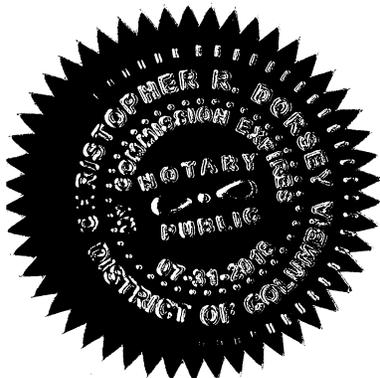
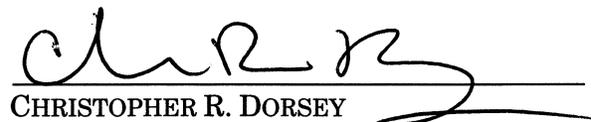
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**Nos. 12-1146 and Consolidated Cases**

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IN THE  
**Supreme Court of the United States**

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UTILITY AIR REGULATORY GROUP, *ET AL.*,  
*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,  
*Respondent.*

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**On Writ of Certiorari  
To the United States Court of Appeals  
For the District of Columbia Circuit**

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**BRIEF OF THE STATES OF KANSAS, KENTUCKY,  
MONTANA, OHIO, WEST VIRGINIA, AND WYOMING  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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**CERTIFICATE OF COMPLIANCE**

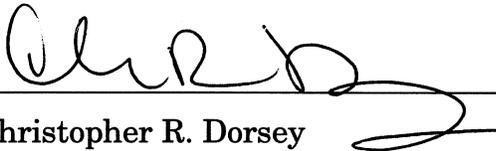
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AMERICAN PETROLEUM INSTITUTE,

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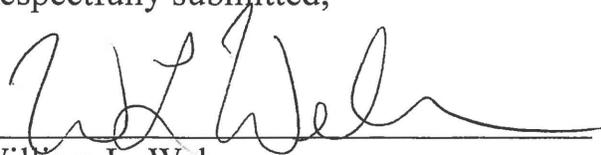
Respondent.

No. 13-1289

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, Circuit Rule 15, and section 307(b) of the Clean Air Act (“CAA”), 42 U.S.C. § 7607(b), the American Petroleum Institute hereby petitions this Court to review the final agency action of Respondent United States Environmental Protection Agency under the CAA published at 78 Fed. Reg. 58416 (Sept. 23, 2013), titled, “Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards.”

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. L. Wehrum', written over a horizontal line.

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UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
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AMERICAN PETROLEUM INSTITUTE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

No. 13-1289

**RULE 26.1 DISCLOSURE STATEMENT OF THE  
AMERICAN PETROLEUM INSTITUTE**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner American Petroleum Institute (“API”) files the following statement:

API is a nationwide, non-profit trade association representing over 500 member companies, headquartered in the District of Columbia. API’s member companies engage in all segments of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in API.

Dated: November 22, 2013

Respectfully submitted,



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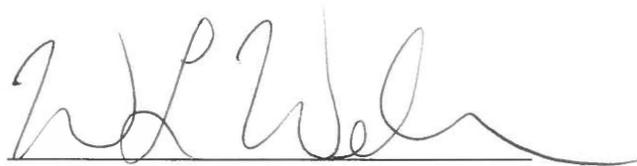
**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of November 2013, the foregoing  
Petition for Review and Rule 26.1 Corporate Disclosure Statement of Petitioner  
American Petroleum Institute have been served by first-class mail, postage  
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 AGENCY and REGINA A. McCARTHY,  
 Administrator, U.S. Environmental  
 Protection Agency,

Respondents.

13-1292

No. 13-1292

**PETITION FOR REVIEW**

Pursuant to section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Rule 15 of the Federal Rules of Appellate Procedure, the Texas Oil & Gas Association hereby petitions the Court for review of the nationally applicable final action of the U.S. Environmental Protection Agency entitled *Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards; Final Rule*, 78 Fed. Reg. 58,416 (Sept. 23, 2013), codified at 40 C.F.R. Part 60.

A copy of the final rule is attached to this petition.

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THE DISTRICT OF COLUMBIA CIRCUIT

TEXAS OIL AND GAS ASSOCIATION,

Petitioner,

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AGENCY and REGINA A. McCARTHY,  
Administrator, U.S. Environmental  
Protection Agency,

Respondents.

13 121

No. 13-1292

**RULE 26.1 STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner Texas Oil and Gas Association (TXOGA) makes the following Disclosure:

TXOGA, a “trade association” within the meaning of Circuit Rule 26.1, is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The membership of TXOGA produces in excess of 90 percent of Texas’ crude oil and natural gas, operates nearly 100 percent of the state’s refining capacity, and is responsible for the vast majority of the state’s pipelines. TXOGA member companies produce approximately a quarter of the nation’s oil, a third of its natural gas and account for one-fourth of the U.S. refining capacity and,

therefore, own and operate facilities that are affected by the rule at issue in this case. TXOGA has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in TXOGA.

Respectfully submitted,



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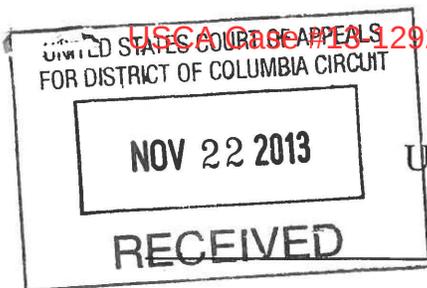
Suite 200

Washington, D.C. 20007

(202) 625-3500

*Counsel for the Texas Oil and Gas  
Association*

Dated: November 22, 2013



UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TEXAS OIL AND GAS ASSOCIATION,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and REGINA A. McCARTHY, Administrator, U.S. Environmental Protection Agency,

Respondents.

No. 13-1292

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing Petition for Review and Rule 26.1 Statement have been served by United States first-class mail this 22<sup>nd</sup> day of November 2013, upon each of the following:

U.S. ENVIRONMENTAL PROTECTION AGENCY  
Office of General Counsel 20460A  
Ariel Rios Building (AR)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

REGINA A. McCARTHY  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building (AR), 1101A  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

ERIC H. HOLDER, JR.  
U.S. Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

A handwritten signature in black ink, reading "Shannon S. Broome". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

---

Shannon S. Broome

Document ID: 0.7.691.538024-000003

Owner: Peter Zalzal <pzalzal@edf.org>

Filename: 13-1293 Independent Petroleum Association et al.pdf

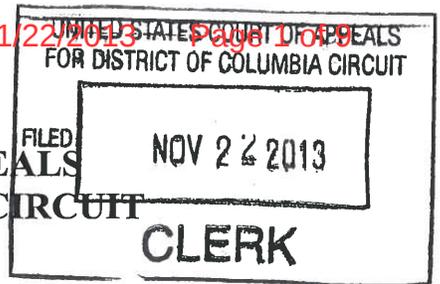
Last Modified: Tue Dec 17 14:27:22 EST 2013

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USCA Case #13-1293

Document #1467702

Filed: 11/22/2013 Page 1 of 1



UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil & Gas Association,

Petitioners,

v.

United States Environmental Protection Agency,

Respondent.

CASE NO. 13-1293

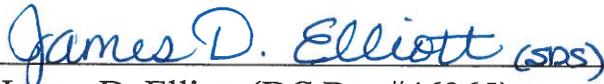
PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), the Independent Petroleum Association of America ("IPAA"), Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association (collectively, the "Independent Producers"), and Virginia Oil & Gas Association hereby petition this Court for review of final agency action that respondent United

States Environmental Protection Agency took under Sections 111(b)(1)(B) and 112(d)(2) of the CAA, 42 U.S.C. §§ 7411(b)(1)(B) and 7412(d), entitled "Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards" 78 Fed. Reg. 58416 (September 23, 2013) (the "NSPS Storage Vessel Revisions").

The Independent Producers participated in comments on the proposed NSPS Storage Vessel Revisions either in their individual capacity or as a member of IPAA, or both.

Respectfully Submitted,



James D. Elliott (DC Bar #46965)

M. Katherine Crockett

Spilman Thomas & Battle, PLLC

1100 Bent Creek Boulevard, Suite 101

Mechanicsburg, PA 17050

Phone: (717) 791-2012

Fax: (717) 795-2743

Counsel for the Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil & Gas Association

Dated: November 22, 2013

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

<hr/>			)	
<b>Independent Petroleum Association of</b>			)	
<b>America, Independent Oil and Gas</b>			)	
<b>Association of West Virginia, Inc.</b>			)	
<b>Kentucky Oil &amp; Gas Association, Inc.,</b>			)	
<b>Pennsylvania Independent Oil &amp; Gas</b>			)	
<b>Association, Ohio Oil and Gas</b>			)	
<b>Association, Illinois Oil and Gas</b>			)	
<b>Association, Indiana Oil and Gas</b>			)	
<b>Association, and Virginia Oil &amp; Gas</b>			)	
<b>Association,</b>			)	
			)	
	<b>Petitioners,</b>		)	
			)	<b>CASE NO.</b>
	<b>v.</b>		)	
			)	
<b>United States Environmental</b>			)	
<b>Protection Agency,</b>			)	
			)	
	<b>Respondent.</b>		)	
<hr/>			)	

**RULE 26.1 DISCLOSURE STATEMENT  
OF THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,  
INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA,  
INC., KENTUCKY OIL & GAS ASSOCIATION, INC., PENNSYLVANIA  
INDEPENDENT OIL & GAS ASSOCIATION, OHIO OIL AND GAS  
ASSOCIATION, ILLINOIS OIL AND GAS ASSOCIATION, INDIANA OIL  
AND GAS ASSOCIATION AND VIRGINIA OIL & GAS ASSOCIATION**

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioners the Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc.,

Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil & Gas Association (collectively, the "Independent Producers") file the following statement:

The Independent Petroleum Association of America ("IPAA") is an incorporated trade association that represents thousands of independent oil and natural gas producers and service companies across the United States that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. IPAA serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, the Administration and federal agencies. IPAA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV") is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil in West Virginia and the companies that support these extraction and production activities. IOGA-WV was formed to promote and protect a strong, competitive and capable independent natural gas and oil producing industry in West Virginia, as well as the natural

environment of our state. IOGA-WV has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Kentucky Oil & Gas Association, Inc. ("KOGA") was formed in 1931 to represent the interests of Kentucky's crude oil and natural gas industry, and more particularly, the independent crude oil and natural gas operators as well as the businesses that support the industry. KOGA is comprised of 220 companies which consist of over 600 member representatives that are directly related to the crude oil and natural gas industry in Kentucky. KOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Pennsylvania Independent Oil & Gas Association ("PIOGA") is a non-profit corporation that was initially formed in 1978 to represent the interests of smaller independent producers of Pennsylvania natural gas from conventional limestone and sandstone formations. Through the years PIOGA's membership has grown to nearly 1,000 members: oil and natural gas producers, drilling contractors, service companies, engineering companies, manufacturers, marketers, Pennsylvania Public Utility Commission-licensed Natural Gas Suppliers ("NGSs"), professional firms and consultants, and royalty owners. PIOGA promotes the interests of its members in environmentally responsible oil and natural gas operations in both conventional geologic formations and unconventional shale formations, and the development of competitive markets and additional uses for

Pennsylvania-produced natural gas. PIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Ohio Oil & Gas Association ("OOGA") is a trade association with over 3,150 members involved in all aspects of the exploration, production and development of crude oil and natural gas resources within the State of Ohio. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Indiana Oil and Gas Association, Inc. ("INOGA") has a rich history of involvement in the exploration and development of hydrocarbons in the State of Indiana. INOGA was formed in 1942 and historically has been an all-volunteer organization principally made up of representatives of oil and gas exploration and development companies (operators), however, it has enjoyed support and membership from pipeline, refinery, land acquisition, service, supply, legal, engineering and geologic companies or individuals. INOGA has been an active representative for the upstream oil and gas industry in Indiana and provides a common forum for this group. INOGA represents its membership on issues of state, federal and local regulation/legislation that has, does and will affect the business of this industry. INOGA is a 501(c)(6) trade association incorporated as

Non-Profit Domestic Corporation under the statutes of Indiana. INOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Illinois Oil & Gas Association ("IOGA") was organized in 1944 to provide an agency through which oil and gas producers, land owners, royalty owners, and others who may be directly or indirectly affected by or interested in oil and gas development and production in Illinois, may protect, preserve and advance their common interests. IOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Formed in 1977 the Virginia Oil & Gas Association ("VOGA") is a non-profit trade association representing the interests of companies, partnerships, individuals or other entities having an interest in the oil and gas industry who are primarily engaged in the exploration, production, development, transportation and distribution of natural gas and oil in Virginia. VOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respectfully Submitted,

  
James D. Elliott (DC Bar #46965)

M. Katherine Crockett

Spilman Thomas & Battle, PLLC

1100 Bent Creek Boulevard, Suite 101

Mechanicsburg, PA 17050

Phone: (717) 791-2012

Fax: (717) 795-2743

Counsel for the Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil & Gas Association

Dated: November 22, 2013

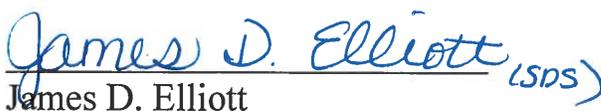
**PROOF OF SERVICE**

I hereby certify that on this 22nd day of November, 2013, one copy of the foregoing Petition for Review and one copy of the accompanying Rule 26.1 Disclosure Statement was served by first-class mail, postage prepaid, on each of the following:

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection  
Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Mail Code 1101A  
Washington, D.C. 20460

The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-0001

Avi Garbow  
General Counsel  
U.S. Environmental Protection  
Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Mail Code 2310A  
Washington, D.C. 20460

  
James D. Elliott (SDS)

Document ID: 0.7.691.538024-000004

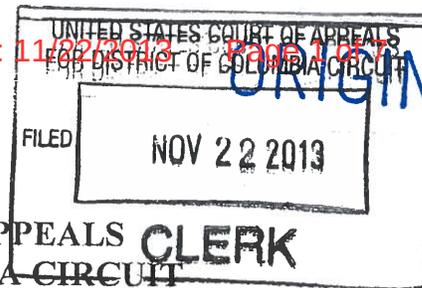
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Filename: 13-1294 Western Energy Alliance.pdf  
Last Modified: Tue Dec 17 14:27:22 EST 2013

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USCA Case #13-1294 Document #1467714

Filed: 11/22/2013

Page 1 of 1



ORIGINAL

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN ENERGY ALLIANCE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and

REGINA A. McCARTHY, Administrator, United States Environmental Protection Agency,

Respondents.

13-1294

No. \_\_\_\_\_

PETITION FOR REVIEW

Under Section 307 of the Clean Air Act, 42 U.S.C. § 7607(b), Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, and Federal Rule of Appellate Procedure 15, Western Energy Alliance petitions this Court for review of the final action of the United States Environmental Protection Agency (“EPA”) and Regina A. McCarthy, EPA Administrator, published in the Federal Register at 78 Fed. Reg. 58,416 (Sept. 23, 2013), entitled “Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards; Final Rule.”

Respectfully submitted,



John R. Jacus, Esq.

Eric P. Waeckerlin, Esq.

D.C. Bar No. 977228

DAVIS GRAHAM & STUBBS LLP

1550 Seventeenth Street, Suite 500

Denver, Colorado 80202

Telephone: (303) 892-9400

Facsimile: (303) 893-1379

E-mail: John.Jacus@dgsllaw.com

E-mail: Eric.Waeckerlin@dgsllaw.com

DATED: November 22, 2013

*Counsel for Western Energy Alliance*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN ENERGY ALLIANCE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and

REGINA A. McCARTHY, Administrator,  
United States Environmental Protection  
Agency,

Respondents.

No. \_\_\_\_\_

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure and Circuit Rule 15(a), I hereby certify that on this 22nd day of November 2013 a copy of the foregoing Petition for Review of the Environmental Protection Agency's rule entitled "*Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards; Final Rule*" was sent by first-class mail to:

//

//

Regina A. McCarthy  
Administrator  
U.S. Environmental Protection  
Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

The Honorable Eric Holder  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530



Eric P. Waeckerlin

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

WESTERN ENERGY ALLIANCE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and

REGINA A. McCARTHY, Administrator,  
United States Environmental Protection  
Agency,

Respondents.

No. \_\_\_\_\_

---

**PETITIONER'S CORPORATE DISCLOSURE STATEMENT**

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Western Energy Alliance hereby certifies that it is a 401(c)(6) non-profit trade association and that no publicly held company has a 10% or greater ownership interest in Western Energy Alliance.

//

//

//

Respectfully submitted,



John R. Jacus, Esq.

Eric P. Waeckerlin, Esq.

D.C. Bar No. 977228

DAVIS GRAHAM & STUBBS LLP

1550 Seventeenth Street, Suite 500

Denver, Colorado 80202

Telephone: (303) 892-9400

Facsimile: (303) 893-1379

E-mail: [John.Jacus@dgsllaw.com](mailto:John.Jacus@dgsllaw.com)

E-mail: [Eric.Waeckerlin@dgsllaw.com](mailto:Eric.Waeckerlin@dgsllaw.com)

DATED: November 22, 2013

*Counsel for Western Energy Alliance*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN ENERGY ALLIANCE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and

REGINA A. McCARTHY, Administrator,  
United States Environmental Protection  
Agency,

Respondents.

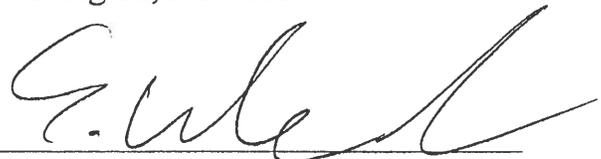
No. \_\_\_\_\_

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure and  
Circuit Rule 15(a), I hereby certify that on this 22nd day of November 2013 a copy  
of the foregoing Corporate Disclosure Statement was sent by first-class mail to:

Regina A. McCarthy  
Administrator  
U.S. Environmental Protection  
Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

The Honorable Eric Holder  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530



Eric P. Waeckerlin

Document ID: 0.7.691.538024-000005

Owner: Peter Zalzal <pzalzal@edf.org>

Filename: Petition for Review.pdf

Last Modified: Tue Dec 17 14:27:22 EST 2013

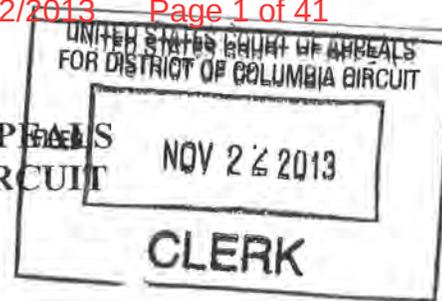
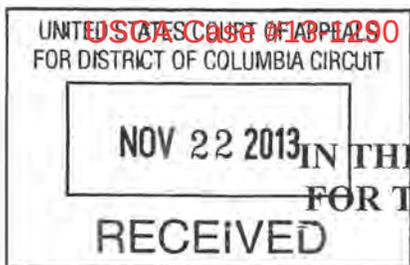
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U.S. Case # 13-1290

Document #1467649

Filed: 11/22/2013

Page 1 of 41



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

GAS PROCESSORS ASSOCIATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

13-1290

No. 13-\_\_\_\_\_

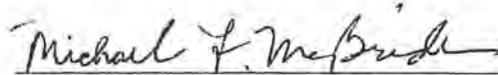
**PETITION FOR REVIEW**

Pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) (2006 & Supp. V 2011), Rule 15 of the Federal Rules of Appellate Procedure, and Rule 15 of the Local Rules of this Court, the Gas Processors Association hereby petitions this Court for review of the United States Environmental Protection Agency Administrator’s final rule entitled “Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards; Final Rule,” 40 CFR Part 60. The aforementioned rule was made final for purposes of judicial review by publication in the *Federal Register* at 78 Fed. Reg. 58,416 (September 23, 2013).

This Petition for Review is related to the following consolidated cases now held in abeyance: Nos. 12-1405, 12-1406, 12-1407, 12-1408, 12-1409, 12-1410, 12-1411, 12-1412, and should be consolidated therewith.

A copy of the final rule is attached to this Petition.

Respectfully submitted,



Michael F. McBride

Kyle Danish

Kaitlin Gregg

Van Ness Feldman, LLP

1050 Thomas Jefferson St. NW, Suite 700

Washington, DC 20007-3877

Tel.: (202) 298-1800

Fax: (202) 338-2416

Attorneys for Gas Processors Association

November 22, 2013

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

GAS PROCESSORS ASSOCIATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

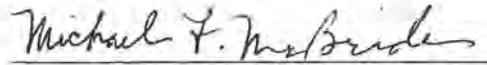
No. 12- \_\_\_\_\_

**RULE 26.1 DISCLOSURE STATEMENT OF PETITIONERS  
GAS PROCESSORS ASSOCIATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Local Rules of this Court, Petitioners Gas Processors Association hereby provides the following information:

The Gas Processors Association (GPA) is a non-profit trade organization made up of approximately 130 corporate members, all of whom are engaged in the processing of natural gas into merchantable pipeline gas, or in the manufacture, transportation, or further processing of liquid products from natural gas. Our members also produce, gather, transmit, and market natural gas and natural gas liquids. GPA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in GPA.

Respectfully submitted,



Michael F. McBride

Kyle Danish

Kaitlin Gregg

Van Ness Feldman, LLP

1050 Thomas Jefferson St. NW, Suite 700

Washington, DC 20007-3877

Tel.: (202) 298-1800

Fax: (202) 338-2416

Attorneys for Gas Processors Association

November 22, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 22nd day of November, 2013, caused copies of the foregoing documents to be served on parties listed below by causing copies of the same to be sent via U.S. first-class mail.

Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
Mail Code 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20004

U.S. Environmental Protection Agency  
Associate General Counsel for Air and  
Radiation Law Office  
Office of General Counsel  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Attorney General Eric H. Holder, Jr.  
U.S. Department of Justice  
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Washington, DC 20530-0001

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Earthjustice  
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Washington, DC 20036-2212

Shannon S. Broome  
Katten Muchin Rosenman LLP  
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Tomas Elias Carbonell  
Environmental Defense Fund  
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Emma Cordelia Cheuse  
Earthjustice  
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James S. Crockett Jr.  
Spilman Thomas & Battle  
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Spilman Center  
Charleston, WV 25321-0000

David D. Doniger  
Natural Resources Defense Council  
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James D. Elliott  
Spilman Thomas & Battle, PLLC  
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Meleah Anne Geertsma  
Natural Resources Defense Council  
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Elizabeth Louise Horner  
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John Robert Jacus  
Davis Graham & Stubbs LLP  
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(DOJ) Environmental Defense Section  
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Clean Air Task Force  
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Darin T. Schroeder  
Clean Air Task Force  
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Suite 530  
Boston, MA 02108

Joanne Marie Spalding  
Sierra Club  
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Second Floor  
San Francisco, CA 94105-3441

Eric Paul Waeckerlin  
Davis Graham & Stubbs LLP  
1550 17th Street  
Suite 500  
Denver, CO 80202

Ann Brewster Weeks  
Clean Air Task Force  
18 Tremont Street  
Suite 530  
Boston, MA 02108

William L. Wehrum Jr.  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037

Peter Michel Zalzal  
Environmental Defense Fund  
2060 Broadway  
Suite 300  
Boulder, CO 80304

Respectfully submitted,



Michael F. McBride

Lisa Epifani

Kyle Danish

Kaitlin Gregg

Van Ness Feldman, LLP

1050 Thomas Jefferson St. NW, Suite 700

Washington, DC 20007-3877

Tel.: (202) 298-1800

Fax: (202) 338-2416

Attorneys for Gas Processors Association

November 22, 2013

58416 Federal Register / Vol. 78, No. 184 / Monday, September 23, 2013 / Rules and Regulations

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 60**

[EPA-HQ-OAR-2010-0505, FRL-9844-4]

RIN 2060-AR75

**Oil and Natural Gas Sector:  
Reconsideration of Certain Provisions  
of New Source Performance Standards****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final Amendments.

**SUMMARY:** This action finalizes the amendments to new source performance standards for the oil and natural gas sector. The Administrator received petitions for reconsideration of certain aspects of the August 12, 2012, final standards. These amendments are a result of reconsideration of certain issues raised by petitioners related to implementation of storage vessel provisions. The final amendments provide clarity of notification and compliance dates, ensure control of all storage vessel affected facilities and update key definitions. This action also corrects technical errors that were inadvertently included in the final standards.

**DATES:** This final rule is effective on September 23, 2013.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2010-0505. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA's Docket Center, Public Reading Room, EPA West Building, Room Number 3334, 1301 Constitution Avenue NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bruce Moore, Sector Policies and Programs Division (E143-05), Office of Air Quality Planning and Standards,

Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-5460; facsimile number: (919) 685-3200; email address: [moore.bruce@epa.gov](mailto:moore.bruce@epa.gov).

**SUPPLEMENTARY INFORMATION:**  
*Organization of This Document.* The information presented in this preamble is organized as follows:

- I. Preamble Acronyms and Abbreviations
- II. General Information
  - A. Executive Summary
  - B. Does this reconsideration notice apply to me?
  - C. How do I obtain a copy of this document and other related information?
  - D. Judicial Review
- III. Summary of Final Amendments
  - A. Initial Notification and Compliance Dates
  - B. Group 1 and Group 2 Storage Vessel Emission Standards Applicability
  - C. Group 1 Storage Vessel Affected Facility Control Requirements
  - D. Alternative 4-tpy Uncontrolled Actual VOC Emission Rate
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K. Congressional Review Act

**I. Preamble Acronyms and Abbreviations**

Several acronyms and terms are included in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

API American Petroleum Institute  
 AVO Auditory, Visual and Olfactory  
 BOE Barrels of Oil Equivalent  
 bbl Barrel  
 bpd Barrels Per Day  
 BID Background Information Document  
 BSER Best System of Emissions Reduction  
 CAA Clean Air Act  
 CFR Code of Federal Regulations  
 CPMS Continuous Parametric Monitoring Systems  
 EIA Energy Information Administration  
 EPA Environmental Protection Agency  
 GOR Gas to Oil Ratio  
 HAP Hazardous Air Pollutant  
 HPDI HPDI, LLC  
 Mcf Thousand Cubic Feet  
 NTTAA National Technology Transfer and Advancement Act of 1995  
 NEI National Emissions Inventory  
 NEMS National Energy Modeling System  
 NESHAP National Emissions Standards for Hazardous Air Pollutants  
 NSPS New Source Performance Standards  
 OAQPS Office of Air Quality Planning and Standards  
 OMB Office of Management and Budget  
 PRA Paperwork Reduction Act  
 PTE Potential to Emit  
 RFA Regulatory Flexibility Act  
 SISNOSE Significant Economic Impact on a Substantial Number of Small Entities  
 tpy Tons per Year  
 TTN Technology Transfer Network  
 UMRA Unfunded Mandates Reform Act  
 VCS Voluntary Consensus Standards  
 VOC Volatile Organic Compounds  
 VRU Vapor Recovery Unit

**II. General Information****A. Executive Summary****1. Purpose of This Regulatory Action**

The purpose of this action is to finalize amendments to the 40 CFR part 60, subpart OOOO, Standards of Performance for Crude Oil and Natural Gas Production, Transmission and

Distribution final rule promulgated under section 111(b) of the Clean Air Act (CAA), which was published on August 16, 2012 [77 FR 49490]. The amendments being finalized were proposed on April 12, 2012 [78 FR 22126]. Specifically, this final rule action amends aspects of the 2012 new source performance standards (2012 NSPS) to address select issues raised by different stakeholders through several administrative petitions for reconsideration of the 2012 NSPS. The select issues being reconsidered and addressed by this action are related primarily to implementation of the storage vessel provisions.

## 2. Summary of Major Amendments to the NSPS

This rule finalizes a number of aspects of the proposal but, after consideration of public comments received, it also makes certain changes, as described in this section.

### a. Initial Notification and Compliance Dates

For Group 1 storage vessels (*i.e.*, those the construction, reconstruction or modification of which began after August 23, 2011, and on or before April 12, 2013),<sup>1</sup> the final amendments require that owners/operators estimate emissions from the storage vessels to determine affected facility no later than October 15, 2013, and a notification be submitted with the facilities' annual report due by January 15, 2014, to inform regulatory agencies of the existence and location of the Group 1 storage vessel affected facilities. The final amendments retain the requirement that all Group 1 storage vessel affected facilities comply with the emission standards but, in a change from proposal, extend the compliance deadline to April 15, 2015. Since all Group 1 affected facilities are required to meet the emission standards, the final amendments do not require Group 1 storage vessel affected facilities to track emission increase events, as we had proposed.

For Group 2 storage vessel affected facilities (*i.e.*, those the construction, reconstruction or modification of which began after April 12, 2013), the final amendments extend the compliance date to April 15, 2014 (or 60 days after startup, whichever is later), for implementing the emission standards, as proposed.

In response to comments regarding the confusion about when the affected

facility status for Group 1 storage vessels should be determined, we have also made clarifying changes to § 60.5365(e) in the final amendments that clearly specify October 15, 2013, as the deadline for calculating potential volatile organic compound (VOC) emissions from Group 1 storage vessels for determining the affected facility status.

### b. Group 1 and Group 2 Storage Vessel Emission Standards Applicability

We have amended § 60.5395 to more clearly specify that the requirements of the NSPS apply to Group 1 and Group 2 storage vessel affected facilities (*i.e.*, those with potential to emit (PTE) 6 or more tpy of VOC, as determined by the methods and dates specified in this final rule). We amended this language in response to several comments expressing confusion about whether the requirements applied to all Group 1 storage vessels or just those with VOC emissions of 6 tpy or greater (*i.e.*, affected facilities).

### c. Group 1 Storage Vessel Affected Facility Emission Standards and Compliance Dates

A key feature of this action is that the final amendments require control of all storage vessel affected facilities constructed since the August 23, 2011, proposal date of the 2012 NSPS. This decision, as summarized in this section and discussed fully in sections IV.A and V.C of this preamble, was based on new information we received that indicates that the projected control device supply appears to be greater than we originally estimated.

In the preamble to the proposed amendments, based on the information then available to the EPA, we developed an estimate of the supply of the type of combustors likely to be used by owners and operators to comply with the control requirements and concluded that control supply would not catch up with its demand under this rule until 2016. To avoid delaying control until such time, we proposed that Group 1 affected facilities notify the EPA of their presence and location by October 15, 2013, but need not comply with the 95 percent reduction requirement unless they experience an emission increase event. However, new information we received since proposal indicates that the combustor suppliers have the manufacturing capacity to meet the demand posed both by this regulation and a variety of state and local regulations that require the installation of control devices. Therefore, in the final amendments, we are not changing the requirement of the 2012 NSPS that

Group 1 storage vessel affected facilities comply with the emission standard requirements. However, we have extended the current compliance deadline. For the reasons discussed in detail in section IV.A, these final amendments require that Group 2 affected facilities comply with the emission standards by April 15, 2014, as we proposed, and that Group 1 affected facilities comply by April 15, 2015.

### d. Alternative 4-tpy Uncontrolled Actual VOC Emission Rate

To help alleviate the control supply shortage believed to exist at the time, we had proposed that affected facilities meet the 95% reduction requirement or an uncontrolled actual VOC emission rate of less than 4 tpy, which would allow control devices to be removed from storage vessel affected sources below that emission rate and relocated to those that have just come on line and have PTE of 6 tpy VOC or more. As mentioned above, new information we received since proposal indicate that the combustor suppliers have the manufacturing capacity to meet the demand posed by this regulation, which in turn would suggest that a supply buffer may no longer be necessary. However, for the reasons provided in section V.C of this preamble, we are finalizing the amendment to the storage vessel emission standards as proposed due to questionable cost effectiveness, the secondary environmental impact and the energy impacts from the continued operation of the combustion control device at an inlet stream concentration of less than about 4 tpy. We were aware but had not highlighted these concerns in the proposed amendment because the perceived supply problem alone necessitated proposing the amendment. The resolution of the supply issue, however, shifts our focus back to these concerns. As explained in more detail in section V.C of this preamble, in light of the questionable cost effectiveness of additional control, the secondary environmental impact and the energy impacts we conclude that the best system of emissions reduction (BSER) for reducing VOC emissions from storage vessel affected facilities is not represented by continued control when their sustained uncontrolled emission rates fall below 4 tpy. We are therefore finalizing the amendment as proposed. Under the final amendments, an owner or operator may comply with the uncontrolled actual VOC emission rate instead of the 95 percent control requirement where it can be demonstrated that, based on records of monthly determinations of actual

<sup>1</sup> The 2012 NSPS proposal was published on August 23, 2011, and the proposed rule for this action was published on April 12, 2013.

emission rate for the 12 consecutive months immediately preceding the demonstration, that the storage vessel affected facility uncontrolled actual VOC emissions for each month during that 12-month period have been below 4 tpy. The final amendments require that the owner or operator re-evaluate the uncontrolled actual VOC emissions on a monthly basis. If the results of the monthly determination show that the uncontrolled actual VOC emission rate is 4 tpy or more, the owner or operator would have 30 days to meet the 95 percent control requirement. We discuss this further in section V.C of this preamble.

**e. Definition of Storage Vessel Affected Facility**

We have finalized the proposed amendments to the definition of "storage vessel affected facility" in the final rule (see § 60.5365(e)) to (1) include the 6 tpy VOC emission threshold and to clarify that a source can take into account any legally and practically enforceable emission limit under federal, state, local or tribal authority when determining the VOC emission rate for purposes of this threshold; (2) clarify that a storage vessel affected facility whose VOC PTE decreases to less than 6 tpy would

remain an affected facility; and (3) to clarify that PTE does not include any vapor recovered and routed to a process.

**f. Streamlined Compliance Monitoring Provisions**

We received several comments regarding the streamlined compliance monitoring provisions; our review of the comments did not result in significant changes since proposal. These compliance monitoring provisions include inspections of covers, closed-vent systems and control devices, performed at least monthly. We believe that these measures are sufficient to ensure that storage vessel affected facilities that have installed controls meet the 95 percent VOC reduction standard. Although the more stringent compliance monitoring provisions in the 2012 NSPS may provide better assurance of compliance, there are significant issues regarding their implementation, which have been raised in several administrative reconsideration petitions. We continue to evaluate the reconsideration issues related to compliance monitoring and intend to complete our reconsideration by the end of 2014.

**3. Cost and Benefits**

Owners and operators of storage vessel affected facilities are expected to

install and operate the same or similar air pollution control technologies under these final amendments as would have been necessary to meet the previously finalized standards for the oil and natural gas sector under the 2012 NSPS. We project that these amendments will not result in a significant change in costs and or benefits compared to the 2012 NSPS. The final amendments continue to require that all storage vessel affected facilities comply with the emission standards. Although the final amendments may not achieve the same level of emission reductions as the 2012 NSPS, it was necessary to revise the standards due to the limitations of the 2012 rule. The revisions provided in the final amendments were needed for the reasons explained in this preamble, and we believe the rule provides significant benefits. We anticipate that, if there are any changes in costs for these units, such changes would likely be small relative to both the overall costs of the individual projects and the overall costs and benefits of the final rule.

*B. Does this reconsideration notice apply to me?*

Categories and entities potentially affected by today's notice include:

TABLE 1—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS ACTION

Category	NAICS code <sup>1</sup>	Examples of regulated entities
Industry .....	211111 211112 221210 486110 486210	Crude Petroleum and Natural Gas Extraction. Natural Gas Liquid Extraction. Natural Gas Distribution. Pipeline Distribution of Crude Oil. Pipeline Transportation of Natural Gas.
Federal government .....	.....	Not affected.
State/local/tribal government .....	.....	Not affected.

<sup>1</sup> North American Industry Classification System.

This table is not intended to be exhaustive, but rather is meant to provide a guide for readers regarding entities likely to be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permitting authority for the entity or your EPA regional representative as listed in 40 CFR 60.4 or 40 CFR 63.13 (General Provisions).

**C. How do I obtain a copy of this document and other related information?**

In addition to being available in the docket, electronic copies of these proposed rules will be available on the Worldwide Web through the Technology Transfer Network (TTN).

Following signature, a copy of each proposed rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/oarpg/>. The TTN provides information and technology exchange in various areas of air pollution control.

**D. Judicial Review**

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by November 22, 2013. Under section 307(d)(7)(B) of the CAA, only an objection to this final rule that was raised with reasonable specificity

during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. Section 307(d)(7)(B) of the CAA further provides that "[o]nly 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." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was

impracticable to raise such objection within [the period for public comment] 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." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

### III. Summary of Final Amendments

The final amendments include revisions to certain reconsidered aspects of the existing 2012 NSPS which primarily affect the implementation of the regulation of VOC emissions from storage vessels. A summary of the final amendments resulting from our reconsideration are provided in the following paragraphs.

#### A. Initial Notification and Compliance Dates

For Group 1 storage vessel affected facilities, we have amended the 2012 NSPS to require that a notification be submitted with the initial annual report, to inform regulatory agencies of the existence and location of the vessels. In addition, we have amended the 2012 NSPS to require that all Group 1 storage vessel affected facilities comply with the emission standards no later than April 15, 2015, and that all Group 2 storage vessel affected facilities comply no later than April 15, 2014, (or 60 days after startup, whichever is later).

The final amendments also make clarifying changes to § 60.5395 that clearly specify October 15, 2013, as the deadline for calculating potential VOC emissions from Group 1 storage vessels to determine affected facility status.

#### B. Group 1 and Group 2 Storage Vessel Emission Standards Applicability

We have amended § 60.5395 to clearly state that the emission standards apply to Group 1 and Group 2 storage vessel affected facilities (as opposed to all storage vessels).

#### C. Group 1 Storage Vessel Affected Facility Control Requirements

The final amendments retain the requirement in the 2012 NSPS that all

storage vessel affected facilities meet the emission standards. However, the final amendments require that owners and operators of Group 1 storage vessel affected facilities comply with the emission standards by April 15, 2015, and that Group 2 storage vessel affected facilities comply by April 15, 2014.

#### D. Alternative 4-tpy Uncontrolled Actual VOC Emission Rate

We have amended the storage vessel standards to include a sustained uncontrolled actual VOC emission rate of less than 4 tpy. Specifically, an owner or operator may comply with the uncontrolled actual VOC emission rate instead of the 95 percent control requirement where it can be demonstrated that, based on records of monthly emission estimates for the 12 months immediately preceding the demonstration, that the storage vessel affected facility uncontrolled actual VOC emissions estimated each of those months were below 4 tpy. The owner or operator would be required to re-evaluate the uncontrolled actual VOC emissions on a monthly basis. If the results of the monthly determination show that the uncontrolled actual VOC emission rate is 4 tpy or more, the owner or operator would have 30 days to meet the 95 percent control requirement, unless the increase was associated with the fracturing or refracturing of a well feeding the storage vessel affected facility. In that case, 95 percent control would be required as soon as liquids are routed from the fractured or refractured well to the storage vessel. We discuss this further in section V.C of this preamble.

#### E. Definition of Storage Vessel

The final amendments revise the definition of "storage vessel" to clarify that it refers only to vessels containing crude oil, condensate, intermediate hydrocarbon liquids or produced water.

#### F. Definition of Storage Vessel Affected Facility

The final amendments revise the definition of "storage vessel affected facility" (see § 60.5365(e)) to (1) include the 6 tpy VOC emission limit and to clarify that a source can take into account any legally and practically enforceable emission limit under federal, state, local or tribal authority when determining the VOC emission rate for purposes of this threshold; (2) clarify that a storage vessel affected facility whose VOC PTE decreases to less than 6 tpy would remain an affected facility; (3) clarify that "other mechanisms" (or non-federally enforceable mechanisms) must be

legally and practically enforceable under federal, state, local or tribal authority; and (4) clarify that vapor from a storage vessel that is recovered and routed to a process is not to be counted in the PTE for purposes of determining affected facility status.

We also added language at § 60.5395(f) to address storage vessel affected facilities that are removed from service. Owners and operators are required to include a notification in their next annual report that the storage vessel has been taken out of service. If a storage vessel's return to service is associated with fracturing or refracturing of a well feeding the storage vessel, the storage vessel is subject to control requirements immediately upon returning to service. If, however, the storage vessel's return to service is not associated with well fracturing or refracturing, the PTE of the storage vessel must be determined within 30 days. If the PTE is 4 tpy or greater, then the storage vessel affected facility must comply with control requirements within 60 days of returning to service.

#### G. Streamlined Compliance Monitoring Provisions

For storage vessels that install controls to meet the 95 percent VOC reduction standard, we have amended the 2012 NSPS to adopt the streamlined compliance monitoring provisions as proposed without significant changes. These compliance monitoring provisions include inspections performed at least monthly of covers, closed-vent systems and control devices. As mentioned above, we continue to evaluate the reconsideration issues raised concerning the compliance monitoring provisions in the 2012 NSPS and intend to complete our reconsideration by the end of 2014.

#### H. Combustion Control Device Manufacturer Test Protocol

We have finalized amendments to the enclosed combustor manufacturer test protocol in the NSPS to align it with a similar protocol in the Oil and Natural Gas National Emission Standards for Hazardous Air Pollutants (NESHAP) (40 CFR 63, subpart HH).

#### I. Annual Report and Compliance Certification

We finalized amendments to allow 90 days after the end of the compliance period for submittal of the annual report and compliance certification.

### IV. Summary of Significant Changes Since Proposal

Section III summarized the amendments to the 2012 NSPS that the

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EPA is finalizing in this rule. This section will discuss the key changes the EPA has made since the April 12, 2013, proposal. These changes are the result of the EPA's consideration of the many substantive and thoughtful comments submitted on the proposal and other information received since proposal. We believe that the changes we have made sufficiently address concerns expressed by commenters and improve the clarity of the rule while improving or preserving public health and environmental protection required under the CAA.

#### *A. Group 1 Storage Vessel Affected Facility Control Requirements and Applicability*

We received comments requesting clarification regarding Group 1 storage vessel affected facility control requirement applicability. We also received comments on our estimate of the supply of combustors used to comply with the control requirements and our use of this estimate to determine the requirements for Group 1 storage vessel affected facilities.

To the extent that there was confusion regarding the applicability of Group 1 storage vessel affected facility control requirements, we agree that there is a need for more clarity in the final amendments. To accomplish this, we have included amendments to § 60.5395(b) that make it clear that these requirements apply only to Group 1 storage vessel affected facilities (emphasis added) (*i.e.*, those that have the PTE of 6 tpy VOC or more, as determined by the dates specified in the rule, as amended), not all Group 1 storage vessels. Refer to section V.A of this preamble for further discussion of comments and responses pertaining to these changes.

In the proposed amendments, based on the information then available to the EPA, we concluded that control supply would not catch up with its demand under this rule until 2016. To avoid delaying control until such time, we proposed that Group 1 affected facilities notify the EPA of their presence and location by October 15, 2013, but need not comply with the 95 percent reduction requirement unless they experience an emission increase event. Information we received since proposal indicate that the combustor suppliers have the manufacturing capacity to meet the demand posed both by this regulation and a variety of state and local regulations that require the installation of control devices even when accounting for the need to cover Group 1 well in advance of the projected 2016 date. Therefore, in the

final amendments we did not finalize the proposed requirement for Group 1 storage vessel affected facilities to be controlled only if there is an emission increase event. However, as explained in more detail below, we have concerns regarding the projections of potential combustor supply; the pace at which the combustor manufacturing industry can ramp up production and provide the necessary supply in the short-term; and the availability of trained personnel to install these devices on all affected facilities that will have already come on line by the current compliance date of October 15, 2013, as well as the additional approximately 1,100 new affected facilities per month that may need control. Consideration of these factors leads us to conclude that an adjustment to the compliance schedule is warranted.

First, we note that there is a great variability in the projections of potential combustor supply, with one supplier's projection greatly exceeding the other suppliers' projections. Our revised conclusion regarding supply of control devices is largely based on this one supplier's manufacturing capacity, which, if changed, could potentially affect sources' ability to acquire and install control by the current compliance deadline (*i.e.*, October 15, 2013 or 60 days after startup, whichever is later). In light of the above, additional time is needed beyond October 15, 2013, for compliance with the 95 percent reduction requirement. Secondly, we share the concern raised by several commenters that, due to the large number of storage vessel affected facilities, some may not be able to secure the necessary trained personnel to install control devices by the current compliance deadline, especially in the near term. Under the 2012 NSPS, installation of controls would be required by the current compliance date of October 15, 2013, for over 20,000 affected facilities that we estimate will have already come on line since the August 23, 2011, proposal date of the 2012 NSPS, as well as the additional approximately 1,100 new affected facilities per month that will need to install control 60 days after start-up. Lastly, while the overall supply of combustors appears to be adequate, we have concerns about how quickly the combustor manufacturing industry can ramp up production and provide the necessary supply in the short-term. We are doubtful that, even at full current capacity, there would be sufficient control devices to meet the October 15, 2013, compliance date. For the reasons stated above, we decided to take a

phase-in compliance approach that requires the newer affected facilities (which would have higher emissions) to comply first. Accordingly, the final amendments require that Group 2 affected facilities comply with the emission standards by April 15, 2014, as we proposed, and that Group 1 affected facilities comply by April 15, 2015.

Refer to section V.C of this preamble for further discussion regarding these changes.

In addition, we had proposed a list of examples of "events" that would trigger control requirements for Group 1 storage vessel affected facilities. As noted, all Group 1 storage vessel affected facilities must meet the control requirements by April 15, 2015. Therefore, we no longer need to look to events that may be presumed to increase emissions to determine which Group 1 storage vessel affected facilities are subject to control requirements. All proposed provisions related to tracking events have been removed from the final amendments, thereby simplifying the rule and avoiding additional burden and potential confusion.

Refer to section V.A of this preamble for further discussion regarding these changes.

#### *B. Applicability Dates and Compliance Dates*

As discussed in section IV.A of this preamble, the EPA previously concluded that there will be an insufficient supply of combustion control devices for all storage vessel affected facilities until 2016, based on information available at proposal. To avoid postponing control for all storage vessels affected facilities until 2016, we proposed alternative measures for Group 1 and Group 2 storage vessel affected facilities. For Group 1 storage vessel affected facilities, we proposed to require initial notification by October 15, 2013, to inform regulatory agencies of the existence and location of these storage vessels. We also proposed that Group 1 storage vessel affected facilities that undergo an event after April 12, 2013, that could reasonably be expected to lead to an increase in VOC PTE would be subject to control requirements. For Group 2 storage vessel affected facilities, we proposed April 15, 2014, as the compliance date for implementing control requirements.

In response to comments concerning Group 1 storage vessel control requirement applicability and compliance being tied to the "events" listed in § 60.5395(b)(2) and unclear notification and compliance dates for both Group 1 and Group 2 storage vessels, we have made changes to the

final amendments. For Group 1 storage vessels, we are requiring that the owner or operator determine whether the storage vessel is an affected facility no later than October 15, 2013. In the proposed amendments, owners or operators of Group 1 storage vessel affected facilities had to submit an initial notification of these storage vessels by October 15, 2013, as well as an initial annual report by January 15, 2014. In the final amendments, the initial notification may be combined with the initial annual report to reduce the burden of submitting two notifications within a 90-day period. As discussed previously in section IV.A of this preamble, the final amendments retain the requirement in the 2012 NSPS that all Group 1 storage vessel affected facilities comply with emission standards, and specify that compliance must be achieved by April 15, 2015. Therefore, we have removed all provisions related to tracking emission increase events from the final amendments.

For Group 2 storage vessel affected facilities, we are finalizing April 15, 2014, (or 60 days after startup, whichever is later) as the compliance date for implementing control requirements.

Refer to section V.A of this preamble for further discussion of comments and responses regarding these provisions.

#### C. Definition of Storage Vessel Affected Facility

We proposed to amend the definition of "storage vessel affected facility" to specify that the storage vessel must have a VOC PTE equal to or greater than 6 tpy to be an affected facility and to clarify that the owner or operator can take into account any legally and practically enforceable emission limit in an operating permit, or by another mechanism under state, local or tribal authority, when determining the VOC PTE. The proposed amendment also clarified that a storage vessel affected facility whose potential VOC emissions decrease to less than the threshold of 6 tpy would remain an affected facility. We proposed this amendment to clarify that a storage vessel complying with the proposed uncontrolled actual VOC emission rate would remain an affected facility.

We received comments opposing the revisions to the definition of "storage vessel affected facility" to the extent that it may allow storage vessel operators to account for non-federally enforceable emission limitations that may change in the future and are not enforceable by the EPA in the determination of VOC PTE. Upon

evaluation, we believe that the commenters' concern arises from language we used in the proposed amendments to § 60.5365(e) to define the storage vessel affected facility which could have been confusing due to the phrase "other mechanisms." Therefore, the final amendments clarify that "other mechanisms" must be legally and practically enforceable under federal, state, local or tribal authority.

We received public comments that requested that the 6 tpy threshold for storage vessel affected facilities be determined after application of a vapor recovery unit (VRU) (i.e., taking the VRU vapor recovery into account in the emissions determination) for Group 1 and Group 2 storage vessels.

In September 2012, in response to issues brought to the EPA's attention after the publication of the 2012 NSPS, we clarified that we do not consider VRUs that route recovered gas and vapor back to the process to be control devices, which is consistent with their treatment under 40 CFR part 63, subpart HH.<sup>2</sup>

As long as certain operating requirements are met, we believe it is appropriate to take into account reductions in VOC emissions that result from the recovery of vapor and routing of it to a VRU when determining the VOC PTE from a storage vessel for purposes of determining affected facility status. Routing of vapor through a VRU to a process reduces VOC emissions without secondary environmental impacts (e.g., NO<sub>x</sub> emissions) and is responsible conservation of our energy resources. However, it does not totally eliminate VOC emissions, since the VRU cannot operate 100 percent of the time due to maintenance and repair down time. Our September 28, 2012, letter clarified that the cover and closed vent requirements must be met when VRU is used to meet the 95 percent reduction emission standards. That said, we previously determined that routing of vapor through a cover and properly operated closed-vent system would recover all vapor routed to the system as long as the VRU is operating (i.e., 95 percent of the vapor being routed to a line when operating for 95 percent of the time). In light of the above, as long as the VRU is operated consistent with those requirements, we believe that it is appropriate to exclude 95 percent of the vapor that would otherwise be emitted if not recovered when determining PTE for purposes of determining affected facility status. As a result of this

<sup>2</sup> Letter from Peter Tsirigotis to Matthew Todd, American Petroleum Institute, September 28, 2012, Docket Item No. EPA-HQ-OAR-2010-0505-4595.

comment, and based on our prior clarification of this issue, the final amendments to § 60.5365(e) include a provision that "any vapor from the storage vessel that is recovered and routed to a process through a VRU designed and operated as specified in this section is not required to be included in the determination of VOC potential to emit for purposes of determining affected facility status." Further, we have added language to § 60.5365(e) that provides for this adjustment of PTE as long as (1) the storage vessel is operated in compliance with cover requirements in § 60.5411(b) and the closed-vent system requirements in § 60.5411(c), which has a requirement that the CVS (including the VRU) is operational at least 95 percent of the time, and that the operator maintain records demonstrating compliance with these requirements.

We were concerned that, should a VRU be removed or operated inconsistent with the conditions that were the basis for the PTE reduction following the PTE determination for assessing whether the storage vessel is an affected facility, emissions could increase without the storage vessel being subject to control. To address that possibility, we have added language to § 60.5365(e) such that, in the event of removal of apparatus that recovers and routes vapor to a process or operation that is inconsistent with the conditions for qualifying for the PTE reduction, the owner or operator would be required to determine PTE from the storage vessel within 30 days of such removal or operation. If the PTE is determined to be 6 tpy VOC or more, then the storage vessel would be an affected facility and subject to the control requirements in § 60.5395. We believe this approach will help avoid circumvention of the NSPS.

We received comment that storage vessel affected facilities that are removed from service should cease to be considered affected facilities. Although, for the reasons presented in section V.C of this preamble, we disagree with the commenter and have added language at § 60.5395(f) to address storage vessel affected facilities that are removed from service. Owners and operators are required to include a notification in their next annual report following removal from service that the storage vessel has been taken out of service. If a storage vessel's return to service is associated with the fracturing or refracturing of a well feeding the storage vessel, the storage vessel is subject to control requirements immediately upon returning to service. If, however, the storage vessel's return to service is not

associated with well fracturing or refracturing, the PTE of the storage vessel must be determined within 30 days. If the PTE is 4 tpy or greater, then the storage vessel affected facility must comply with control requirements within 60 days of returning to service.

#### V. Summary of Significant Comments and Responses

This section summarizes the significant comments on our proposed amendments and our response thereto.

##### A. Major Comments Concerning Applicability Dates and Compliance Dates

1. When do Group 1 storage vessels have to determine emissions?

###### a. Applicability Determination

*Comment:* One commenter requested that the final rule specify the date upon which the determination of the potential VOC emission rate should occur for the purpose of determining whether the storage vessel is an affected facility. According to the commenter, since the EPA has stipulated controls to not be cost effective for storage vessels emitting less than 6 tpy of VOC, and emission rates for storage vessels in the oil production segment tend to decrease as production declines, the commenter believes the determination should be made near to the date upon which controls would be required in order to minimize the potential to install controls on storage vessels for which production decline has rendered controls no longer cost effective. The commenter stated that the proposed revisions would require a determination by October 15, 2013, of whether individual Group 1 storage vessels are affected facilities, and thus October 15, 2013, would be an appropriate date upon which determination of the potential VOC emission rate should be based. According to the commenter, this would remain consistent with the requirement for determining the potential VOC emission rate for Group 2 storage vessels by April 15, 2014 or 30 days after startup, whichever comes later.

The commenter appears to suggest that, like Group 2, Group 1 storage vessel affected facilities located in the natural gas processing and natural gas transmission and storage segments should also be required to determine potential VOC emissions as the trigger for installing control instead of tracking events but to do so by April 15, 2015 (instead of April 15, 2014, proposed for Group 2). According to the commenter, control of the relatively low number of Group 1 storage vessel affected facilities

in these segments could likely be accommodated by this date.

Another commenter pointed out that the proposed reconsideration rule does not establish the date for a Group 1 storage vessel to determine its potential emissions. The commenter also recommended that notifications are only required for tanks that exceed the 6 tpy threshold on October 15, 2013. Although the publication date of the proposed reconsideration rule was April 12, 2013, the commenter contends that the EPA is not required to, nor should it, establish the emissions determination date for the source category of Group 1 storage vessels on that date. First, given the rapidly declining emissions at storage vessels following initial fracturing, the commenter believes that the expected emissions reduction to be gained from Group 1 storage vessels is likely to be limited. The commenter also states that the proposal date of April 12, 2013, has passed and operators may not be able to accurately back-calculate emissions from that date. Moreover, the commenter contends that emissions from many of these storage vessels will be below the 6 tpy affected source threshold as of October 2013. Given EPA's proposed approach, where storage vessel affected facilities whose emissions drop below 6 tpy remain subject to the standard, the commenter believes that many Group 1 storage vessels will be unnecessarily captured in the source category and required to indefinitely track "events" and perhaps install control devices even if their emissions never again exceed 6 tpy.

*Response:* The final amendments to § 60.5365(e) specify that Group 1 storage vessel affected facilities must determine potential VOC emissions by October 15, 2013, for purposes of determining whether it is an affected facility. For the reasons provided in the Response to Public Comments on the Proposed Amendments document available in the docket, the final amended § 60.5365(e) requires that Group 1 affected facilities submit a notification with the first annual report by January 15, 2014, to inform regulatory agencies of their existence and locations. Determining potential emissions and affected source status early on is not only necessary for Group 1 affected facilities to comply with the notification requirement by January 15, 2014,<sup>3</sup> it will also provide Group 1 affected facilities advance notice and time to secure the necessary

<sup>3</sup> We had proposed to require such notification by October 15, 2013, but, in response to comment, we have extended this deadline slightly to January 15, 2014, to allow Group 1 affected facilities to submit the notification with their annual report instead of separately.

control devices and schedule the installation personnel to perform the installation by April 15, 2015. We reject suggestions by some commenters that emission determination be conducted closer to the deadline for installing control because such delay would frustrate the reason for extending the compliance date for Group 1 affected facilities in the final amendments (i.e., to provide advance notice and time to secure the necessary control devices and schedule the installation personnel to perform installation). Further, the commenters apparently assumed, though incorrectly, that the EPA has concluded that control is not cost effective when VOC emissions are below 6 tpy. No such determination has been made by the EPA or demonstrated by commenters. On the contrary, as discussed in section V.C of this preamble, we have determined that continuing control at uncontrolled emission rates of 4 tpy or above is cost-effective. For the reasons stated above, the final amendments specify October 15, 2013, as the deadline for determining the VOC PTE for Group 1 storage vessels. If the VOC PTE of the Group 1 storage vessel is 6 tpy or greater on October 15, 2013 (or an earlier date if the owner or operator chooses to make the determination prior to October 15, 2013), then the storage vessel is a Group 1 storage vessel affected facility and is subject to the NSPS, which for Group 1 includes the notification requirement by January 15, 2014 (i.e., the date by which the first annual report is due), and the control requirement by April 15, 2015. We are not finalizing the proposed requirement that Group 1 storage vessels track events that may increase the VOC PTE of the storage vessel (refer to section V.A of this preamble) and install control should there be such event; this proposed Group 1 storage vessel requirement is no longer necessary since the final amendments retain the control requirement for all Group 1 storage vessel affected facilities.

One of the commenters expressed concern that Group 1 storage vessels will have to indefinitely track events for these storage vessels and install controls even if VOC emissions do not exceed 6 tpy. The final amendments do not include requirements for owners and operators to track events for Group 1 storage vessels, so this comment is now moot.

The EPA does not believe it is necessary to defer the date at which Group 1 storage vessels located in the natural gas processing and natural gas transmission and storage segments are required to determine emissions. The commenter was suggesting an

alternative to tracking events for storage vessels in these segments, and the final amendments do not include the proposed event tracking provisions.

#### b. Determination After an Event

*Comment:* One commenter sought clarification that the requirement to re-estimate emissions when there is an event that could reasonably be expected to increase emissions does not apply to non-affected facilities. Two commenters requested that the EPA specify whether the VOC emissions increase for Group 1 storage vessels are to be based on potential or actual emissions. Another commenter suggested that the EPA clarify that the baseline emissions used to determine whether a Group 1 storage vessel experiences an emission increase is the level of emissions immediately prior to the event.

*Response:* In the final amendments, we have removed the requirement to track events for Group 1 storage vessels (refer to section IV.A of this preamble). Therefore, these concerns are now moot.

#### 2. Which Group 1 storage vessels are subject to the initial notification requirements and when are the notifications due?

*Comment:* One commenter states that the definitions for "Group 1 storage vessel" and "storage vessel" in § 60.5430 do not contain the 6 tpy threshold required for a "storage vessel affected facility" under § 60.5365(e). The commenter believes that the EPA's intent is to only be notified by October 15, 2013, of Group 1 storage vessels that exceed 6 tpy and for operators to monitor these vessels for a subsequent "event" because any storage vessel under 6 tpy is not an affected facility and therefore should not be subject to requirements under the rule. The commenter further states that in § 60.5395, the heading which premises paragraph (b)(1) states, "You must comply with the standards in this section for each storage vessel affected facility." The commenter asserts that, based on the definition of Group 1 storage vessel and the order of requirements in the above provisions, this requirement could be misinterpreted to mean that all storage vessels between those specified Group 1 dates must be reported, regardless of their PTE.

Another commenter agreed, stating that none of the storage vessel definitions contains the 6 tpy threshold that is included in the § 60.5365(e) definition of "storage vessel affected facility." The commenter added that, as proposed, § 60.5395(b) seems to include requirements for "Group 1 storage

vessel affected facilities" but the notification and event requirements in proposed § 60.5395(b)(1) and (2) apply to "Group 1 storage vessels" rather than "Group 1 storage vessel affected facilities." The commenter believes that these requirements may be misinterpreted to apply to all storage vessels containing an accumulation of crude oil, condensate, intermediate hydrocarbon liquids, or produced water, regardless of whether their potential emissions meet the 6 tpy threshold.

*Response:* As proposed, § 60.5395(a)(1) states that owners or operators of Group 1 storage vessel affected facilities must comply with paragraph § 60.5395(b). The commenters are correct in their interpretation that the § 60.5395(b) requirements apply only to Group 1 storage vessel affected facilities (i.e., those Group 1 storage vessels with potential VOC emissions of 6 tpy or more), not all Group 1 storage vessels. For clarity, we have moved the affected facility determination requirements from § 60.5395 to § 60.5365(e) and have only requirements that apply to affected facilities now in § 60.5395. The final amendments to § 60.5365(e) clarify our intent.

We also proposed in § 60.5395(b) that owners or operators submit the initial notification of Group 1 storage vessel affected facilities by October 15, 2013. As discussed in section V.A of this preamble, the final amendments require that owners or operators determine the VOC PTE of Group 1 storage vessels by October 15, 2013, and submit the initial notification for Group 1 storage vessel affected facilities, which may be included in the first annual report, by January 15, 2014. The provisions in the final amendments to allow the initial notification of Group 1 storage vessel affected facilities to be submitted with the initial annual report are discussed further in the Response to Public Comments on the Proposed Amendments, available in the docket.

#### 3. Group 1 Storage Vessels That Become Affected Facilities on or After April 12, 2013

*Comment:* One commenter requested that Group 1 storage vessels that experience a triggering event should follow the same schedule for Group 2 storage vessel affected facilities to install controls (by April 15, 2014, or 60 days after startup, whichever is later), except that there could be a hard deadline for Group 1 storage vessel affected facilities along a natural gas pipeline. The commenter pointed to the preamble of the proposed amendments (FR 78 22131) that indicates the EPA's intent was for Group 1 storage vessel

affected facilities, after a triggering event, to become subject to the same control requirements as those in Group 2, and that these controls would be required no later than 60 days after the event, or April 15, 2014, whichever is later. According to the commenter, this intent was overlooked in the proposed rule amendments.

Two commenters added that the final rule should specify a compliance period for Group 1 storage vessels that originally had potential VOC emissions less than 6 tpy and subsequently experience an event that causes the potential VOC emission rate to meet or exceed 6 tpy. In such cases, the commenters requested that the storage vessel should be required to achieve compliance within 60 days after the event.

Another commenter contended that almost all events that would increase emissions at Group 1 storage vessels are planned or are of a foreseeable nature. The commenter believes that it is feasible for storage vessel operators to install and operate controls simultaneously with the occurrence of such planned events. The commenter added that because emissions from storage vessels are likely to be highest immediately after the events listed in 60.5395(b)(2), it is also essential for protection of public health that controls be implemented as soon as possible.

*Response:* As explained in section IV.A of this preamble, the emission standards remain applicable to all Group 1 affected facilities, as in the 2012 NSPS. Accordingly, we are not finalizing the proposed requirement to track emission increase events and meet the control requirement as a result of such events for Group 1 storage vessels affected facilities. Thus, comments/issues relative to compliance schedule for Group 1 storage vessel affected facilities that experience an event are now moot.

#### B. Major Comments Concerning the Storage Vessel Affected Facility Definition

*Comment:* In the reconsideration proposal, the EPA proposed to include a VOC emissions threshold of 6 tpy to determine, in part, which storage vessels are affected facilities. Additionally, the proposal allowed operators to take into account requirements under a legally and practically enforceable limit in an operating permit or by other mechanism. One commenter opposed this proposal to the extent that it allows storage vessel operators to account for non-federally enforceable emission limitations. According to the

commenter, the inclusion of non-federally enforceable limitations leads to oversight concerns, and some storage vessels would avoid the NSPS under the proposed threshold.

Additionally, the commenter maintains that the CAA does not allow "synthetic minor" programs to determine applicability of its NSPS regulations. The commenter states that the term "potential to emit" is not found in section 111 of the CAA but is a concept from CAA programs governing expressly defined major sources. As a result, the commenter states that the CAA does not specify that a minor source program run by the states or other entities should be a means to avoid NSPS regulations. According to the commenter, allowing non-federally enforceable standards to exempt sources from NSPS is problematic because states vary widely in the letter, implementation, and enforcement of their synthetic minor programs.

*Response:* In the preamble to the proposed amendments we stated that our intent was that "a source can take into account any legal and practically enforceable emissions limit under federal, state, local or tribal authority when determining the VOC emission rate for purposes of [the 6 tpy] threshold" (78 FR 22132). The language we used in the proposed amendments to § 60.5365(e) to define the storage vessel affected facility allows the owner or operator to "tak[e] into account requirements under a legally and practically enforceable limit in an operating permit or by other mechanism." We agree with the commenter in so much as the term "other mechanism" may be construed to include non-federally enforceable mechanisms that may have questionable, if any, enforceability provisions. Therefore, the final amendments removed the term "other mechanisms" and revised the provision to allow the owner or operator to "tak[e] into account requirements under a legally and practically enforceable limit in an operating permit or requirement under a Federal, state, local or tribal authority." We believe that the amendment clarifies only legally and practically enforceable limits can be considered when a source determines its PTE. The EPA's ability to require Federal enforceability rather than just legal and practical enforceability has been an issue since the DC Circuit decision in *National Mining Assn. v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995). As we have yet to address this remand/vacatur, the agency does not feel at this time that it can dictate Federal enforceability in this context.

Concerning the comments on our use of PTE as an applicability threshold, that was based on our BSER determination made in the 2012 NSPS taking into account the control's cost effectiveness. Section 111(a)(1) of the CAA specifically identifies cost of achieving reduction as a factor to consider in setting NSPS standards. Nothing in section 111 of the CAA prohibits the EPA from using PTE to reflect our cost consideration in establishing applicability thresholds under section 111. Petitioner failed to explain how the fact that PTE is often used in connection with determining major source status in other provisions of the CAA bars its use for determining applicability status under section 111.

### C. Major Comments Concerning Storage Vessel Control Requirements

#### 1. CAA Section 111 Requirements

*Comments:* According to one commenter, section 111 of the CAA is fundamentally a technology-forcing provision that can and should be used to spur aggressive deployment of emission control technologies. The commenter contends that standards are to be set stringently, in order to force the development of new technology. If the EPA must phase in controls, and can otherwise justify such an approach under section 111, the commenter believes the EPA must do so in as limited a way possible, ensuring it does not disrupt incentives which would otherwise expand pollution control development.

The commenter added that the courts have clarified that EPA's selection of BSER is only limited by cost when industry demonstrates an "inability to adjust itself in a healthy economic fashion to the end sought by the Act as represented by the standards prescribed." Further, the commenter states that creating deferrals meant to track control equipment supply is not technology-forcing, but market-following. According to the commenter, this ignores the role of standard-setting in incentivizing higher production of control equipment. If EPA cites availability of control devices in deferring or reducing the stringency of an NSPS, the commenter contends that the EPA must offer a strong demonstration that supply constraints render the standard unachievable or prohibitively expensive for the industry as a whole.

*Response:* As explained in section IV.A of this preamble, the EPA proposed to phase in the control requirement for storage vessel affected facilities based on its belief at the time that there would

not be enough control devices to meet the demand of all storage vessel affected facilities by the October 15, 2013, compliance date in the 2012 NSPS or any time in the near future. Although new information received since our proposal indicates that control supply may not be an issue, the EPA is phasing in the storage vessel control requirement in the final amendments for the reasons provided in section IV.A. The phase-in approach has never been based on cost, as the commenter suggests; rather, as indicated in section IV.A of this preamble and in the preamble to the April 12, 2013, reconsideration proposal, the phase-in approach is intended to avoid setting a control requirement that cannot be met due to limitations associated with installing control devices. We do not believe that a standard that ignores such limitations accurately represents the BSER for these affected facilities.

#### 2. Group 1 Requirements

##### a. No Control of Group 1 Storage Vessels

*Comment:* According to one commenter the proposal to exempt Group 1 storage vessels that do not experience increases in emissions rests on questionable projections of estimated current and future supply of control devices, number of storage vessels and decline of oil and natural gas well production. The commenter contends that the EPA cited only unidentified oil and gas industry sources for the asserted level of control device production and provided no justification for forecasted rate of production increase or the production rate plateau of 1,400 units per month. The commenter believes that it is as or more likely that industry would continue to expand control device production in response to the proposed standards, but the proposed delays would slow control manufacture by removing demand. According to the commenter, the EPA could remove its artificial ceiling for control manufacture and accelerate the compliance deadline for Group 2 storage vessels and require most or all Group 1 storage vessels to control emissions by mid-2015. The commenter contended that the EPA must disclose the information underlying these forecasts to allow the public to evaluate their reasonableness and offer comments.

The commenter added that the assumption of one storage vessel per well overestimates the number of new storage vessels and is unjustified. The commenter provided examples of increased use of multi-well pads.

According to the commenter, the EPA uses the fact that oil and gas wells

decline in production over time as justification for exempting Group 1 storage vessels from control requirements. The commenter states that the EPA's forecast of control equipment availability implies no reduction in the number of storage vessels requiring control. This is contrary to the justification given for exempting Group 1 storage vessels from control requirements. According to estimates of a decline in production, the commenter believes that some Group 1 storage vessels could remain a significant source of emissions.

The commenter also contended that the EPA's projections indicate that the supply of existing control devices will be adequate to meet the combined demands of Group 1 and 2 storage vessels by 2016. It is not clear to the commenter what portion of the estimated 20,000 Group 1 storage vessels would ultimately be subject to control, so it is unclear whether subpart OOOO would ever apply to those Group 1 storage vessels with high emissions. Even assuming that emissions from these Group 1 storage vessels generally continue to decline over their remaining lives, the commenter believes that allowing this group of storage vessels to be uncontrolled would result in a large amount of excess emissions relative to the current rule. Conservative estimates by the commenter indicate that the proposal to leave Group 1 storage vessels unregulated would allow over 3 million tpy VOC and 700,000 tpy of methane to be emitted. Taking into account the production decline, the commenter contends that an analysis of the Bakken shale formation indicates that in 2015 storage vessels could still be emitting about 30 percent of their initial emissions. For the reasons given above, the commenter believes that the Group 1 storage vessel exemption is arbitrary and falls short of section 111 mandates that standards of performance reflect BSEER.

The commenter further contended that if EPA's analysis indicates a sufficient supply of control devices will be available in the future, then Group 1 storage vessels should be controlled within a reasonable time. The commenter states that a compliance deadline in mid 2015 would provide adequate time for all storage vessels currently subject to the proposed rule to come into compliance. To support this view, the commenter reasons that, if some fraction of the Group 1 storage vessels will no longer have emissions exceeding 6 tpy, the demand for control devices is likely to be lower than the EPA's projections, given the opportunities to manifold closely-

spaced storage vessels, the increased practice of multi-well pads which would share storage vessels, and the EPA's statement in the preamble to the proposed rule that control device manufacturers are likely to be flexible in their ability to meet equipment demand increases in the future.

Another commenter agrees that an alternate compliance schedule is necessary to accommodate the increased demand for control devices but recommended that Group 1 storage vessels that continue to have emissions greater than 6 tpy as of the Group 2 compliance date be required to comply with the control requirements of the rule.

Several commenters express concern that the increased demand for control devices will lead to delays in getting the devices installed and that additional time to comply with the proposed standards is required. One commenter states that the companies that supply the services to comply with the proposed amendments will have their time monopolized by the large oil and gas companies, leading to a shortage of these services for small oil and gas companies. Another commenter similarly expresses concern that small independent producers will experience a shortage of service personnel because the smaller producers have less leverage and buying power than large producers.

*Response:* In the preamble to the proposed amendments, we discussed our rationale for requiring controls only on those Group 1 storage vessel affected facilities that have an event that would likely lead to an increase in the potential to emit VOC (78 FR 22130). Our decision to require controls only on Group 1 storage vessels that experience such an event was based, in large part, on our understanding at that time and the information then available of the supply of combustors that likely would be used to comply with the control requirements. As we understood the combustor manufacturing industry at the time of proposal, the total capacity to produce combustors was approximately 300 units per month, which was based on information from six combustor manufacturers, and that the industry had the capability of increasing that capacity by about 100 units per month.

In response to comments questioning our combustor supply analysis, we reassessed the production capacity of the combustor manufacturing industry. We were able to confirm the data for some of the six manufacturers for which we had data at proposal, which leads us to believe the data as a whole for these manufacturers are reasonable (*i.e.*,

current capacity on average of about 600 units per year for each company). In addition, we were able to identify five additional combustor manufacturers. Of these five, three provided production capacity estimates that were in line with the data we originally had for the six companies, one provided production estimates that were significantly higher than any of the other companies, and one did not provide any data. We averaged the production capacity of the nine similar companies to complete the missing data from the one facility that did not provide data. We then summed the capacity of these 11 companies to determine total current manufacturing capacity of combustors, which was approximately 2,300 units per month.

We also estimated future capacity of the combustor manufacturers based on information provided by the manufacturers for anticipated future increases in production capacity. Based on this information, we estimated future capacity to be as high as approximately 3,000 units per month by April 15, 2015.

The new information described above (for further details, see the memorandum entitled *Combustor Supply and Demand Analysis*, available in the docket) seems to indicate that the combustor suppliers have the manufacturing capacity to meet the demand posed by all (*i.e.*, both Group 1 and Group 2) storage vessel affected facilities required to comply with emission standards in the 2012 NSPS. Therefore, in the final amendments, we continue to require that Group 1 storage vessel affected facilities comply with the emission standard requirements. However, we have extended the current compliance deadline for the reasons stated below.

While the overall projected supply of combustors appears to be adequate, we do not have information as to whether the combustor manufacturers are producing at the projected capacity and, if not, how quickly they can ramp up production to provide the necessary supply for the 2012 NSPS. More importantly, we note that there is a great variability in the projections of combustor supply, where one supplier's projection greatly exceeds the other suppliers' projections and accounts for a significant portion of the supply. To gauge the sensitivity of this one company on the combustor supply, we revisited our supply analysis assuming this company could manufacture combustors only at the highest manufacturing rate reported by any of the other combustor manufacturers. We found that under this scenario the supply of combustors never satisfies the

demand. Thus, this one manufacturer is critical in meeting the overall demand imposed by the 2012 NSPS.

Because this company plays such an important role in meeting the combustor supply, any factor that may delay or slow their production may significantly affect the ability of Group 1 and Group 2 storage vessel affected facilities to achieve compliance by the current compliance deadline in the 2012 NSPS (*i.e.*, October 15, 2013, or 60 days after startup, whichever is later). In light of the above, we believe it is prudent to allow more time for compliance to lift the pressure on the demand of control devices, especially in the short term. Under the 2012 NSPS, compliance is required by October 15, 2013, for an estimated over 20,000 storage vessel affected facilities that will have come on line since the August 23, 2011, (the proposal date of the 2012 NSPS), and an additional 1,100 new affected facilities per month will need to install control 60 days after start-up. Extending the current compliance deadline would allow the market to more easily absorb any events that may cause combustor manufacturing to fall short of the projected production capacity.

In addition to the supply issues described above, commenters raise the concern about not being able to secure the necessary trained personnel to install control devices by the current compliance deadline. In light of the large number of storage vessel affected facilities (estimated over 20,000 by October 15, 2013, with an additional 1,000 per month after that), and given the wide geographic distribution of oil and gas wells across the United States, we believe that the commenters raise a legitimate concern. In particular, we are concerned about how a potential shortage of trained personnel may impact small businesses. The comments we received indicate that larger owners and operators may be able to garner the majority of the available installation personnel due to their greater resources and influence. This may result in a situation where small owners and operators may be placed in a disadvantage to their larger competitors in obtaining installation personnel. If such a situation should occur, the smaller owners and operators may be forced to shut down wells or delay drilling new wells until installation personnel are made available.

In light of the issues described above that may hinder storage vessel affected facilities' ability to comply by the current October 15, 2013, deadline, we do not believe it is reasonable to retain that compliance date. Instead, in the final amendments, we take a phase-in

compliance approach that first addresses newer affected facilities (which would have higher emissions) while assuring that all affected facilities have time to acquire and schedule installation of control. The final amendments establish Group 1 and Group 2 affected facilities, as proposed, where Group 1 are those affected facilities that came on line on or before April 12, 2013, and Group 2 are those that come on line after that date. The final amendments require that Group 2 comply by April 15, 2014 (or 60 days after start-up, whichever is later), a 6-month extension from the current October 15, 2013, deadline for these newer affected facilities. The final amendments require that Group 1 comply by April 15, 2015. Were we to require that both groups comply by April 15, 2014, an estimated 30,000 affected facilities would be competing to acquire and install control by that date; as a result, the 6 month extension would do little to ease the demand for control or skilled personnel to install control should either become an issue in the near future. Also, requiring Group 1 to comply by April 15, 2014 would likely affect Group 2's ability to comply, thus undermining our goal to address the newer storage affected facilities sooner. Lastly, considering the large number of Group 1 affected facilities (which we estimate to be around 19,400), we believe that requiring all Group 1 affected facilities to comply by April 15, 2015 is reasonable. In light of the issues discussed above, we do not expect that these affected facilities would wait until near that deadline and risk noncompliance; rather, we believe that the deadline provides Group 1 advance notice and allows them time to plan for acquiring and scheduling installation of control device by that date. Therefore, in the final amendments, we have specified that all Group 1 storage vessel affected facilities must comply by April 15, 2015, and that Group 2 storage vessel affected facilities must comply by April 15, 2014, or 60 days after startup, whichever is later.

#### b. Clarification of "Events" That May Increase Emissions

*Comment:* Several commenters request that the EPA more clearly define the types of events that would trigger emission increases for Group 1 storage vessels. Seven commenters request that the EPA limit the examples to a finite list of events to remove ambiguity. One commenter states that the "events" that trigger control requirements for Group 1 tanks should be more specific for storage vessels at well sites. According to the commenter, only the events

described in § 60.5395(b)(2)(i) through (iii) of the proposed amendments should be considered triggering events for storage vessels that store reservoir fluids (*i.e.*, at well sites, tank batteries, centralized production facilities).

One commenter requested that the EPA delete the list of examples of events that would increase emissions from the rule language and provide that control requirements are triggered by a change that, in the owner's/operator's judgment, is one that could reasonably be expected to increase VOC emissions.

One commenter suggests that the EPA should clarify the illustrative list of emission-increasing events to include well maintenance activities, such as liquids unloading, various well workover procedures, and any other well maintenance activities which increase production.

*Response:* As discussed in section IV.A of this preamble, the final amendments do not change the requirement in the 2012 NSPS that all storage vessel affected facilities, including those we define as Group 1 affected facilities, to meet the emission standards, although the amendments extend the time for compliance. Since all Group 1 storage vessel affected facilities remain subject to control requirements, there is no need to track events in order to determine which Group 1 storage vessel affected facilities are subject to control requirements, we are not finalizing the proposed provisions related to events in the final amendments.

c. At what emission rate are Group 1 storage vessels that experience an event required to install controls?

*Comment:* Three commenters request that the EPA clarify that Group 1 storage vessels that experience an event that results in an increase in emissions would not be required to install controls if the VOC emissions are below the 6-tpy emission threshold. Two commenters recommend that the 6 tpy threshold be included either in the definition of "Group 1 storage vessels" in § 60.5430 or be explicitly listed as a condition in the requirement under § 60.5395(b)(1).

One commenter states that if emissions from a Group 1 storage vessel affected facility decrease below 6 tpy due to production decline, and it was determined even after a potentially triggering event that emissions had not returned to a level above 6 tpy, the storage vessel should not become subject to Group 2 controls. This view is generally supported by two additional commenters. The commenter refers to § 60.5410(i) which specifies that the

requirement for installing Group 2-level controls is further limited to Group 1 storage vessel affected facilities for which the potential VOC emission rate is 6 tpy or greater after the triggering event. According to the commenter, this 6 tpy threshold is reasonable and appropriate because the EPA concluded in the initial rulemaking that Group 2 controls would not be cost effective for storage vessels emitting less than 6 tpy of VOC.

The commenter adds that based on statements in the preamble (78 FR 22132) and regulatory language in § 60.5410(i), this 6 tpy threshold should be repeated in § 60.5395.

*Response:* As discussed in the previous comment response, the final amendments do not require that Group 1 storage vessels track events. Therefore, these comments are now moot.

### 3. Alternative 4-tpy Uncontrolled Actual VOC Emission Rate

*Comment:* One commenter states that the proposed 4 tpy emission rate, below which controls would not be required, is not BSER and would allow large and unjustifiable emissions increases. According to the commenter, the 95 percent control limit ensures that actual emissions do not exceed 0.2 tpy. Under the proposal, a storage vessel could emit up to 4 tpy indefinitely which is nearly a 3.8 tpy increase above the emissions that would be allowed under the proposed NSPS.

According to the commenter, once control devices are removed, it is more likely that unplanned events will cause significant emissions spikes, further increasing air pollution. For example, if an operator diverts a sudden surge of VOC-containing liquids to a storage vessel for which the operator has removed controls under the proposed mass-based limit, there will be no way to control the resulting emissions spike. The commenter contends that the result is that transient but significant emissions events may become more common at storage vessels using the proposed mass-based limits.

The commenter adds that even if it is assumed that the proposed emission rate would apply for a single year of a given group of storage vessels' lives, the proposal would allow tens of thousands of tons of pollution in that year. If storage vessels operate longer, or decline more slowly after passing the 4 tpy threshold, the amount of additional air emissions will be even higher.

The commenter could find no authority in the CAA for abandoning BSER controls after they have been installed. Having already determined that 95 percent control is BSER, the

commenter states that the EPA provided no justification of the basic premise or the level of the proposed emission rate. The emission rate has not been demonstrated to alleviate any control device shortage, and control devices that would become available due to the emission rate are unlikely to be available for more than a decade after the proposal is finalized.

The commenter contends that the EPA has not shown that the proposed 4 tpy limit corresponds to BSER. To make such a demonstration, the commenter believes, it would be necessary for the EPA to show that control technology has not been demonstrated below the 4 tpy emission rate, meaning that such sources can properly escape control, or that controls are not cost-effective for the industry as a whole below such an emission rate. According to the commenter, controls clearly are available for storage vessels with emissions of 4 tpy and below, so there is no justification for the 4 tpy emission rate on control technology availability grounds. Additionally, the commenter contends that significant VOC emissions can be captured below the proposed threshold. With respect to cost, the commenter believes recent information indicates the annualized cost of storage vessel combustors has declined substantially since subpart OOOO was finalized, significantly enhancing the cost effectiveness of controlling VOC emissions from storage vessels with a PTE of 4 tpy or less. The commenter provides information from a Colorado Department of Public Health and Environment (DPHE) pending rulemaking showing that the annualized combustor costs are around \$15,900/yr, as compared to the previous value of \$19,600/yr, resulting in a cost effectiveness of \$4200/ton at 4 tpy.

Further, the commenter believes that the EPA's control costs overestimate actual costs because the EPA does not take into account savings that would be experienced when controls are shared among storage vessels. As a result, controls are more affordable at lower uncontrolled emissions thresholds. According to the commenter, if the EPA sets a very low emission threshold at which removal and reuse is permissible, more vessels would have to buy new control devices, raising control costs again. Thus, the commenter believes that the EPA's analysis does not compare this variation, or considered the appropriate way to design such a system in light of the variation.

According to the commenter, the EPA states in the proposal that control device manufacture will lag the growing population of storage vessels for a few

years and used this rationale to separately waive controls for Group 1 storage vessels and assure adequate supply of control devices for Group 2 storage vessels. The commenter contends that the EPA further states that allowing affected storage vessels to remove controls under the proposed emission rate would help alleviate the control device shortage. According to the commenter, the EPA's justification that imposing the emission rate is due to uncertainty in their control technology projections and that an additional exemption would "help build a buffer" against this uncertainty is not a cognizable justification for a section 111 standard under the CAA. Further, the commenter does not believe that the EPA has demonstrated either the necessity or appropriateness of the proposed emission rate.

The commenter states that the EPA's concerns about "buffering" technology supply could only justify this departure from the existing standard if the proposed emission rate was also demonstrated to be BSER. According to the commenter, the EPA determined that requiring storage vessels with uncontrolled emissions greater than 6 tpy to achieve 95 percent control of those emissions reflects BSER and is cost effective. The commenter states that if these controls were maintained on a storage vessel as its emissions declined over time, total uncontrolled emissions would continue to fall. But under the proposed emission rate, the commenter contends that emissions could instead jump sharply after the threshold has been crossed. The commenter believes that this reversal in the emissions trend does not reflect BSER because it does not reflect the best demonstrated system of emissions control. According to the commenter, it is instead what happens when BSER controls are removed.

The commenter adds that for the EPA's "buffer" rationale to hold up, operators must be able to cost-effectively and regularly remove used control devices, store them as needed, and transfer them to new storage vessels at a rate which will meaningfully address the control device shortage which the EPA projects. The commenter asserts that the EPA provided no evidence showing operators would be able to do this, or would choose to do so. According to the commenter, storage vessels installed now would in all likelihood not take advantage of the proposal until the 15th year of operation (based on decline curve data provided by the commenter showing that it would take up to 15 years for well production to decline to a level to produce uncontrolled storage vessel emissions of

4 tpy). As a result, the commenter believes that the proposed emission rate would not generate any control devices for transfer for more than a decade, which is long after the EPA estimates adequate control devices will be available. Thus, according to the commenter's analysis, even if control devices could be transferred, such transfers will not buffer a short-term shortage. That shortage, if it exists, will long have passed. Instead, the commenter believes that the proposed emission rate would simply increase air pollution.

The commenter further states that even if the EPA were to actually require operators to build the buffer it desires, the EPA offers no evidence that such a buffer is required indefinitely. Elsewhere in the proposal, the commenter contends, the EPA expresses its view that control device manufacturers will respond to the standards by manufacturing enough control devices to meet the demand imposed by the standards, perhaps after an initial delay. The commenter points out that past experience shows that control devices become available if they are required, and this technology-forcing function is central to how section 111 is intended to work. By instead allowing operators to avoid purchasing new controls, and to remove them from other sources and reuse them, the commenter contends that the EPA permanently limits the market for new control technology, while also allowing excess emissions. The result will be fewer controls in the long-term, and more pollution.

The commenter believes that the Wyoming guidance the EPA mentions in the proposal does not comply with section 111 standards, and contends that the EPA does not offer evidence that it has avoided excess pollution.

Another commenter believes the EPA's choice of an uncontrolled emission rate of 4 tpy as the emission rate is arbitrary and unsupported. The commenter states that the EPA provided no engineering basis, credible health benefit estimate, or other justification for why the 4 tpy emission rate is appropriate.

The commenter also states that the EPA did not provide any justification or analysis demonstrating whether control at 4 tpy is cost effective. The commenter states a cost effectiveness analysis was performed for the 6 tpy applicability threshold, but no such information is provided for the proposed 4 tpy emission rate. The commenter opined that this approach will create situations of great inequity where neighboring facilities may have identical PTE VOC

emissions from a single storage vessel or battery, but very different regulatory burdens. The commenter provides an example where a site with emissions of 5.95 tpy is not subject to any of the notification, reporting, or control requirements of this NSPS. However, a neighboring site with initial production emissions of 6.1 tpy must notify, control, monitor, record, and report to comply with the NSPS. The commenter provides that, as natural production declines occur, after a year of uncontrolled emissions of 3.95 tpy (below the 4 tpy threshold) the additional controls may be removed, but the burden of reporting and recordkeeping continues indefinitely for this site.

The commenter also states that this approach may also drive companies to design their sites in a way that results in increased emissions overall, defeating the goal of the rule itself. For example, according to the commenter, to avoid applicability of the rule as a whole, new sites will likely be designed with more tanks such that no single tank will exceed the 6 tpy applicability threshold but emissions from the larger number of small tanks may have higher overall emissions. The commenter believes that this in turn may exacerbate the shortage of storage tanks that already exists and may further delay production due to the lack of tank availability. Further, the commenter states that the proposed emission rate may lead to hastily constructed tanks that may not be as soundly designed and constructed creating potential concerns for public health and safety as well as air quality.

The commenter contends that the EPA focused on the concept of any planned event that has the potential to increase emissions to or above 4 tpy. However, according to the commenter, this does not account for any potential short-term activities that may trigger reinstallation of controls such as degassing, refilling, inspection or maintenance when emissions in the long-term would otherwise remain below the 4 tpy level. The commenter states that this may result in the delay of appropriate maintenance or other actions that would otherwise be conducted. Building on the example of neighboring sites described above, the commenter states that, if the second site wanted to confirm tank integrity by inspection and cleaning, one-time emissions may raise the annual uncontrolled PTE to over 4 tpy, thus triggering not only reinstallation of controls but all associated monitoring, recordkeeping and reporting requirements.

Several commenters believe that a more appropriate approach would be to allow the removal of controls if a storage vessel has had uncontrolled actual emissions that remain below 6 tpy VOCs for 6 months. The commenters also believe that this initial determination is sufficient and that no further monitoring should be required unless otherwise required under § 60.5395(b)(2). According to the commenters, wells experiencing natural production decline are unlikely to ever experience an increase in emissions, but instead will continue to experience an emissions decrease. The commenters state that this continuing natural decline also supports the contention that 6 months is a sufficient timeframe to monitor emissions before removing controls.

One commenter adds that the proposed approach would require owners/operators to make a one-time commitment of what a tank will contain to the extent that potential emissions will ever exceed 6 tpy. The commenter believes that this inappropriately extends the "once in, always in" policy beyond its previous applications. While it appears that EPA would allow vessels to come in and out of regulation based on whether they contain crude oil, condensate, intermediate hydrocarbon liquids, or produced water at a given time, the commenter contended that the proposal would create a one-time determination of potential emissions that forever captures a tank, regardless of whether it continues to hold the materials that would bring it within regulation. In proposing low emitting storage vessels remain subject to the rule indefinitely, the commenter believes that the EPA is imposing unnecessary and burdensome control, recordkeeping, and reporting requirements on many storage vessels. Should EPA retain this "once in, always in" requirement, the commenter recommends that it should affirm that storage vessels no longer holding VOC-containing liquids or that are taken out of service are no longer an affected source.

Concerning re-installation of controls, several commenters state that the threshold should be 6 tpy instead of 4 tpy based on the EPA's cost effectiveness determination.

*Response:* To help alleviate the control supply shortage believed to exist at the time, we had proposed to amend the storage vessel emission standards to require compliance with either the 95 percent reduction requirement or an uncontrolled actual VOC emission rate of less than 4 tpy, which would allow control devices to be removed from storage vessel affected facilities below

that emission rate and relocated to those that have just come on line and have the VOC PTE of 6 tpy or more. As previously mentioned, new information we received since proposal indicates that the combustor suppliers have the manufacturing capacity to meet the demand posed by this NSPS, which in turn suggests that a supply buffer may no longer be necessary. However, for the reasons stated below, we have amended the storage vessel emission standards as proposed due to the cost effectiveness of continuing control and the increasing environmental disbenefits and energy impacts from the continued operation of the combustion control device at an inlet stream VOC concentration of less than 4 tpy.

As shown in the memo entitled *Cost and Secondary Environmental Impacts Associated with Controlling Storage Vessels under the Oil and Natural Gas Sector New Source Performance Standards*, available in the docket, our analysis indicates that the cost of controls for each storage vessel affected facility at a VOC emission rate of 4 tpy is approximately \$5,100 per ton. This cost increases to approximately \$6,900 per ton at an emission rate of 3 tpy, and to approximately \$10,000 per ton at 2 tpy. For comparison, we note that, in a previous NSPS rulemaking [72 FR 64864 (November 16, 2007)], we had concluded that a VOC control option was not cost effective at a cost of \$5,700/ton, which calls into question the cost effectiveness of continuing control of storage vessel affected facilities at an emission rate below 4 tpy.

One commenter recommends that, if we retain the uncontrolled VOC emission rate, it should be set no higher than 0.3 tpy (representing the emission rate of a 6 tpy VOC emission stream controlled at 95 percent) rather than 4 tpy. We emphasize that the 4 tpy uncontrolled VOC emission rate is not based on equivalency to the 95 percent reduction, nor do we think such conversion to an emission limit is appropriate considering it would result in a range of emission limits depending on the baseline uncontrolled emissions. The 0.3 tpy suggested by the commenter only represents the limit for sources with PTE of 6 tpy while those with higher PTE would have higher limits that equate to 95 percent reduction. Further, at the commenter's suggested emission rate of 0.3 tpy, the cost would be approximately \$70,000 per ton of emission reduction, which we do not consider to be cost effective.

One commenter questioned the basis of our control cost estimates and pointed to a recent update by Colorado

DPHE, an earlier version of which we used as the basis for our cost estimate, which indicated a lower cost of control. We point out that the lower cost in the revised Colorado analysis is primarily due to a lower cost (by approximately half) of the fuel for the pilot flame. Our assumption is that gas prices will remain relatively stable over time and question whether this lower fuel cost is applicable to all areas of the U.S. outside Colorado and whether such costs will be maintained in the long term. We also point out that the Colorado analysis did not include costs for a surveillance system or data management system, which were included in our analysis. Finally, the Colorado analysis showed an increase in capital cost of about \$2,000 over the capital costs in our analysis. For these reasons, we believe our costs, if anything, may underestimate costs rather than overestimate as the commenter claims. We made no changes to our cost analysis based on this comment.

Another commenter suggested that our cost estimate overestimates costs because we did not take into account savings that would result when control devices are shared by storage vessels. The comment is incorrect. In our analysis, we assumed that there would be one control device used per well site. We also acknowledged that there are likely multiple storage vessels per well site, all of which would be routed to a single control device.

In addition to cost effectiveness, we evaluated the secondary impact from continuing control below 4 tpy. As shown in the memo entitled *Cost and Secondary Environmental Impacts Associated with Controlling Storage Vessels under the Oil and Natural Gas Sector New Source Performance Standards*, available in the docket, on a nationwide basis, the combustion of the pilot flame fuel and the combustion of the VOC vapor in the storage vessel vent stream will result in increases in NO<sub>x</sub>, CO, CO<sub>2</sub>, and methane emissions, most notably CO<sub>2</sub> emissions. We estimate that the operation of each combustion control device on a VOC storage vessel vent stream flow rate of 3 tpy will result in the following secondary emissions: 54 tpy of carbon dioxide (CO<sub>2</sub>), 0.14 tpy of carbon monoxide (CO) and 0.028 tpy of nitrogen oxides (NO<sub>x</sub>).

We also evaluated the energy impacts associated with continuing control below 4 tpy. The discussion here for secondary energy and environmental impacts is on the basis of one combustion control device. As of the date of publication of this preamble, we estimate that there are approximately

20,000 storage vessel affected facilities that require combustion control devices and that the number is projected to increase by about 11,000 per year. We also estimate that on average, from 2014 through 2020, approximately 8,000 storage vessel affected facilities per year will experience VOC emissions decline to below 4 tpy. Our information indicates that the fuel usage (primarily methane) for the pilot flame on a single combustion control device may be approximately 12 tpy (based on a fuel flow rate of 70 scf/hr for the pilot flame, or about 613 Mcf per year). Thus, at a storage vessel VOC emission rate of 4 tpy, a combustion device would have to combust an amount of fuel gas about 3 times the mass of the VOC vapor from the tank being controlled simply to keep the pilot flame operating. This ratio increases even further for VOC emission rates less than 4 tpy. Considering the nationwide energy impact of continuing to operate the pilot flame of an extremely large number of combustion control devices for VOC flow rates far lower than the pilot flame fuel flow rates, we question whether this is a responsible use of our energy resources.

In light of the cost-effectiveness, the secondary environmental impacts and the energy impacts, we have concluded that the BSER for reducing VOC emissions from storage vessel affected facilities is not represented by continued control when their sustained uncontrolled emission rates fall below 4 tpy. For the reason stated above, we have amended the storage vessel emission standards to require that, at all times, affected facilities comply with either the 95 percent reduction requirement or an uncontrolled actual VOC emission rate of less than 4, as proposed. Under the final amendments, an owner or operator may comply with the uncontrolled VOC emission rate instead of the 95 percent control requirement where it can be demonstrated that, based on records of monthly determinations of VOC emissions for the 12 consecutive months immediately preceding the demonstration, that the storage vessel affected facility uncontrolled actual VOC emissions each month during that 12-month period are below 4 tpy. The final amendments require that the owner or operator re-evaluate the uncontrolled VOC emissions on a monthly basis. For the same reasons discussed below in this section in our response to comments concerning storage vessels that are taken out of service, the 4 tpy alternative emission standards in the final amendments at § 60.5395(d)(2) require control to be

applied in either of two cases. First, if a well feeding a storage vessel affected facility undergoes fracturing or refracturing, the owner or operator must comply with the 95 percent reduction requirements in § 60.5395(d)(1) as soon as liquids from the well following fracturing or refracturing are routed to the storage vessel affected facility, regardless of the last monthly emissions determination. On the other hand, if a monthly emissions determination required in § 60.5395(d)(2) indicates that VOC emissions from a storage vessel affected facility have increased to 4 tpy or greater, and the increase is not associated with fracturing or refracturing of a well feeding the storage vessel, then the owner or operator must apply 95 percent control according to § 60.5395(d)(1) within 30 days of the monthly calculation.

One commenter stated that the 4 tpy uncontrolled VOC emission rate does not represent BSER. As previously explained, due to the cost effectiveness, the secondary environmental impact and energy impact, the 4 tpy emission rate likely represents a point below which continued control ceases to be the BSER for reducing VOC emissions from storage vessel affected facilities.

One commenter asserted that some maintenance events at neighboring sites may cause short-term spikes in VOC emissions of 4 tpy or more, thereby triggering control for at least another 12 months. As discussed above, the final amendments provide for two alternative emission standards, either of which must be met at all times. However, the 2012 NSPS contains affirmative defense provisions that may be considered in cases where malfunctions occur causing emissions to exceed the standard. Planned activities are expected to be conducted in compliance with the emission standards.

We also made changes to the final amendments to clarify our intent that the uncontrolled VOC emission rate is available for all storage vessel affected facilities. In the proposed amendments, § 60.5395(d)(2) conditionally allowed the owner or operator to meet an uncontrolled actual VOC emission rate so long as the monthly actual uncontrolled emission rate remained below 4 tpy. However, in the proposed amendments we included the following qualifier in § 60.5395(d)(2): "provided that you have been using a control device and have demonstrated that the VOC emissions have been below 4 tpy without considering control for at least the 12 consecutive months immediately preceding the demonstration."

We now believe that this qualifier places undue restriction on the use of

the emission rate. Under the qualifier, Group 1 affected facilities that had uncontrolled emission below 4 tpy by the amended compliance date would not be able to avail itself of this option. We see no reason for such limitation and have therefore removed the qualifier language in the final amendments.

Concerning a commenter's assertion that one storage vessel with PTE of just over 6 tpy would be subject to control, recordkeeping and reporting requirements but that a storage vessel with PTE of just under 6 tpy would not be subject to any requirements, we respond that applicability thresholds exist for many rules and that subpart OOOO is not unique in that regard. With regard to the assertion that owners and operators may try to circumvent the NSPS by installing multiple small throughput storage vessels to keep individual tank emissions below the 6 tpy threshold, this comment pertains to the 2012 NSPS and not the proposed reconsideration, since changes to that threshold were not proposed. In response to the commenter's concern about transient emissions above 4 tpy that are caused by operator actions, storage vessels that increase emissions to at least the 4 tpy actual VOC emissions limit are subject to the control requirements. Owners and operators must ensure that they are aware of emissions increases that may occur after an activity and take appropriate action to control those emissions as required by the NSPS. With regard to uncontrolled VOC emissions of 6 tpy for 6 consecutive months being a more appropriate uncontrolled actual VOC emission limit, we have explained in section IV.B our rationale for the 4 tpy emission limit. In addition, we have never determined that control below 6 tpy is not cost-effective; to the contrary, we have determined that control at 4 tpy and above is cost-effective. Furthermore, we are concerned that setting the emission limit to allow removal of control if uncontrolled emissions are below 6 tpy for 6 consecutive months does not provide for reasonable certainty that emissions would not be controlled to the maximum extent possible that is still cost-effective and that does not create undue secondary impacts. Moreover, a full 12 months of sustained monthly uncontrolled actual emissions estimates below the 4 tpy limit will reasonably ensure that emissions fluctuations will not cause excursions above the limit, requiring controls to be reapplied. In the context of once in always in, the EPA has not extended this policy by providing that

storage vessel affected facilities that subsequently reduce PTE to below 6 tpy remain affected facilities. The EPA historically has never let facilities in and out of affected facility status and is consistent in subpart OOOO. Having storage vessels remain affected facilities when emissions decline allows regulatory agencies to track emissions of these storage vessels and to monitor compliance if they increase. Further, operators are not restricted as to what they store in a tank; if the contents are crude oil, condensate, hydrocarbon intermediates or produced water, and the storage vessel has PTE of at least 6 tpy, it is a storage vessel affected facility and subject to subpart OOOO. In addition, in response to a comment that a tank is forever an affected facility regardless of its future contents, we disagree. If a tank ceases to be used for a purpose other than to hold an accumulation of any of the materials listed above, then it ceases to fit the definition of storage vessel under subpart OOOO and is therefore no longer an affected facility subject to the standards.

One commenter requests that we clarify that a storage vessel affected facility that is taken out of service ceases to be an affected facility under the NSPS. On the contrary, the storage vessel remains to be an affected facility, although we realize that there may be undue burden associated with control and monitoring, recordkeeping and reporting requirements for storage vessels that are not in service. However, if a storage vessel affected facility that is out of service is returned to service, an emissions determination is necessary to see whether it can continue compliance with the 4 tpy uncontrolled emission rate or it must now install control to meet the 95 percent reduction requirement. In the 2012 NSPS, we concluded that we need to provide sufficient time for determining emissions and, if necessary, installing control. See 77 FR 49490, at 49526 (August 16, 2012). Accordingly, the 2012 NSPS provide 30 days for determining emissions and an additional 30 days to make control operational. We believe that a similar time frame is needed for a dormant storage vessel returned to service to demonstrate continued compliance with the 4 tpy uncontrolled emission rate or to install control to meet the 95 percent reduction requirement. After all, these storage vessels may very well have very low emissions upon startup and should not be forced to install control immediately without an opportunity to demonstrate that they can continue

compliance with the 4 tpy uncontrolled emission rate. However, we are concerned that a dormant storage vessel that is returned to service associated with the fracturing or refracturing of a well feeding it is likely to release substantial amounts of vapor if not controlled right away due to the initially high liquid flow and flash emissions from freshly fractured or refractured wells. We also believe that potential emissions associated with fracturing and refracturing of a well are unlikely to meet the 4 tpy uncontrolled emission rate. We are therefore not providing the time period described above for storage vessels returned to service associated with fracturing or refracturing of a well. In light of these considerations, we have added language at § 60.5395(f) of the final amendments to address storage vessel affected facilities that are removed from service. After taking a storage vessel affected facility out of service, owners or operators are required provide notification in their next annual report that the storage vessel has been taken out of service. If a storage vessel's return to service is associated with fracturing or refracturing of a well feeding the storage vessel, the storage vessel must comply with control requirements in § 60.5395(d) immediately upon returning to service. If, however, the storage vessel's return to service is not associated with well fracturing or refracturing, the PTE of the storage vessel must be determined within 30 days. If the PTE is 4 tpy or greater, then the storage vessel affected facility must comply with control requirements in § 60.5395(d) within 60 days of being returned to service.

#### *D. Major Comments Concerning Ongoing Compliance Requirements*

##### 1. Burden of Monitoring and Testing Requirements

*Comment:* One commenter states that the monitoring and testing requirements for storage vessels in the 2012 NSPS are overly complex and stringent given the large number of units affected and the remoteness of some wells sites. The commenter supports the EPA's intent to reduce the monitoring and testing burden on affected sources by means of the streamlined monitoring provisions in the proposed amendments. However, the commenter contends that many of these "streamlined" provisions remain overly burdensome due to the large number of affected vessels and the remoteness of the well sites at which they are installed. In particular, the commenter believes that § 60.5416 should only require an annual auditory,

visual and olfactory (AVO) inspection of the vessel and control device, and that Method 22 observation should be required only if smoke is observed by the operator.

Another commenter states that, as proposed, the monthly inspections and obligations for prompt repairs can be accomplished with existing personnel and not add significantly to the cost of compliance while ensuring that the required emissions controls are operating properly.

*Response:* In this action, the EPA is finalizing the streamlined compliance monitoring requirements, as proposed, with minor clarifying changes. As we stated in the preamble to the proposed amendments (78 FR 22134), we will continue to fully evaluate the compliance demonstration and monitoring issues. We intend to complete our reconsideration of these requirements, along with other issues for which we intend to grant reconsideration, by the end of 2014.

In response to the comment stating that the streamlined monitoring provisions are still too burdensome, the EPA has re-evaluated the Method 22 requirements in the proposed reconsideration rule and continues to believe that an observation time of fifteen minutes with a one minute smoke allowance for all combustion controls is appropriate. For manufacturer-tested enclosed combustors, the required frequency of the Method 22 test is quarterly. For all other combustion controls, the required frequency of the Method 22 test is monthly. A "smoke/no smoke" determination is essentially what Method 22 requires. Method 22 simply requires the observer to note how long emissions were seen over a period of time (15 minutes for monthly testing, 1 hour for quarterly testing). If smoke is seen for more than a specified amount of time, it is a violation. We have information indicating that personnel are on-site at each well at least monthly. Since the Method 22 observation does not require highly trained personnel to conduct the test, we believe the personnel already on-site are capable of performing the test. Thus, we do not agree with the commenter that the monitoring provisions in the reconsideration proposal would result in undue burden, or that they are inappropriate considering the remoteness of the well sites. We have therefore finalized those provisions.

##### 2. Streamlined Compliance Monitoring

*Comment:* Several commenters commented on the proposed streamlined compliance monitoring

requirements for closed vent systems and control devices installed to reduce VOC emissions from storage vessels. Four commenters request that the EPA make the streamlined compliance monitoring requirements permanent. One of these commenters states that monitoring requirements imposed by the 2012 NSPS would be particularly onerous for small, independent operators that cannot afford the number of employees-hours required to travel to distant well sites with such high frequency. According to the commenters, their suggested changes to the proposed amendments would meet the goal of proper monitoring of emissions without requiring such a large amount of human and capital resources. Two commenters oppose the streamlined monitoring requirements and request that the EPA reinstate the more rigorous requirements in the 2012 NSPS. One commenter states that portions of the streamlined monitoring requirements are unnecessary and burdensome.

Another commenter expresses concern that the proposed amendments replace instrument-based monitoring of control devices and closed vent systems (CVS) with less reliable methods. Effective monitoring of the integrity and performance of emission control devices is vital to ensuring compliance with emissions limitations under section 111, according to the commenter, and is evident in the radically revised number of storage vessels with emissions exceeding 6 tpy.

The commenter pointed out that the current subpart OOOO requirements for continuous parametric monitoring system (CPMS) and Method 22 testing, as well as Method 21 monitoring, build on other long-standing EPA regulations, including storage vessel standards under subpart HH and the NSPS for volatile organic liquid storage vessels, subpart Kb. The commenter added that they are also consistent with the proposed Uniform Standards for CVS and storage vessels. According to the commenter, the EPA went in the wrong direction by proposing to eliminate the CPMS requirements, shorten the Method 22 visible emissions testing, and allow operators to inspect CVS using OVA inspections.

The commenter states that previous agency studies indicate that instrument-based monitoring is cost-effective and more sensitive than sensory inspections, suggesting that if anything subpart OOOO should extend such monitoring to all roof fittings that could emit VOC. The commenter contends that the EPA provided no information in the proposed reconsideration that questions

the findings of the Uniform Standards on relative effectiveness or cost of instrument monitoring of storage vessel components. The commenter also points to the Fort Berthold Indian Reservation Federal Implementation Plan (FBIR FIP) where the EPA required continuous parametric monitoring of enclosed combustors, utility flares, and other control devices. Also in the FBIR FIP according to the commenter, the EPA rejected reducing the Method 22 observation period to 1 hour to mitigate burdensome compliance costs as an option that was not suitable. The commenter does not believe the EPA provided specific information to warrant a different approach.

The commenter adds that the EPA did not demonstrate that the proposed changes are necessary to mitigate cost and burdens raised by industry. The commenter states that the EPA cited general personnel and infrastructure concerns in the preamble but did not provide an analysis of the anticipated costs of implementing monitoring. In proposing to determine that the current monitoring requirements were infeasible, the commenter contends that the EPA did not indicate whether it took into account the reduced monitoring costs associated with the Group 1 exemption for storage vessels that do not undergo an emissions-increasing event and the deferral of the Group 2 storage vessel compliance date.

Further, the commenter states that there is no indication as to whether Method 21 inspections, CPMS and full Method 22 testing would be infeasible at storage vessels at or near manned facilities. As a result, the commenter contends that the EPA's streamlined monitoring requirements appear to be overly broad as well as inadequately supported.

Another commenter adds that periodic monitoring of closed-vent systems and control devices is a very important part of controlling the air quality in the nation. The commenter asserts that most well sites are located far away from cities and sometimes it can be bothersome to drive back and forth in order to accomplish testing and monitoring processes. The commenter believes that the best way to encourage operators to use the appropriate models is by not letting them install equipment without proper documentation, and to fine them, or even stop onsite operations in case they do not obey the requirement.

*Response:* In today's action, the EPA is finalizing the streamlined compliance monitoring requirements, as proposed, with minor clarifying changes. In finalizing these provisions, the EPA has

made no determination on the cost or feasibility of the compliance monitoring provisions in the 2012 NSPS, as some commenters appear to suggest. We also agree with the commenters about those provisions' reliability and effectiveness. However, as we explained in the preamble to the proposed amendments (78 FR 22134), significant issues regarding their implementation have been raised in the administrative petitions for reconsideration of the 2012 NSPS, which we are continuing to evaluate. We intend to complete our reconsideration of these requirements, along with any other issues for which we intend to grant reconsideration, by the end of 2014. We do not believe it is appropriate to impose these monitoring requirements on affected facilities while we are still evaluating their implementation issues. However, to avoid delaying compliance, we have proposed and are finalizing in today's action a set of streamlined compliance monitoring requirements. We believe that they are adequate to assure compliance. Several commenters urge us to retain the monitoring provisions in the 2012 NSPS for the reasons summarized above, but none of them claim that the streamlined provisions laid out in the proposal are inadequate to assure compliance. In light of the above, we are finalizing the streamlined compliance monitoring requirements, as proposed, with minor clarifying changes.

#### *E. Major Comments Concerning Design Requirements*

*Comment:* Three commenters support the inclusion of design parameters in the final amendments. One commenter states that design parameters are important to reduce the possibility for an unintended loophole in the rule language which might result in potentially significant emissions. The commenter adds that their agency has observed the highest emission rates corresponding to flash VOC emissions while liquids are being added to an existing storage vessel and believes that this is common at well sites, where the natural formation results in high pressure liquids which are then routed through the separator to a storage vessel that is at or around atmospheric pressure. The commenter contends that if a closed cover is not maintained during such liquids addition, a large percentage of the annual emissions could vent out of a pressure relief valve or thief hatch, rather than being routed to a control device.

Another commenter supported this view and states that the final amendments must ensure that vapor

collection systems and control devices will reduce 95 percent of VOCs during all phases of operation, including when air pressure significantly increases during loading. The commenter contends that where systems are currently in place to control condensate tank emissions at natural gas exploration and production sites, they are sometimes inadequate for controlling the high-pressure vapor produced when the tanks receive a slug of condensate. The commenter points out that the EPA has noted in this rulemaking that the feasibility of meeting the storage-vessel standards with a vapor recovery unit may be affected by "fluctuations in vapor loading caused by surges in throughput and flash emissions from the storage vessel." The commenter provides several possible approaches to assure equipment is properly designed to meet the storage vessel standards.

One of the commenters adds that the inclusion of design requirements would provide enforceable provisions that would assist permitting agencies in regulating sources.

Eight commenters generally opposed the inclusion of design requirements in the final amendments. One commenter states that the EPA has already established BSER for affected storage vessels as the reduction of VOC emissions by 95 percent or greater and established work practice standards for the closed vent system to any control device or vapor recovery system. According to the commenter, these work practice standards address potential equipment design and maintenance issues that could affect the proper collection of and destruction or recovery of VOC emissions from storage vessels. The commenter asserts that a storage vessel, closed vent system, and control device that are not properly designed would not be able to meet the work practice standards and minimum control device destruction efficiency already required in the proposed rule; therefore, any process design standards would only be duplicative requirements and result in more burden to industry and state agencies responsible for compliance.

The commenter maintains that the EPA should not attempt to expand any NSPS regulations by specifically regulating the process or mechanical design of storage vessels or the closed vent system to control devices or vapor recovery systems. The commenter further states that owners and operators are responsible for designing process equipment based on individual site process conditions and safety considerations. According to the

commenter, it would be a massive undertaking for the EPA to attempt to write regulations regarding the specific "proper" design of storage vessels and closed vent systems. The commenter expresses doubt that the EPA could provide enough flexibility in process and mechanical design of equipment regulations to cover all the unique process conditions at individual facilities.

One commenter adds that over-prescriptive regulations on storage vessel design could stifle technological innovation, including new tank designs that emit less than current storage vessels. Additionally, according to the commenter, storage vessels are specifically designed in accordance with federal safety standards and these specifications should not be potentially compromised under any circumstances. Further, the commenter states that it is in the best economic interest of all operators to procure properly designed equipment and operate storage vessels efficiently. Lastly, the commenter states that, under the CAA, operators already have a general duty requirement to "maintain and operate any affected facility including air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions."

One commenter does not believe that the EPA has the authority under NSPS to require a particular technology or design as a performance standard. The commenter contends that the EPA should not mandate a particular technology, but rather allow companies to choose the technology to best meet the emission standard.

One state agency commenter believes that specifying design requirements in regulations will stifle innovation and create a plateau for new products. The commenter believes that such restrictions will not allow for economic or technological creation of new methods or equipment. The commenter further states that, as the industry grows and changes, so too should the facilities and equipment associated with it, but prescriptive design requirements would not allow this to happen. Also, according to the commenter, due to high variability of materials and situations in the field it seems illogical and inappropriate to deem only certain designs of facilities and equipment acceptable or not. The commenter contends that design requirements specified by rule could cause certain facilities or regions to be unable to implement engineering solutions necessary to account for site- or region-specific conditions.

*Response:* The EPA appreciates the information provided by these commenters in response to the EPA's solicitation of comment on whether the NSPS should include design requirements for storage vessels, closed vent system and control devices. In the preamble to the proposed rule, we had solicited comment on whether the EPA should require that storage vessel installations and associated controls be sized and designed properly for specific applications to minimize excess emissions due to improperly sized and designed storage vessels or control systems. We did not solicit comment on whether the EPA should require specific technology or design parameters. Accordingly, because the reconsideration proposal did not include any specific design requirements for storage vessels and associated closed vent systems and control device, no such requirement is included in the final amendments.

#### *F. Major Comments Concerning Impacts*

*Comment:* One commenter contends that the EPA failed to assess the air quality impacts of its proposed amendments and the EPA must provide further analysis of air quality impacts to support that the proposed revised standards is BSER. According to the commenter's analysis, Group 1 storage vessels that do not experience an event that would increase emissions would result in an increase from the final NSPS in VOC emissions of over 3 million tpy and methane emissions of over 700,000 tpy. In addition, the commenter states that the six-month delay of the compliance date for Group 2 storage vessels results in an increase of 450,000 tpy of VOC emissions and 100,000 tpy of methane emissions. The commenter added that the removal of a control device from sources whose uncontrolled emissions drop below 4 tpy would result in an emission increase of 3.8 tpy VOC per vessel. Assuming that the 11,600 new vessels the EPA projects would qualify for the uncontrolled actual VOC emission rate, emissions would increase by 23,000 tpy VOC and 5,000 tpy methane. The commenter also contends that the removal of the control device would result in sources left uncontrolled during any unplanned events that would generate significant emissions. Additionally, the commenter states that using their decline curve analysis, new sources would not qualify for uncontrolled actual VOC emission rate for at least 14 years, and the increase in pollution is not justified by the EPA's control device availability concerns.

*Response:* As we discussed in section IV.A of this preamble, we are not finalizing our proposal to subject only those Group 1 storage vessels that experience an event to the emission standards. Thus, all Group 1 storage vessel affected facilities will be subject to the emission standards, as required under the 2012 NSPS. We believe this addresses the commenters' concerns about any increase in emissions based on our proposal to require Group 1 to control only if there is a subsequent emission increase event. The commenter is also concerned with emission increase from delayed compliance. However, we believe that the extended deadlines in the final amendments are justified for the reasons stated in section IV.A, and we are phasing the compliance deadlines to address facilities with projected higher emissions more quickly.

We have also provided further analysis of air quality impacts, as the commenter suggests, as well as the cost effectiveness and energy impact associated with the proposed uncontrolled emission rate of less than 4 tpy. As discussed in more detail in section V.C of this preamble, 4 tpy likely represents a point below which control ceases to be the BSER for reducing VOC emissions from storage vessel affected facilities due to the cost effectiveness, the secondary environmental impact and energy impact.

#### **VI. Technical Corrections and Clarifications**

The EPA is finalizing corrections to recordkeeping and reporting requirements for all affected facilities. In addition, the final amendments include corrections that are editorial in nature, such as typographical and grammatical errors, as well as incorrect cross-references.

#### **VII. Impacts of These Final Amendments**

Our analysis shows that owners and operators of storage vessel affected facilities would choose to install and operate the same or similar air pollution control technologies under the proposed standards as would have been necessary to meet the previously finalized standards. We project that this rule will result in no significant change in costs, emission reductions, or benefits. Even if there were changes in costs for these units, such changes would likely be small relative to both the overall costs of the individual projects and the overall costs and benefits of the final rule. Since we believe that owners and operators would put on the same

controls for this revised final rule that they would have for the original final rule, there should not be any incremental costs related to this proposed revision.

*A. What are the air impacts?*

We believe that owners and operators of storage vessel affected facilities will install the same or similar control technologies to comply with the revised standards finalized in this action as they would have installed to comply with the previously finalized standards. Accordingly, we believe that this final rule will not result in significant changes in emissions of any of the regulated pollutants.

*B. What are the energy impacts?*

This final rule is not anticipated to have an effect on the supply, distribution, or use of energy. As previously stated, we believe that owners and operators of storage vessel affected facilities would install the same or similar control technologies as they would have installed to comply with the previously finalized standards.

*C. What are the compliance costs?*

We believe there will be no significant change in compliance costs as a result of this final rule because owners and operators of storage vessel affected facilities would install the same or similar control technologies as they would have installed to comply with the previously finalized standards. However, we note that there likely will be reductions of costs imposed on owners and operators associated with the streamlined compliance monitoring procedures provided in the final amendments.

*D. What are the economic and employment impacts?*

Because we expect that owners and operators of storage vessel affected facilities would install the same or similar control technologies to meet the standards finalized in this action as they would have chosen to comply with the previously finalized standards, we do not anticipate that this final rule will result in significant changes in emissions, energy impacts, costs, benefits, or economic impacts. Likewise, we believe this rule will not have any impacts on the price of electricity, employment or labor markets, or the U.S. economy.

*E. What are the benefits of the proposed standards?*

As previously stated, the EPA anticipates the oil and natural gas sector will not incur significant compliance

costs or savings as a result of this rule and we do not anticipate any significant emission changes resulting from this rule. Therefore, there are no direct monetized benefits or disbenefits associated with this rule.

**VIII. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

An RIA was prepared for the April 2012 NSPS and can be found at: [http://www.epa.gov/ttn/ecas/regdata/RIAs/oil\\_natural\\_gas\\_final\\_neshap\\_nsps\\_ria.pdf](http://www.epa.gov/ttn/ecas/regdata/RIAs/oil_natural_gas_final_neshap_nsps_ria.pdf). This final rule will not result in a significant change in costs, emission reductions, or benefits in 2015 (the year of full implementation of the 2012 NSPS being amended with this action).

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. This action does not change the information collection requirements previously finalized under the 2012 NSPS and, as a result, does not impose any additional burden on industry. However, OMB has previously approved the information collection requirements contained in the existing regulations (see 77 FR 49490) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0673). The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business in the oil or natural gas industry whose parent company has no more than 500

employees (or revenues of less than \$7 million for firms that transport natural gas via pipeline); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The EPA has determined that none of the small entities will experience a significant impact because these final amendments will not impose additional compliance costs on owners or operators of affected facilities.

*D. Unfunded Mandates Reform Act*

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action contains no requirements that apply to small governments nor does it impose obligations upon them.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule is a reconsideration of an existing rule and imposes no new impacts or costs. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicited comment on the proposed action from state and local officials.

**F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments**

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effect on tribal governments, on the relationship between the federal government and tribal governments or on the distribution of power and responsibilities between the federal government and tribal governments, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

In the spirit of Executive Order 13175, and consistent with the EPA policy to promote communications between the EPA and tribal governments, the EPA specifically solicited comment on the proposed action from tribal officials. The EPA notes that significant oil and natural gas development is occurring on some tribal lands and has been mindful of this in consideration of these final amendments.

**G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks**

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. This final rule will not result in a significant change in emission reductions and benefits in 2015, the year of full implementation of the 2012 NSPS being amended with this action. Therefore, health and risk assessments were not conducted.

The public was invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to HAP from oil and natural gas sector activities.

**H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use**

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

**I. National Technology Transfer and Advancement Act**

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary

consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

**J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations**

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations because it does not affect the level of human health or environmental protection for all affected populations. This final rule is a reconsideration of an existing rule and imposes no new impacts or costs. Therefore, this final rule would not have any disproportionately high and adverse human health or environmental effects on any population, including any minority, low income or indigenous populations.

**K. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S.

Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective September 23, 2013.

**List of Subjects in 40 CFR Part 60**

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping.

Dated: August 2, 2013.

Gina McCarthy,  
Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of 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.*

**Subpart OOOO—[Amended]**

■ 2. Section 60.5365 is amended by revising paragraphs (e) and (h)(4) to read as follows:

**§ 60.5365 Am I subject to this subpart?**

\* \* \* \* \*

(e) Each storage vessel affected facility, which is a single storage vessel located in the oil and natural gas production segment, natural gas processing segment or natural gas transmission and storage segment, and has the potential for VOC emissions equal to or greater than 6 tpy as determined according to this section by October 15, 2013 for Group 1 storage vessels and by April 15, 2014, or 30 days after startup (whichever is later) for Group 2 storage vessels. A storage vessel affected facility that subsequently has its potential for VOC emissions decrease to less than 6 tpy shall remain an affected facility under this subpart. The potential for VOC emissions must be calculated using a generally accepted model or calculation methodology, based on the maximum average daily throughput determined for a 30-day period of production prior to the applicable emission determination deadline specified in this section. The determination may take into account requirements under a legally and practically enforceable limit in an operating permit or other requirement

established under a Federal, State, local or tribal authority. Any vapor from the storage vessel that is recovered and routed to a process through a VRU designed and operated as specified in this section is not required to be included in the determination of VOC potential to emit for purposes of determining affected facility status, provided you comply with the requirements in paragraphs (e)(1) through (4) of this section.

(1) You meet the cover requirements specified in § 60.5411(b).

(2) You meet the closed vent system requirements specified in § 60.5411(c).

(3) You maintain records that document compliance with paragraphs (e)(1) and (2) of this section.

(4) In the event of removal of apparatus that recovers and routes vapor to a process, or operation that is inconsistent with the conditions specified in paragraphs (e)(1) and (2) of this section, you must determine the storage vessel's potential for VOC emissions according to this section within 30 days of such removal or operation.

\* \* \* \* \*

(h) \* \* \*

(4) A gas well facility initially constructed after August 23, 2011, is considered an affected facility regardless of this provision.

■ 3. Section 60.5380 is amended by revising paragraphs (a)(2), (b), and (c) to read as follows:

**§ 60.5380 What standards apply to centrifugal compressor affected facilities?**

\* \* \* \* \*

(a) \* \* \*

(2) If you use a control device to reduce emissions, you must equip the wet seal fluid degassing system with a cover that meets the requirements of § 60.5411(b), that is connected through a closed vent system that meets the requirements of § 60.5411(a) and routed to a control device that meets the conditions specified in § 60.5412(a), (b) and (c). As an alternative to routing the closed vent system to a control device, you may route the closed vent system to a process.

(b) You must demonstrate initial compliance with the standards that apply to centrifugal compressor affected facilities as required by § 60.5410(b).

(c) You must demonstrate continuous compliance with the standards that apply to centrifugal compressor affected facilities as required by § 60.5415(b).

\* \* \* \* \*

■ 4. Section 60.5390 is amended by:

- a. Revising the introductory text;
- b. Revising paragraph (a); and

■ c. Revising paragraph (c).

The revisions read as follows:

**§ 60.5390 What standards apply to pneumatic controller affected facilities?**

For each pneumatic controller affected facility you must comply with the VOC standards, based on natural gas as a surrogate for VOC, in either paragraph (b)(1) or (c)(1) of this section, as applicable. Pneumatic controllers meeting the conditions in paragraph (a) of this section are exempt from this requirement.

(a) The requirements of paragraph (b)(1) or (c)(1) of this section are not required if you determine that the use of a pneumatic controller affected facility with a bleed rate greater than the applicable standard is required based on functional needs, including but not limited to response time, safety and positive actuation. However, you must tag such pneumatic controller with the month and year of installation, reconstruction or modification, and identification information that allows traceability to the records for that pneumatic controller, as required in § 60.5420(c)(4)(ii).

\* \* \* \* \*

(c)(1) Each pneumatic controller affected facility constructed, modified or reconstructed on or after October 15, 2013, at a location between the wellhead and a natural gas processing plant or the point of custody transfer to an oil pipeline must have a bleed rate less than or equal to 6 standard cubic feet per hour.

(2) Each pneumatic controller affected facility at a location between the wellhead and a natural gas processing plant or the point of custody transfer to an oil pipeline must be tagged with the month and year of installation, reconstruction or modification, and identification information that allows traceability to the records for that controller as required in § 60.5420(c)(4)(iii).

\* \* \* \* \*

■ 5. Section 60.5395 is revised to read as follows:

**§ 60.5395 What standards apply to storage vessel affected facilities?**

Except as provided in paragraph (h) of this section, you must comply with the standards in this section for each storage vessel affected facility.

(a)(1) If you are the owner or operator of a Group 1 storage vessel affected facility, you must comply with paragraph (b) of this section.

(2) If you are the owner or operator of a Group 2 storage vessel affected facility, you must comply with paragraph (c) of this section.

(b) *Requirements for Group 1 storage vessel affected facilities.* If you are the owner or operator of a Group 1 storage vessel affected facility, you must comply with paragraphs (b)(1) and (2) of this section.

(1) You must submit a notification identifying each Group 1 storage vessel affected facility, including its location, with your initial annual report as specified in § 60.5420(b)(6)(iv).

(2) You must comply with paragraphs (d) through (g) of this section.

(c) *Requirements for Group 2 storage vessel affected facilities.* If you are the owner or operator of a Group 2 storage vessel affected facility, you must comply with paragraphs (d) through (g) of this section.

(d) You must comply with the control requirements of paragraph (d)(1) of this section unless you meet the conditions specified in paragraph (d)(2) of this section.

(1) Reduce VOC emissions by 95.0 percent according to the schedule specified in (d)(1)(i) and (ii) of this section.

(i) For each Group 2 storage vessel affected facility, you must achieve the required emissions reductions by April 15, 2014, or within 60 days after startup, whichever is later.

(ii) For each Group 1 storage vessel affected facility, you must achieve the required emissions reductions by April 15, 2015.

(2) Maintain the uncontrolled actual VOC emissions from the storage vessel affected facility at less than 4 tpy without considering control. Prior to using the uncontrolled actual VOC emission rate for compliance purposes, you must demonstrate that the uncontrolled actual VOC emissions have remained less than 4 tpy as determined monthly for 12 consecutive months. After such demonstration, you must determine the uncontrolled actual VOC emission rate each month. The uncontrolled actual VOC emissions must be calculated using a generally accepted model or calculation methodology. Monthly calculations must be based on the average throughput for the month. Monthly calculations must be separated by at least 14 days. You must comply with paragraph (d)(1) of this section if your storage vessel affected facility meets the conditions specified in paragraphs (d)(2)(i) or (ii) of this section.

(i) If a well feeding the storage vessel affected facility undergoes fracturing or refracturing, you must comply with paragraph (d)(1) of this section as soon as liquids from the well following fracturing or refracturing are routed to the storage vessel affected facility.

(ii) If the monthly emissions determination required in this section indicates that VOC emissions from your storage vessel affected facility increase to 4 tpy or greater and the increase is not associated with fracturing or refracturing of a well feeding the storage vessel affected facility, you must comply with paragraph (d)(1) of this section within 30 days of the monthly calculation.

(e) *Control requirements.* (1) Except as required in paragraph (e)(2) of this section, if you use a control device to reduce emissions from your storage vessel affected facility, you must equip the storage vessel with a cover that meets the requirements of § 60.5411(b) and is connected through a closed vent system that meets the requirements of § 60.5411(c), and you must route emissions to a control device that meets the conditions specified in § 60.5412(c) and (d). As an alternative to routing the closed vent system to a control device, you may route the closed vent system to a process.

(2) If you use a floating roof to reduce emissions, you must meet the requirements of § 60.112b(a)(1) or (2) and the relevant monitoring, inspection, recordkeeping, and reporting requirements in 40 CFR part 60, subpart Kb.

(f) *Requirements for storage vessel affected facilities that are removed from service.* If you are the owner or operator of a storage vessel affected facility that is removed from service, you must comply with paragraphs (f)(1) and (2) of this section.

(1) You must submit a notification in your next annual report, identifying all storage vessel affected facilities removed from service during the reporting period.

(2) If the storage vessel affected facility identified in paragraph (f)(1) of this section is returned to service, you must comply with paragraphs (f)(2)(i) through (iii) of this section.

(i) If returning your storage vessel affected facility to service is associated with fracturing or refracturing of a well feeding the storage vessel affected facility, you must comply with paragraph (d) of this section immediately upon returning the storage vessel to service.

(ii) If returning your storage vessel affected facility to service is not associated with a well that was fractured or refractured, you must comply with paragraphs (f)(2)(ii)(A) and (B) of this section.

(A) You must determine emissions as specified in § 60.5365(e) within 30 days of returning your storage vessel affected facility to service.

(B) If the uncontrolled VOC emissions without considering control from your storage vessel affected facility are 4 tpy or greater, you must comply with paragraph (d) of this section within 60 days of returning to service.

(iii) You must submit a notification in your next annual report identifying each storage vessel affected facility that has been returned to service.

(g) *Compliance, notification, recordkeeping, and reporting.* You must comply with paragraphs (g)(1) through (3) of this section.

(1) You must demonstrate initial compliance with standards as required by § 60.5410(h) and (i).

(2) You must demonstrate continuous compliance with standards as required by § 60.5415(e)(3).

(3) You must perform the required notification, recordkeeping and reporting as required by § 60.5420.

(h) *Exemptions.* This subpart does not apply to storage vessels subject to and controlled in accordance with the requirements for storage vessels in 40 CFR part 60, subpart Kb, 40 CFR part 63, subparts G, CC, HH, or WW.

■ 6. Section 60.5410 is amended by:

■ a. Revising the introductory text;

■ b. Revising paragraphs (a)(3) and (4);

■ c. Revising paragraphs (b)(2) through (5);

■ d. Revising paragraphs (b)(7) and (8);

■ e. Removing and reserving paragraph (c)(2);

■ f. Revising paragraphs (d)

introductory text, (d)(1), (d)(2), and (d)(4);

■ g. Removing and reserving paragraph (e); and

■ h. Adding paragraphs (h) and (i).

The revisions and additions read as follows:

■ The revisions and additions read as follows:

(3) You must maintain a log of records as specified in § 60.5420(c)(1)(i) through (iv) for each well completion operation conducted during the initial compliance period.

(4) For each gas well affected facility subject to both § 60.5375(a)(1) and (3), as an alternative to retaining the records specified in § 60.5420(c)(1)(i) through (iv), you may maintain records of one or more digital photographs with the date the photograph was taken and the latitude and longitude of the well site imbedded within or stored with the digital file showing the equipment for storing or re-injecting recovered liquid, equipment for routing recovered gas to the gas flow line and the completion combustion device (if applicable) connected to and operating at each gas well completion operation that occurred during the initial compliance period. As an alternative to imbedded latitude and longitude within the digital photograph, the digital photograph may consist of a photograph of the equipment connected and operating at each well completion operation with a photograph of a separately operating GIS device within the same digital picture, provided the latitude and longitude output of the GIS unit can be clearly read in the digital photograph.

(b) \* \* \*

(2) If you use a control device to reduce emissions, you must equip the wet seal fluid degassing system with a cover that meets the requirements of § 60.5411(b) that is connected through a closed vent system that meets the requirements of § 60.5411(a) and is routed to a control device that meets the conditions specified in § 60.5412(a), (b) and (c). As an alternative to routing the closed vent system to a control device, you may route the closed vent system to a process.

(3) You must conduct an initial performance test as required in § 60.5413 within 180 days after initial startup or by October 15, 2012, whichever is later, and you must comply with the continuous compliance requirements in § 60.5415(b)(1) through (3).

(4) You must conduct the initial inspections required in § 60.5416(a) and (b).

(5) You must install and operate the continuous parameter monitoring systems in accordance with § 60.5417(a) through (g), as applicable.

\* \* \* \* \*

(7) You must submit the initial annual report for your centrifugal compressor affected facility as required in § 60.5420(b)(3) for each centrifugal compressor affected facility.

(8) You must maintain the records as specified in § 60.5420(c)(2).

(c) \* \* \*

(2) [Reserved]

(d) To achieve initial compliance with emission standards for your pneumatic controller affected facility you must comply with the requirements specified in paragraphs (d)(1) through (6) of this section, as applicable.

(1) You must demonstrate initial compliance by maintaining records as specified in § 60.5420(c)(4)(ii) of your determination that the use of a pneumatic controller affected facility with a bleed rate greater than 6 standard cubic feet of gas per hour is required as specified in § 60.5390(a).

(2) You own or operate a pneumatic controller affected facility located at a natural gas processing plant and your pneumatic controller is driven by a gas other than natural gas and therefore emits zero natural gas.

(4) You must tag each new pneumatic controller affected facility according to the requirements of § 60.5390(b)(2) or (c)(2).

(e) [Reserved]

(h) For each storage vessel affected facility, you must comply with paragraphs (h)(1) through (5) of this section. For a Group 1 storage vessel affected facility, you must demonstrate initial compliance by April 15, 2015, except as otherwise provided in paragraph (i) of this section. For a Group 2 storage vessel affected facility, you must demonstrate initial compliance by April 15, 2014, or within 60 days after startup, whichever is later.

(1) You must determine the potential VOC emission rate as specified in § 60.5365(e).

(2) You must reduce VOC emissions in accordance with § 60.5395(d).

(3) If you use a control device to reduce emissions, or if you route emissions to a process, you must demonstrate initial compliance by meeting the requirements in § 60.5395(e).

(4) You must submit the information required for your storage vessel affected facility as specified in § 60.5420(b).

(5) You must maintain the records required for your storage vessel affected facility, as specified in § 60.5420(c)(5) through (8) and § 60.5420(c)(12) and (13) for each storage vessel affected facility.

(i) For each Group 1 storage vessel affected facility, you must submit the notification specified in § 60.5395(b)(2)

with the initial annual report specified in § 60.5420(b)(6).

■ 7. Section 60.5411 is amended by:

- a. Revising the section heading;
- b. Revising paragraphs (a) introductory text, (a)(1), and (a)(3)(i)(A);
- c. Revising the heading of paragraph (b), and paragraphs (b)(1) and (b)(2)(iv);
- d. Adding paragraph (b)(3); and
- e. Adding paragraph (c).

The revisions and additions read as follows:

**§ 60.5411 What additional requirements must I meet to determine initial compliance for my covers and closed vent systems routing materials from storage vessels and centrifugal compressor wet seal degassing systems?**

\* \* \* \* \*

(a) Closed vent system requirements for centrifugal compressor wet seal degassing systems. (1) You must design the closed vent system to route all gases, vapors, and fumes emitted from the material in the wet seal fluid degassing system to a control device or to a process that meets the requirements specified in § 60.5412(a) through (c).

\* \* \* \* \*

(3) \* \* \*

(i) \* \* \*

(A) You must properly install, calibrate, maintain, and operate a flow indicator at the inlet to the bypass device that could divert the stream away from the control device or process to the atmosphere that is capable of taking periodic readings as specified in § 60.5416(a)(4) and sounds an alarm when the bypass device is open such that the stream is being, or could be, diverted away from the control device or process to the atmosphere.

\* \* \* \* \*

(b) Cover requirements for storage vessels and centrifugal compressor wet seal degassing systems. (1) The cover and all openings on the cover (e.g., access hatches, sampling ports, pressure relief valves and gauge wells) shall form a continuous impermeable barrier over the entire surface area of the liquid in the storage vessel or wet seal fluid degassing system.

(2) \* \* \*

(iv) To vent liquids, gases, or fumes from the unit through a closed-vent system designed and operated in accordance with the requirements of paragraph (a) or (c) of this section to a control device or to a process.

(3) Each storage vessel thief hatch shall be weighted and properly seated. You must select gasket material for the hatch based on composition of the fluid in the storage vessel and weather conditions.

(c) Closed vent system requirements for storage vessel affected facilities

using a control device or routing emissions to a process. (1) You must design the closed vent system to route all gases, vapors, and fumes emitted from the material in the storage vessel to a control device that meets the requirements specified in § 60.5412(c) and (d), or to a process.

(2) You must design and operate a closed vent system with no detectable emissions, as determined using olfactory, visual and auditory inspections. Each closed vent system that routes emissions to a process must be operational 95 percent of the year or greater.

(3) You must meet the requirements specified in paragraphs (c)(3)(i) and (ii) of this section if the closed vent system contains one or more bypass devices that could be used to divert all or a portion of the gases, vapors, or fumes from entering the control device or to a process.

(i) Except as provided in paragraph (c)(3)(ii) of this section, you must comply with either paragraph (c)(3)(i)(A) or (B) of this section for each bypass device.

(A) You must properly install, calibrate, maintain, and operate a flow indicator at the inlet to the bypass device that could divert the stream away from the control device or process to the atmosphere that sounds an alarm, or, initiates notification via remote alarm to the nearest field office, when the bypass device is open such that the stream is being, or could be, diverted away from the control device or process to the atmosphere.

(B) You must secure the bypass device valve installed at the inlet to the bypass device in the non-diverting position using a car-seal or a lock-and-key type configuration.

(ii) Low leg drains, high point bleeds, analyzer vents, open-ended valves or lines, and safety devices are not subject to the requirements of paragraph (c)(3)(i) of this section.

■ 8. Section 60.5412 is amended by:

- a. Revising paragraphs (a) introductory text, (a)(1) introductory text, and (a)(2);
- b. Revising paragraph (b);
- c. Revising paragraphs (c) introductory text and (c)(1); and
- d. Adding paragraph (d).

The revisions and addition read as follows:

**§ 60.5412 What additional requirements must I meet for determining initial compliance with control devices used to comply with the emission standards for my storage vessel or centrifugal compressor affected facility?**

\* \* \* \* \*

(a) Each control device used to meet the emission reduction standard in § 60.5380(a)(1) for your centrifugal compressor affected facility must be installed according to paragraphs (a)(1) through (3) of this section. As an alternative, you may install a control device model tested under § 60.5413(d), which meets the criteria in § 60.5413(d)(11) and § 60.5413(e).

(1) Each combustion device (e.g., thermal vapor incinerator, catalytic vapor incinerator, boiler, or process heater) must be designed and operated in accordance with one of the performance requirements specified in paragraphs (a)(1)(i) through (iv) of this section.

\* \* \* \* \*

(2) Each vapor recovery device (e.g., carbon adsorption system or condenser) or other non-destructive control device must be designed and operated to reduce the mass content of VOC in the gases vented to the device by 95.0 percent by weight or greater as determined in accordance with the requirements of § 60.5413. As an alternative to the performance testing requirements, you may demonstrate initial compliance by conducting a design analysis for vapor recovery devices according to the requirements of § 60.5413(c).

\* \* \* \* \*

(b) You must operate each control device installed on your centrifugal compressor affected facility in accordance with the requirements specified in paragraphs (b)(1) and (2) of this section.

(1) You must operate each control device used to comply with this subpart at all times when gases, vapors, and fumes are vented from the wet seal fluid degassing system affected facility, as required under § 60.5380(a), through the closed vent system to the control device. You may vent more than one affected facility to a control device used to comply with this subpart.

(2) For each control device monitored in accordance with the requirements of § 60.5417(a) through (g), you must demonstrate compliance according to the requirements of § 60.5415(b)(2), as applicable.

(c) For each carbon adsorption system used as a control device to meet the requirements of paragraph (a)(2) or (d)(2) of this section, you must manage the carbon in accordance with the requirements specified in paragraphs (c)(1) or (2) of this section.

(1) Following the initial startup of the control device, you must replace all carbon in the control device with fresh carbon on a regular, predetermined time

interval that is no longer than the carbon service life established according to § 60.5413(c)(2) or (3) or according to the design required in paragraph (d)(2) of this section, for the carbon adsorption system. You must maintain records identifying the schedule for replacement and records of each carbon replacement as required in § 60.5420(c)(10) and (12).

\* \* \* \* \*

(d) Each control device used to meet the emission reduction standard in § 60.5395(d) for your storage vessel affected facility must be installed according to paragraphs (d)(1) through (3) of this section, as applicable. As an alternative, you may install a control device model tested under § 60.5413(d), which meets the criteria in § 60.5413(d)(11) and § 60.5413(e).

(1) Each enclosed combustion device (e.g., thermal vapor incinerator, catalytic vapor incinerator, boiler, or process heater) must be designed to reduce the mass content of VOC emissions by 95.0 percent or greater. You must follow the requirements in paragraphs (d)(1)(i) through (iii) of this section.

(i) Ensure that each enclosed combustion device is maintained in a leak free condition.

(ii) Install and operate a continuous burning pilot flame.

(iii) Operate the enclosed combustion device with no visible emissions, except for periods not to exceed a total of one minute during any 15 minute period. A visible emissions test using section 11 of EPA Method 22, 40 CFR part 60, appendix A, must be performed at least once every calendar month, separated by at least 15 days between each test. The observation period shall be 15 minutes. Devices failing the visible emissions test must follow manufacturer's repair instructions, if available, or best combustion engineering practices as outlined in the unit inspection and maintenance plan, to return the unit to compliant operation. All inspection, repair and maintenance activities for each unit must be recorded in a maintenance and repair log and must be available for inspection. Following return to operation from maintenance or repair activity, each device must pass a Method 22, 40 CFR part 60, appendix A, visual observation as described in this paragraph.

(2) Each vapor recovery device (e.g., carbon adsorption system or condenser) or other non-destructive control device must be designed and operated to reduce the mass content of VOC in the gases vented to the device by 95.0 percent by weight or greater. A carbon replacement schedule must be included

in the design of the carbon adsorption system.

(3) You must operate each control device used to comply with this subpart at all times when gases, vapors, and fumes are vented from the storage vessel affected facility through the closed vent system to the control device. You may vent more than one affected facility to a control device used to comply with this subpart.

■ 9. Section 60.5413 is amended by:

- a. Revising the introductory text;
- b. Revising paragraph (a)(7);
- c. Revising paragraph (d); and
- d. Adding paragraph (e).

The revisions and addition read as follows:

**§ 60.5413 What are the performance testing procedures for control devices used to demonstrate compliance at my storage vessel or centrifugal compressor affected facility?**

This section applies to the performance testing of control devices used to demonstrate compliance with the emissions standards for your centrifugal compressor affected facility. You must demonstrate that a control device achieves the performance requirements of § 60.5412(a) using the performance test methods and procedures specified in this section. For condensers, you may use a design analysis as specified in paragraph (c) of this section in lieu of complying with paragraph (b) of this section. In addition, this section contains the requirements for enclosed combustion device performance tests conducted by the manufacturer applicable to both storage vessel and centrifugal compressor affected facilities.

(a) \* \* \*

(7) A control device whose model can be demonstrated to meet the performance requirements of § 60.5412(a) through a performance test conducted by the manufacturer, as specified in paragraph (d) of this section.

\* \* \* \* \*

(d) *Performance testing for combustion control devices—manufacturers' performance test.* (1) This paragraph applies to the performance testing of a combustion control device conducted by the device manufacturer. The manufacturer must demonstrate that a specific model of control device achieves the performance requirements in paragraph (d)(11) of this section by conducting a performance test as specified in paragraphs (d)(2) through (10) of this section. You must submit a test report for each combustion control device in accordance with the

requirements in paragraph (d)(12) of this section.

(2) Performance testing must consist of three one-hour (or longer) test runs for each of the four firing rate settings specified in paragraphs (d)(2)(i) through (iv) of this section, making a total of 12 test runs per test. Propene (propylene) gas must be used for the testing fuel. All fuel analyses must be performed by an independent third-party laboratory (not affiliated with the control device manufacturer or fuel supplier).

(i) 90–100 percent of maximum design rate (fixed rate).

(ii) 70–100–70 percent (ramp up, ramp down). Begin the test at 70 percent of the maximum design rate. During the first 5 minutes, incrementally ramp the firing rate to 100 percent of the maximum design rate. Hold at 100 percent for 5 minutes. In the 10–15 minute time range, incrementally ramp back down to 70 percent of the maximum design rate. Repeat three more times for a total of 60 minutes of sampling.

(iii) 30–70–30 percent (ramp up, ramp down). Begin the test at 30 percent of the maximum design rate. During the first 5 minutes, incrementally ramp the firing rate to 70 percent of the maximum design rate. Hold at 70 percent for 5 minutes. In the 10–15 minute time range, incrementally ramp back down to 30 percent of the maximum design rate. Repeat three more times for a total of 60 minutes of sampling.

(iv) 0–30–0 percent (ramp up, ramp down). Begin the test at the minimum firing rate. During the first 5 minutes, incrementally ramp the firing rate to 30 percent of the maximum design rate. Hold at 30 percent for 5 minutes. In the 10–15 minute time range, incrementally ramp back down to the minimum firing rate. Repeat three more times for a total of 60 minutes of sampling.

(3) All models employing multiple enclosures must be tested simultaneously and with all burners operational. Results must be reported for each enclosure individually and for the average of the emissions from all interconnected combustion enclosures/chambers. Control device operating data must be collected continuously throughout the performance test using an electronic Data Acquisition System. A graphic presentation or strip chart of the control device operating data and emissions test data must be included in the test report in accordance with paragraph (d)(12) of this section. Inlet fuel meter data may be manually recorded provided that all inlet fuel data readings are included in the final report.

(4) Inlet testing must be conducted as specified in paragraphs (d)(4)(i) through (ii) of this section.

(i) The inlet gas flow metering system must be located in accordance with Method 2A, 40 CFR part 60, appendix A–1, (or other approved procedure) to measure inlet gas flow rate at the control device inlet location. You must position the fitting for filling fuel sample containers a minimum of eight pipe diameters upstream of any inlet gas flow monitoring meter.

(ii) Inlet flow rate must be determined using Method 2A, 40 CFR part 60, appendix A–1. Record the start and stop reading for each 60-minute THC test. Record the gas pressure and temperature at 5-minute intervals throughout each 60-minute test.

(5) Inlet gas sampling must be conducted as specified in paragraphs (d)(5)(i) through (ii) of this section.

(i) At the inlet gas sampling location, securely connect a Silonite-coated stainless steel evacuated canister fitted with a flow controller sufficient to fill the canister over a 3-hour period. Filling must be conducted as specified in paragraphs (d)(5)(i)(A) through (C) of this section.

(A) Open the canister sampling valve at the beginning of each test run, and close the canister at the end of each test run.

(B) Fill one canister across the three test runs such that one composite fuel sample exists for each test condition.

(C) Label the canisters individually and record sample information on a chain of custody form.

(ii) Analyze each inlet gas sample using the methods in paragraphs (d)(5)(ii)(A) through (C) of this section. You must include the results in the test report required by paragraph (d)(12) of this section.

(A) Hydrocarbon compounds containing between one and five atoms of carbon plus benzene using ASTM D1945–03.

(B) Hydrogen (H<sub>2</sub>), carbon monoxide (CO), carbon dioxide (CO<sub>2</sub>), nitrogen (N<sub>2</sub>), oxygen (O<sub>2</sub>) using ASTM D1945–03.

(C) Higher heating value using ASTM D3588–98 or ASTM D4891–89.

(6) Outlet testing must be conducted in accordance with the criteria in paragraphs (d)(6)(i) through (v) of this section.

(i) Sample and flow rate must be measured in accordance with paragraphs (d)(6)(i)(A) through (B) of this section.

(A) The outlet sampling location must be a minimum of four equivalent stack diameters downstream from the highest peak flame or any other flow

disturbance, and a minimum of one equivalent stack diameter upstream of the exit or any other flow disturbance. A minimum of two sample ports must be used.

(B) Flow rate must be measured using Method 1, 40 CFR part 60, appendix A–1 for determining flow measurement traverse point location, and Method 2, 40 CFR part 60, appendix A–1 for measuring duct velocity. If low flow conditions are encountered (*i.e.*, velocity pressure differentials less than 0.05 inches of water) during the performance test, a more sensitive manometer must be used to obtain an accurate flow profile.

(ii) Molecular weight and excess air must be determined as specified in paragraph (d)(7) of this section.

(iii) Carbon monoxide must be determined as specified in paragraph (d)(8) of this section.

(iv) THC must be determined as specified in paragraph (d)(9) of this section.

(v) Visible emissions must be determined as specified in paragraph (d)(10) of this section.

(7) Molecular weight and excess air determination must be performed as specified in paragraphs (d)(7)(i) through (iii) of this section.

(i) An integrated bag sample must be collected during the Method 4, 40 CFR part 60, appendix A–3, moisture test following the procedure specified in (d)(7)(i)(A) through (B) of this section. Analyze the bag sample using a gas chromatograph-thermal conductivity detector (GC–TCD) analysis meeting the criteria in paragraphs (d)(7)(i)(C) through (D) of this section.

(A) Collect the integrated sample throughout the entire test, and collect representative volumes from each traverse location.

(B) Purge the sampling line with stack gas before opening the valve and beginning to fill the bag. Clearly label each bag and record sample information on a chain of custody form.

(C) The bag contents must be vigorously mixed prior to the gas chromatograph analysis.

(D) The GC–TCD calibration procedure in Method 3C, 40 CFR part 60, appendix A, must be modified by using EPA Alt–045 as follows: For the initial calibration, triplicate injections of any single concentration must agree within 5 percent of their mean to be valid. The calibration response factor for a single concentration re-check must be within 10 percent of the original calibration response factor for that concentration. If this criterion is not met, repeat the initial calibration using at least three concentration levels.

(ii) Calculate and report the molecular weight of oxygen, carbon dioxide, methane, and nitrogen in the integrated bag sample and include in the test report specified in paragraph (d)(12) of this section. Moisture must be determined using Method 4, 40 CFR part 60, appendix A-3. Traverse both ports with the Method 4, 40 CFR part 60, appendix A-3, sampling train during each test run. Ambient air must not be introduced into the Method 3C, 40 CFR part 60, appendix A-2, integrated bag sample during the port change.

(iii) Excess air must be determined using resultant data from the EPA Method 3C tests and EPA Method 3B, 40 CFR part 60, appendix A, equation 3B-1.

(8) Carbon monoxide must be determined using Method 10, 40 CFR part 60, appendix A. Run the test simultaneously with Method 25A, 40 CFR part 60, appendix A-7 using the same sampling points. An instrument range of 0-10 parts per million by volume-dry (ppmvd) is recommended.

(9) Total hydrocarbon determination must be performed as specified by in paragraphs (d)(9)(i) through (vii) of this section.

(i) Conduct THC sampling using Method 25A, 40 CFR part 60, appendix A-7, except that the option for locating the probe in the center 10 percent of the stack is not allowed. The THC probe must be traversed to 16.7 percent, 50 percent, and 83.3 percent of the stack diameter during each test run.

(ii) A valid test must consist of three Method 25A, 40 CFR part 60, appendix A-7, tests, each no less than 60 minutes in duration.

(iii) A 0-10 parts per million by volume-wet (ppmvw) (as propane) measurement range is preferred; as an alternative a 0-30 ppmvw (as carbon) measurement range may be used.

(iv) Calibration gases must be propane in air and be certified through EPA Protocol 1—"EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended August 25, 1999, EPA-600/R-97/121 (or more recent if updated since 1999).

(v) THC measurements must be reported in terms of ppmvw as propane.

(vi) THC results must be corrected to 3 percent CO<sub>2</sub>, as measured by Method 3C, 40 CFR part 60, appendix A-2. You must use the following equation for this diluent concentration correction:

$$C_{\text{corr}} = C_{\text{meas}} \left( \frac{3}{\text{CO}_{2\text{meas}}} \right)$$

Where:

$C_{\text{meas}}$  = The measured concentration of the pollutant.

$\text{CO}_{2\text{meas}}$  = The measured concentration of the CO<sub>2</sub> diluent.

3 = The corrected reference concentration of CO<sub>2</sub> diluent.

$C_{\text{corr}}$  = The corrected concentration of the pollutant.

(vii) Subtraction of methane or ethane from the THC data is not allowed in determining results.

(10) Visible emissions must be determined using Method 22, 40 CFR part 60, appendix A. The test must be performed continuously during each test run. A digital color photograph of the exhaust point, taken from the position of the observer and annotated with date and time, must be taken once per test run and the 12 photos included in the test report specified in paragraph (d)(12) of this section.

(11) *Performance test criteria.* (i) The control device model tested must meet the criteria in paragraphs (d)(11)(i)(A) through (D) of this section. These criteria must be reported in the test report required by paragraph (d)(12) of this section.

(A) Method 22, 40 CFR part 60, appendix A, results under paragraph (d)(10) of this section with no indication of visible emissions.

(B) Average Method 25A, 40 CFR part 60, appendix A, results under paragraph (d)(9) of this section equal to or less than 10.0 ppmvw THC as propane corrected to 3.0 percent CO<sub>2</sub>.

(C) Average CO emissions determined under paragraph (d)(8) of this section equal to or less than 10 parts ppmvd, corrected to 3.0 percent CO<sub>2</sub>.

(D) Excess combustion air determined under paragraph (d)(7) of this section equal to or greater than 150 percent.

(ii) The manufacturer must determine a maximum inlet gas flow rate which must not be exceeded for each control device model to achieve the criteria in paragraph (d)(11)(iii) of this section. The maximum inlet gas flow rate must be included in the test report required by paragraph (d)(12) of this section.

(iii) A control device meeting the criteria in paragraph (d)(11)(i)(A) through (D) of this section must demonstrate a destruction efficiency of 95 percent for VOC regulated under this subpart.

(12) The owner or operator of a combustion control device model tested under this paragraph must submit the information listed in paragraphs (d)(12)(i) through (vi) in the test report required by this section in accordance with § 60.5420(b)(8).

(i) A full schematic of the control device and dimensions of the device components.

(ii) The maximum net heating value of the device.

(iii) The test fuel gas flow range (in both mass and volume). Include the maximum allowable inlet gas flow rate.

(iv) The air/stream injection/assist ranges, if used.

(v) The test conditions listed in paragraphs (d)(12)(v)(A) through (O) of this section, as applicable for the tested model.

(A) Fuel gas delivery pressure and temperature.

(B) Fuel gas moisture range.

(C) Purge gas usage range.

(D) Condensate (liquid fuel) separation range.

(E) Combustion zone temperature range. This is required for all devices that measure this parameter.

(F) Excess combustion air range.

(G) Flame arrestor(s).

(H) Burner manifold.

(I) Pilot flame indicator.

(J) Pilot flame design fuel and calculated or measured fuel usage.

(K) Tip velocity range.

(L) Momentum flux ratio.

(M) Exit temperature range.

(N) Exit flow rate.

(O) Wind velocity and direction.

(vi) The test report must include all calibration quality assurance/quality control data, calibration gas values, gas cylinder certification, strip charts, or other graphic presentations of the data annotated with test times and calibration values.

(e) *Continuous compliance for combustion control devices tested by the manufacturer in accordance with paragraph (d) of this section.* This paragraph applies to the demonstration of compliance for a combustion control device tested under the provisions in paragraph (d) of this section. Owners or operators must demonstrate that a control device achieves the performance requirements in (d)(11) of this section by installing a device tested under paragraph (d) of this section and complying with the criteria specified in paragraphs (e)(1) through (6) of this section.

(1) The inlet gas flow rate must be equal to or less than the maximum specified by the manufacturer.

(2) A pilot flame must be present at all times of operation.

(3) Devices must be operated with no visible emissions, except for periods not to exceed a total of 2 minutes during any hour. A visible emissions test using Method 22, 40 CFR part 60, appendix A, must be performed each calendar quarter. The observation period must be 1 hour and must be conducted according to EPA Method 22, 40 CFR part 60, appendix A.

(4) Devices failing the visible emissions test must follow manufacturer's repair instructions, if available, or best combustion engineering practice as outlined in the unit inspection and maintenance plan, to return the unit to compliant operation. All repairs and maintenance activities for each unit must be recorded in a maintenance and repair log and must be available for inspection.

(5) Following return to operation from maintenance or repair activity, each device must pass an EPA Method 22, 40 CFR part 60, appendix A, visual observation as described in paragraph (e)(3) of this section.

(6) If the owner or operator operates a combustion control device model tested under this section, an electronic copy of the performance test results required by this section shall be submitted via email to *Oil and Gas\_PT@EPA.GOV* unless the test results for that model of combustion control device are posted at the following Web site: *epa.gov/airquality/oilandgas/*.

- 10. Section 60.5415 is amended by:
- a. Revising paragraphs (b) introductory text and (b)(2);
- b. Revising paragraph (e) introductory text;
- c. Removing and reserving paragraphs (e)(1) and (2);
- d. Adding paragraph (e)(3); and
- e. Revising paragraph (h)(1) introductory text.

The revisions and addition read as follows:

**§ 60.5415 How do I demonstrate continuous compliance with the standards for my gas well affected facility, my centrifugal compressor affected facility, my stationary reciprocating compressor affected facility, my pneumatic controller affected facility, my storage vessel affected facility, and my affected facilities at onshore natural gas processing plants?**

\* \* \* \* \*

(b) For each centrifugal compressor affected facility, you must demonstrate continuous compliance according to paragraphs (b)(1) through (3) of this section.

\* \* \* \* \*

(2) For each control device used to reduce emissions, you must demonstrate continuous compliance with the performance requirements of § 60.5412(a) using the procedures specified in paragraphs (b)(2)(i) through (vii) of this section. If you use a condenser as the control device to achieve the requirements specified in § 60.5412(a)(2), you must demonstrate compliance according to paragraph (b)(2)(viii) of this section. You may switch between compliance with

paragraphs (b)(2)(i) through (vii) of this section and compliance with paragraph (b)(2)(viii) of this section only after at least 1 year of operation in compliance with the selected approach. You must provide notification of such a change in the compliance method in the next annual report, as required in § 60.5420(b), following the change.

(i) You must operate below (or above) the site specific maximum (or minimum) parameter value established according to the requirements of § 60.5417(f)(1).

(ii) You must calculate the daily average of the applicable monitored parameter in accordance with § 60.5417(e) except that the inlet gas flow rate to the control device must not be averaged.

(iii) Compliance with the operating parameter limit is achieved when the daily average of the monitoring parameter value calculated under paragraph (b)(2)(ii) of this section is either equal to or greater than the minimum monitoring value or equal to or less than the maximum monitoring value established under paragraph (b)(2)(i) of this section. When performance testing of a combustion control device is conducted by the device manufacturer as specified in § 60.5413(d), compliance with the operating parameter limit is achieved when the criteria in § 60.5413(e) are met.

(iv) You must operate the continuous monitoring system required in § 60.5417 at all times the affected source is operating, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, system accuracy audits and required zero and span adjustments). A monitoring system malfunction is 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. You are required to complete monitoring system repairs in response to monitoring system malfunctions and to return the monitoring system to operation as expeditiously as practicable.

(v) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected

during all other required data collection periods to assess the operation of the control device and associated control system.

(vi) Failure to collect required data is a deviation of the monitoring requirements, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required quality monitoring system quality assurance or quality control activities (including, as applicable, system accuracy audits and required zero and span adjustments).

(vii) If you use a combustion control device to meet the requirements of § 60.5412(a) and you demonstrate compliance using the test procedures specified in § 60.5413(b), you must comply with paragraphs (b)(2)(vii)(A) through (D) of this section.

(A) A pilot flame must be present at all times of operation.

(B) Devices must be operated with no visible emissions, except for periods not to exceed a total of 2 minutes during any hour. A visible emissions test using section 11. of Method 22, 40 CFR part 60, appendix A, must be performed each calendar quarter. The observation period must be 1 hour and must be conducted according to section 11. of EPA Method 22, 40 CFR part 60, appendix A.

(C) Devices failing the visible emissions test must follow manufacturer's repair instructions, if available, or best combustion engineering practice as outlined in the unit inspection and maintenance plan, to return the unit to compliant operation. All repairs and maintenance activities for each unit must be recorded in a maintenance and repair log and must be available for inspection.

(D) Following return to operation from maintenance or repair activity, each device must pass a Method 22, 40 CFR part 60, appendix A, visual observation as described in paragraph (b)(2)(vii)(B) of this section.

(viii) If you use a condenser as the control device to achieve the percent reduction performance requirements specified in § 60.5412(a)(2), you must demonstrate compliance using the procedures in paragraphs (b)(2)(viii)(A) through (E) of this section.

(A) You must establish a site-specific condenser performance curve according to § 60.5417(f)(2).

(B) You must calculate the daily average condenser outlet temperature in accordance with § 60.5417(e).

(C) You must determine the condenser efficiency for the current operating day using the daily average condenser outlet temperature calculated under paragraph (b)(2)(viii)(B) of this

section and the condenser performance curve established under paragraph (b)(2)(viii)(A) of this section.

(D) Except as provided in paragraphs (b)(2)(viii)(D)(1) and (2) of this section, at the end of each operating day, you must calculate the 365-day rolling average TOC emission reduction, as appropriate, from the condenser efficiencies as determined in paragraph (b)(2)(viii)(C) of this section.

(1) After the compliance dates specified in § 60.5370, if you have less than 120 days of data for determining average TOC emission reduction, you must calculate the average TOC emission reduction for the first 120 days of operation after the compliance dates. You have demonstrated compliance with the overall 95.0 percent reduction requirement if the 120-day average TOC emission reduction is equal to or greater than 95.0 percent.

(2) After 120 days and no more than 364 days of operation after the compliance date specified in § 60.5370, you must calculate the average TOC emission reduction as the TOC emission reduction averaged over the number of days between the current day and the applicable compliance date. You have demonstrated compliance with the overall 95.0 percent reduction requirement, if the average TOC emission reduction is equal to or greater than 95.0 percent.

(E) If you have data for 365 days or more of operation, you have demonstrated compliance with the TOC emission reduction if the rolling 365-day average TOC emission reduction calculated in paragraph (b)(2)(viii)(D) of this section is equal to or greater than 95.0 percent.

\* \* \* \* \*

(e) You must demonstrate continuous compliance according to paragraph (e)(3) of this section for each storage vessel affected facility, for which you are using a control device or routing emissions to a process to meet the requirement of § 60.5395(d)(1).

(1) [Reserved]

(2) [Reserved]

(3) For each storage vessel affected facility, you must comply with paragraphs (e)(3)(i) and (ii) of this section.

(i) You must reduce VOC emissions as specified in § 60.5395(d).

(ii) For each control device installed to meet the requirements of § 60.5395(d), you must demonstrate continuous compliance with the performance requirements of § 60.5412(d) for each storage vessel affected facility using the procedure specified in paragraph (e)(3)(ii)(A) and

either (e)(3)(ii)(B) or (e)(3)(ii)(C) of this section.

(A) You must comply with § 60.5416(c) for each cover and closed vent system.

(B) You must comply with § 60.5417(h) for each control device.

(C) Each closed vent system that routes emissions to a process must be operated as specified in § 60.5411(c)(2).

\* \* \* \* \*

(h) \* \* \*

(1) To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in § 60.5415(h)(2), and must prove by a preponderance of evidence that:

\* \* \* \* \*

■ 11. Section 60.5416 is amended by:

- a. Revising the introductory text;
- b. Revising paragraphs (a) introductory text, (a)(1)(ii), (a)(2)(iii), and (a)(3)(ii);
- c. Revising paragraphs (b) introductory text, (b)(9) introductory text, and (b)(11); and
- d. Adding paragraph (c).

The revisions and addition read as follows:

**§ 60.5416 What are the initial and continuous cover and closed vent system inspection and monitoring requirements for my storage vessel and centrifugal compressor affected facility?**

For each closed vent system or cover at your storage vessel or centrifugal compressor affected facility, you must comply with the applicable requirements of paragraphs (a) through (c) of this section.

(a) *Inspections for closed vent systems and covers installed on each centrifugal compressor affected facility.* Except as provided in paragraphs (b)(11) and (12) of this section, you must inspect each closed vent system according to the procedures and schedule specified in paragraphs (a)(1) and (2) of this section, inspect each cover according to the procedures and schedule specified in paragraph (a)(3) of this section, and inspect each bypass device according to the procedures of paragraph (a)(4) of this section.

(1) \* \* \*

(ii) Conduct annual visual inspections for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in piping; loose connections; liquid leaks; or broken or missing caps or other closure devices. You must monitor a component or connection using the test methods and procedures in paragraph (b) of this section to demonstrate that it operates with no detectable emissions following any time the component is

repaired or replaced or the connection is unsealed. You must maintain records of the inspection results as specified in § 60.5420(c)(6).

(2) \* \* \*

(iii) Conduct annual visual inspections for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in ductwork; loose connections; liquid leaks; or broken or missing caps or other closure devices. You must maintain records of the inspection results as specified in § 60.5420(c)(6).

(3) \* \* \*

(ii) You must initially conduct the inspections specified in paragraph (a)(3)(i) of this section following the installation of the cover. Thereafter, you must perform the inspection at least once every calendar year, except as provided in paragraphs (b)(11) and (12) of this section. You must maintain records of the inspection results as specified in § 60.5420(c)(7).

\* \* \* \* \*

(b) *No detectable emissions test methods and procedures.* If you are required to conduct an inspection of a closed vent system or cover at your centrifugal compressor affected facility as specified in paragraphs (a)(1), (2), or (3) of this section, you must meet the requirements of paragraphs (b)(1) through (13) of this section.

\* \* \* \* \*

(9) *Repairs.* In the event that a leak or defect is detected, you must repair the leak or defect as soon as practicable according to the requirements of paragraphs (b)(9)(i) and (ii) of this section, except as provided in paragraph (b)(10) of this section.

\* \* \* \* \*

(11) *Unsafe to inspect requirements.* You may designate any parts of the closed vent system or cover as unsafe to inspect if the requirements in paragraphs (b)(11)(i) and (ii) of this section are met. Unsafe to inspect parts are exempt from the inspection requirements of paragraphs (a)(1) through (3) of this section.

(i) You determine that the equipment is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of complying with paragraphs (a)(1), (2), or (3) of this section.

(ii) You have a written plan that requires inspection of the equipment as frequently as practicable during safe-to-inspect times.

\* \* \* \* \*

(c) *Cover and closed vent system inspections for storage vessel affected facilities.* If you install a control device

or route emissions to a process, you must inspect each closed vent system according to the procedures and schedule specified in paragraphs (c)(1) of this section, inspect each cover according to the procedures and schedule specified in paragraph (c)(2) of this section, and inspect each bypass device according to the procedures of paragraph (c)(3) of this section. You must also comply with the requirements of (c)(4) through (7) of this section.

(1) For each closed vent system, you must conduct an inspection at least once every calendar month as specified in paragraphs (c)(1)(i) through (iii) of this section.

(i) You must maintain records of the inspection results as specified in § 60.5420(c)(6).

(ii) Conduct olfactory, visual and auditory inspections for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in piping; loose connections; liquid leaks; or broken or missing caps or other closure devices.

(iii) Monthly inspections must be separated by at least 14 calendar days.

(2) For each cover, you must conduct inspections at least once every calendar month as specified in paragraphs (c)(2)(i) through (iii) of this section.

(i) You must maintain records of the inspection results as specified in § 60.5420(c)(7).

(ii) Conduct olfactory, visual and auditory inspections for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in the cover, or between the cover and the separator wall; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices. In the case where the storage vessel is buried partially or entirely underground, you must inspect only those portions of the cover that extend to or above the ground surface, and those connections that are on such portions of the cover (e.g., fill ports, access hatches, gauge wells, etc.) and can be opened to the atmosphere.

(iii) Monthly inspections must be separated by at least 14 calendar days.

(3) For each bypass device, except as provided for in § 60.5411(c)(3)(ii), you must meet the requirements of paragraphs (c)(3)(i) or (ii) of this section.

(i) Set the flow indicator to sound an alarm at the inlet to the bypass device when the stream is being diverted away from the control device or process to the atmosphere. You must maintain records of each time the alarm is sounded according to § 60.5420(c)(8).

(ii) If the bypass device valve installed at the inlet to the bypass device is secured in the non-diverting position using a car-seal or a lock-and-key type configuration, visually inspect the seal or closure mechanism at least once every month to verify that the valve is maintained in the non-diverting position and the vent stream is not diverted through the bypass device. You must maintain records of the inspections and records of each time the key is checked out, if applicable, according to § 60.5420(c)(8).

(4) *Repairs.* In the event that a leak or defect is detected, you must repair the leak or defect as soon as practicable according to the requirements of paragraphs (c)(4)(i) through (iii) of this section, except as provided in paragraph (c)(5) of this section.

(i) A first attempt at repair must be made no later than 5 calendar days after the leak is detected.

(ii) Repair must be completed no later than 30 calendar days after the leak is detected.

(iii) Grease or another applicable substance must be applied to deteriorating or cracked gaskets to improve the seal while awaiting repair.

(5) *Delay of repair.* Delay of repair of a closed vent system or cover for which leaks or defects have been detected is allowed if the repair is technically infeasible without a shutdown, or if you determine that emissions resulting from immediate repair would be greater than the fugitive emissions likely to result from delay of repair. You must complete repair of such equipment by the end of the next shutdown.

(6) *Unsafe to inspect requirements.* You may designate any parts of the closed vent system or cover as unsafe to inspect if the requirements in paragraphs (c)(6)(i) and (ii) of this section are met. Unsafe to inspect parts are exempt from the inspection requirements of paragraphs (c)(1) and (2) of this section.

(i) You determine that the equipment is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of complying with paragraphs (c)(1) or (2) of this section.

(ii) You have a written plan that requires inspection of the equipment as frequently as practicable during safe-to-inspect times.

(7) *Difficult to inspect requirements.* You may designate any parts of the closed vent system or cover as difficult to inspect, if the requirements in paragraphs (c)(7)(i) and (ii) of this section are met. Difficult to inspect parts are exempt from the inspection

requirements of paragraphs (c)(1) and (2) of this section.

(i) You determine that the equipment cannot be inspected without elevating the inspecting personnel more than 2 meters above a support surface.

(ii) You have a written plan that requires inspection of the equipment at least once every 5 years.

- 12. Section 60.5417 is amended by:
- a. Revising paragraph (a);
- b. Revising paragraph (b) introductory text;
- c. Revising paragraph (c) introductory text;
- d. Revising paragraphs (d)(1)(viii)(A) and (B);
- e. Revising paragraph (d)(2);
- f. Revising paragraph (f)(1)(iii);
- g. Revising paragraph (g)(6)(ii); and
- h. Adding paragraph (h).

The revisions and addition read as follows:

**§ 60.5417 What are the continuous control device monitoring requirements for my storage vessel or centrifugal compressor affected facility?**

\* \* \* \* \*

(a) For each control device used to comply with the emission reduction standard for centrifugal compressor affected facilities in § 60.5380, you must install and operate a continuous parameter monitoring system for each control device as specified in paragraphs (c) through (g) of this section, except as provided for in paragraph (b) of this section. If you install and operate a flare in accordance with § 60.5412(a)(3), you are exempt from the requirements of paragraphs (e) and (f) of this section.

(b) You are exempt from the monitoring requirements specified in paragraphs (c) through (g) of this section for the control devices listed in paragraphs (b)(1) and (2) of this section.

\* \* \* \* \*

(c) If you are required to install a continuous parameter monitoring system, you must meet the specifications and requirements in paragraphs (c)(1) through (4) of this section.

\* \* \* \* \*

- (d) \* \* \*
- (1) \* \* \*
- (viii) \* \* \*

(A) The continuous monitoring system must measure gas flow rate at the inlet to the control device. The monitoring instrument must have an accuracy of ±2 percent or better. The flow rate at the inlet to the combustion device must not exceed the maximum or minimum flow rate determined by the manufacturer.

(B) A monitoring device that continuously indicates the presence of

the pilot flame while emissions are routed to the control device.

(2) An organic monitoring device equipped with a continuous recorder that measures the concentration level of organic compounds in the exhaust vent stream from the control device. The monitor must meet the requirements of Performance Specification 8 or 9 of 40 CFR part 60, appendix B. You must install, calibrate, and maintain the monitor according to the manufacturer's specifications.

\* \* \* \* \*

(f) \* \* \*  
(1) \* \* \*

(iii) If you operate a control device where the performance test requirement was met under § 60.5413(d) to demonstrate that the control device achieves the applicable performance requirements specified in § 60.5412(a), then your control device inlet gas flow rate must not exceed the maximum or minimum inlet gas flow rate determined by the manufacturer.

\* \* \* \* \*

(g) \* \* \*  
(6) \* \* \*

(ii) Failure of the quarterly visible emissions test conducted under § 60.5413(e)(3) occurs.

(h) For each control device used to comply with the emission reduction standard in § 60.5395(d)(1) for your storage vessel affected facility, you must demonstrate continuous compliance according to paragraphs (h)(1) through (h)(3) of this section. You are exempt from the requirements of this paragraph if you install a control device model tested in accordance with § 60.5413(d)(2) through (10), which meets the criteria in § 60.5413(d)(11), the reporting requirement in § 60.5413(d)(12), and meet the continuous compliance requirement in § 60.5413(e).

(1) For each combustion device you must conduct inspections at least once every calendar month according to paragraphs (h)(1)(i) through (iv) of this section. Monthly inspections must be separated by at least 14 calendar days.

(i) Conduct visual inspections to confirm that the pilot is lit when vapors are being routed to the combustion device and that the continuous burning pilot flame is operating properly.

(ii) Conduct inspections to monitor for visible emissions from the combustion device using section 11 of EPA Method 22, 40 CFR part 60, appendix A. The observation period shall be 15 minutes. Devices must be operated with no visible emissions, except for periods not to exceed a total of 1 minute during any 15 minute period.

(iii) Conduct olfactory, visual and auditory inspections of all equipment associated with the combustion device to ensure system integrity.

(iv) For any absence of pilot flame, or other indication of smoking or improper equipment operation (e.g., visual, audible, or olfactory), you must ensure the equipment is returned to proper operation as soon as practicable after the event occurs. At a minimum, you must perform the procedures specified in paragraphs (h)(1)(iv)(A) and (B) of this section.

(A) You must check the air vent for obstruction. If an obstruction is observed, you must clear the obstruction as soon as practicable.

(B) You must check for liquid reaching the combustor.

(2) For each vapor recovery device, you must conduct inspections at least once every calendar month to ensure physical integrity of the control device according to the manufacturer's instructions. Monthly inspections must be separated by at least 14 calendar days.

(3) Each control device must be operated following the manufacturer's written operating instructions, procedures and maintenance schedule to ensure good air pollution control practices for minimizing emissions. Records of the manufacturer's written operating instructions, procedures, and maintenance schedule must be available for inspection as specified in § 60.5420(c)(13).

■ 13. Section 60.5420 is amended by:

- a. Revising paragraph (a) introductory text;
- b. Revising paragraph (a)(1);
- c. Revising paragraph (b) introductory text;
- d. Revising paragraph (b)(3)(iii);
- e. Revising paragraph (b)(4)(i);
- f. Revising paragraph (b)(5) introductory text;
- g. Revising paragraph (b)(5)(i);
- h. Revising paragraph (b)(6) introductory text;
- i. Revising paragraphs (b)(6)(i) and (ii);
- j. Adding paragraphs (b)(6)(iv) through (vii);
- k. Revising paragraph (b)(7);
- l. Adding paragraph (b)(8);
- m. Revising paragraph (c) introductory text;
- n. Revising paragraph (c)(1)(v);
- o. Revising paragraph (c)(4)(ii);
- p. Revising paragraph (c)(5);
- q. Revising paragraphs (c)(6) through (11); and
- r. Adding paragraphs (c)(12) and (13).

The revisions and additions read as follows:

**§ 60.5420 What are my notification, reporting, and recordkeeping requirements?**

(a) You must submit the notifications according to paragraphs (a)(1) and (2) of this section if you own or operate one or more of the affected facilities specified in § 60.5365 that was constructed, modified, or reconstructed during the reporting period.

(1) If you own or operate a gas well, pneumatic controller, centrifugal compressor, reciprocating compressor or storage vessel affected facility you are not required to submit the notifications required in § 60.7(a)(1), (3), and (4).

\* \* \* \* \*

(b) Reporting requirements. You must submit annual reports containing the information specified in paragraphs (b)(1) through (6) of this section to the Administrator and performance test reports as specified in paragraph (b)(7) or (8) of this section. The initial annual report is due no later than 90 days after the end of the initial compliance period as determined according to § 60.5410. Subsequent annual reports are due no later than same date each year as the initial annual report. If you own or operate more than one affected facility, you may submit one report for multiple affected facilities provided the report contains all of the information required as specified in paragraphs (b)(1) through (6) of this section. Annual reports may coincide with title V reports as long as all the required elements of the annual report are included. You may arrange with the Administrator a common schedule on which reports required by this part may be submitted as long as the schedule does not extend the reporting period.

\* \* \* \* \*

(3) \* \* \*

(iii) If required to comply with § 60.5380(a)(1), the records specified in paragraphs (c)(6) through (11) of this section.

(4) \* \* \*

(i) The cumulative number of hours of operation or the number of months since initial startup, since October 15, 2012, or since the previous reciprocating compressor rod packing replacement, whichever is later.

\* \* \* \* \*

(5) For each pneumatic controller affected facility, the information specified in paragraphs (b)(5)(i) through (iii) of this section.

(i) An identification of each pneumatic controller constructed, modified or reconstructed during the reporting period, including the

identification information specified in § 60.5390(b)(2) or (c)(2).

\* \* \* \* \*

(6) For each storage vessel affected facility, the information in paragraphs (b)(6)(i) through (vii) of this section.

(i) An identification, including the location, of each storage vessel affected facility for which construction, modification or reconstruction commenced during the reporting period. The location of the storage vessel shall be in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(ii) Documentation of the VOC emission rate determination according to § 60.5365(e).

\* \* \* \* \*

(iv) You must submit a notification identifying each Group 1 storage vessel affected facility in your initial annual report. You must include the location of the storage vessel, in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(v) A statement that you have met the requirements specified in § 60.5410(h)(2) and (3).

(vi) You must identify each storage vessel affected facility that is removed from service during the reporting period as specified in § 60.5395(f)(1).

(vii) You must identify each storage vessel affected facility for which operation resumes during the reporting period as specified in § 60.5395(f)(2)(iii).

(7)(i) Within 60 days after the date of completing each performance test (see § 60.8 of this part) as required by this subpart, except testing conducted by the manufacturer as specified in § 60.5413(d), you must submit the results of the performance tests required by this subpart to the EPA as follows. You must use the latest version of the EPA's Electronic Reporting Tool (ERT) (see <http://www.epa.gov/ttn/chief/ert/index.html>) existing at the time of the performance test to generate a submission package file, which documents the performance test. You must then submit the file generated by the ERT through the EPA's Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed by logging in to the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>). Only data collected using test methods supported by the ERT as listed on the ERT Web site are subject to this requirement for submitting reports electronically. Owners or operators who claim that some of the information being

submitted for performance tests is confidential business information (CBI) must submit a complete ERT file including information claimed to be CBI on a compact disk or other commonly used electronic storage media (including, but not limited to, flash drives) to EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same ERT file with the CBI omitted must be submitted to EPA via CDX as described earlier in this paragraph. At the discretion of the delegated authority, you must also submit these reports, including the confidential business information, to the delegated authority in the format specified by the delegated authority. For any performance test conducted using test methods that are not listed on the ERT Web site, the owner or operator shall submit the results of the performance test to the Administrator at the appropriate address listed in § 60.4.

(ii) All reports, except as specified in paragraph (b)(8) of this section, required by this subpart not subject to the requirements in paragraph (a)(2)(i) of this section must be sent to the Administrator at the appropriate address listed in § 60.4 of this part. The Administrator or the delegated authority may request a report in any form suitable for the specific case (e.g., by commonly used electronic media such as Excel spreadsheet, on CD or hard copy).

(8) For enclosed combustors tested by the manufacturer in accordance with § 60.5413(d), an electronic copy of the performance test results required by § 60.5413(d) shall be submitted via email to [Oil\\_and\\_Gas\\_PT@EPA.GOV](mailto:Oil_and_Gas_PT@EPA.GOV) unless the test results for that model of combustion control device are posted at the following Web site: [epa.gov/airquality/oilandgas/](http://epa.gov/airquality/oilandgas/).

(c) *Recordkeeping requirements.* You must maintain the records identified as specified in § 60.7(f) and in paragraphs (c)(1) through (13) of this section. All records required by this subpart must be maintained either onsite or at the nearest local field office for at least 5 years.

(1) \* \* \*

(v) For each gas well affected facility required to comply with both § 60.5375(a)(1) and (3), if you are using a digital photograph in lieu of the records required in paragraphs (c)(1)(i) through (iv) of this section, you must retain the records of the digital

photograph as specified in § 60.5410(a)(4).

\* \* \* \* \*

(4) \* \* \*

(ii) Records of the demonstration that the use of pneumatic controller affected facilities with a natural gas bleed rate greater than the applicable standard are required and the reasons why.

\* \* \* \* \*

(5) Except as specified in paragraph (c)(5)(v) of this section, for each storage vessel affected facility, you must maintain the records identified in paragraphs (c)(5)(i) through (iv) of this section.

(i) If required to reduce emissions by complying with § 60.5395(d)(1), the records specified in §§ 60.5420(c)(6) through (8), § 60.5416(c)(6)(ii), and § 60.6516(c)(7)(ii) of this subpart.

(ii) Records of each VOC emissions determination for each storage vessel affected facility made under § 60.5365(e) including identification of the model or calculation methodology used to calculate the VOC emission rate.

(iii) Records of deviations in cases where the storage vessel was not operated in compliance with the requirements specified in §§ 60.5395, 60.5411, 60.5412, and 60.5413, as applicable.

(iv) For storage vessels that are skid-mounted or permanently attached to something that is mobile (such as trucks, railcars, barges or ships), records indicating the number of consecutive days that the vessel is located at a site in the oil and natural gas production segment, natural gas processing segment or natural gas transmission and storage segment. If a storage vessel is removed from a site and, within 30 days, is either returned to or replaced by another storage vessel at the site to serve the same or similar function, then the entire period since the original storage vessel was first located at the site, including the days when the storage vessel was removed, will be added to the count towards the number of consecutive days.

(v) You must maintain records of the identification and location of each storage vessel affected facility.

(6) Records of each closed vent system inspection required under § 60.5416(a)(1) for centrifugal compressors or § 60.5416(c)(1) for storage vessels.

(7) A record of each cover inspection required under § 60.5416(a)(3) for centrifugal compressors or § 60.5416(c)(2) for storage vessels.

(8) If you are subject to the bypass requirements of § 60.5416(a)(4) for centrifugal compressors or

§ 60.5416(c)(3) for storage vessels, a record of each inspection or a record each time the key is checked out or a record of each time the alarm is sounded.

(9) If you are subject to the closed vent system no detectable emissions requirements of § 60.5416(b) for centrifugal compressors, a record of the monitoring conducted in accordance with § 60.5416(b).

(10) For each centrifugal compressor affected facility, records of the schedule for carbon replacement (as determined by the design analysis requirements of § 60.5413(c)(2) or (3)) and records of each carbon replacement as specified in § 60.5412(c)(1).

(11) For each centrifugal compressor subject to the control device requirements of § 60.5412(a), (b), and (c), records of minimum and maximum operating parameter values, continuous parameter monitoring system data, calculated averages of continuous parameter monitoring system data, results of all compliance calculations, and results of all inspections.

(12) For each carbon adsorber installed on storage vessel affected facilities, records of the schedule for carbon replacement (as determined by the design analysis requirements of § 60.5412(d)(2)) and records of each carbon replacement as specified in § 60.5412(c)(1).

(13) For each storage vessel affected facility subject to the control device requirements of § 60.5412(c) and (d), you must maintain records of the inspections, including any corrective actions taken, the manufacturers' operating instructions, procedures and maintenance schedule as specified in § 60.5417(h). You must maintain records of EPA Method 22, 40 CFR part 60, appendix A, section 11 results, which include: company, location, company representative (name of the person

performing the observation), sky conditions, process unit (type of control device), clock start time, observation period duration (in minutes and seconds), accumulated emission time (in minutes and seconds), and clock end time. You may create your own form including the above information or use Figure 22-1 in EPA Method 22, 40 CFR part 60, appendix A. Manufacturer's operating instructions, procedures and maintenance schedule must be available for inspection.

- 14. Section 60.5430 is amended by:
  - a. Adding, in alphabetical order, definitions for the terms "Condensate," "Group 1 storage vessel," "Group 2 storage vessel," "Intermediate hydrocarbon liquid" and "Produced water;" and
  - b. Revising the definitions for "Flow line" and "Storage vessel" to read as follows:

**§ 60.5430 What definitions apply to this subpart?**

\* \* \* \* \*

*Condensate* means hydrocarbon liquid separated from natural gas that condenses due to changes in the temperature, pressure, or both, and remains liquid at standard conditions.

\* \* \* \* \*

*Flow line* means a pipeline used to transport oil and/or gas to a processing facility, a mainline pipeline, re-injection, or routed to a process or other useful purpose.

\* \* \* \* \*

*Group 1 storage vessel* means a storage vessel, as defined in this section, for which construction, modification or reconstruction has commenced after August 23, 2011, and on or before April 12, 2013.

*Group 2 storage vessel* means a storage vessel, as defined in this section, for which construction, modification or

reconstruction has commenced after April 12, 2013.

\* \* \* \* \*

*Intermediate hydrocarbon liquid* means any naturally occurring, unrefined petroleum liquid.

\* \* \* \* \*

*Produced water* means water that is extracted from the earth from an oil or natural gas production well, or that is separated from crude oil, condensate, or natural gas after extraction.

\* \* \* \* \*

*Storage vessel* means a tank or other vessel that contains an accumulation of crude oil, condensate, intermediate hydrocarbon liquids, or produced water, and that is constructed primarily of nonearthen materials (such as wood, concrete, steel, fiberglass, or plastic) which provide structural support. For the purposes of this subpart, the following are not considered storage vessels:

(1) Vessels that are skid-mounted or permanently attached to something that is mobile (such as trucks, railcars, barges or ships), and are intended to be located at a site for less than 180 consecutive days. If you do not keep or are not able to produce records, as required by § 60.5420(c)(5)(iv), showing that the vessel has been located at a site for less than 180 consecutive days, the vessel described herein is considered to be a storage vessel since the original vessel was first located at the site.

(2) Process vessels such as surge control vessels, bottoms receivers or knockout vessels.

(3) Pressure vessels designed to operate in excess of 204.9 kilopascals and without emissions to the atmosphere.

\* \* \* \* \*

- 15. Tables 1 and 2 to Subpart OOOO of part 60 are revised to read as follows:

TABLE 1 TO SUBPART OOOO OF PART 60—REQUIRED MINIMUM INITIAL SO<sub>2</sub> EMISSION REDUCTION EFFICIENCY (Z<sub>i</sub>)

H <sub>2</sub> S content of acid gas (Y), %	Sulfur feed rate (X), LT/D			
	2.0≤X≤5.0	5.0<X≤15.0	15.0<X≤300.0	X>300.0
Y≥50 .....	79.0	88.51X <sup>0.0101</sup> Y <sup>0.0125</sup> or 99.9, whichever is smaller.		
20≤Y<50 .....	79.0	88.51X <sup>0.0101</sup> Y <sup>0.0125</sup> or 97.9, whichever is smaller		
10≤Y<20 .....	79.0	88.51X <sup>0.0101</sup> Y <sup>0.0125</sup> or 93.5, whichever is smaller .....	93.5	93.5
Y<10 .....	79.0	79.0 .....	79.0	79.0

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TABLE 2 TO SUBPART OOOO OF PART 60—REQUIRED MINIMUM SO<sub>2</sub> EMISSION REDUCTION EFFICIENCY (Z<sub>c</sub>)

H <sub>2</sub> S content of acid gas (Y), %	Sulfur feed rate (X), LT/D			
	2.0≤X≤5.0	5.0<X≤15.0	15.0<X≤300.0	X>300.0
Y≥50 .....	74.0	85.35X <sup>0.0144</sup> Y <sup>0.0128</sup> or 99.9, whichever is smaller.		
20≤Y<50 .....	74.0	85.35X <sup>0.0144</sup> Y <sup>0.0128</sup> or 97.5, whichever is smaller		97.5
10≤Y<20 .....	74.0	85.35X <sup>0.0144</sup> Y <sup>0.0128</sup> or 90.8, whichever is smaller .....	90.8	90.8
Y<10 .....	74.0	74.0 .....	74.0	74.0

X = The sulfur feed rate from the sweetening unit (i.e., the H<sub>2</sub>S in the acid gas), expressed as sulfur, Mg/D(LT/D), rounded to one decimal place.

Y = The sulfur content of the acid gas from the sweetening unit, expressed as mole percent H<sub>2</sub>S (dry basis) rounded to one decimal place.

Z = The minimum required sulfur dioxide (SO<sub>2</sub>) emission reduction efficiency, expressed as percent carried to one decimal place. Z<sub>i</sub> refers to the reduction efficiency required at the initial performance test. Z<sub>c</sub> refers to the reduction efficiency required on a continuous basis after compliance with Z<sub>i</sub> has been demonstrated.

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Brownbag lunch with EDF  
Date: Wed Dec 18 2013 11:51:31 EST  
Attachments:

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StartTime: Thu Dec 19 12:30:00 Eastern Standard Time 2013  
EndTime: Thu Dec 19 14:00:00 Eastern Standard Time 2013  
Location:  
Recurring: No  
ShowReminder: No  
Accepted: No

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Pennsylvania  
Date: Fri Dec 20 2013 09:45:19 EST  
Attachments: ATT00001.htm  
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[J-127A-D-2012]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

**CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.**

ROBINSON TOWNSHIP, WASHINGTON COUNTY, : No. 63 MAP 2012  
PA; BRIAN COPPOLA, INDIVIDUALLY AND IN HIS :  
OFFICIAL CAPACITY AS SUPERVISOR OF :  
ROBINSON TOWNSHIP; TOWNSHIP OF :  
NOCKAMIXON, BUCKS COUNTY, PA; TOWNSHIP : Appeal from the Order and Opinion of  
OF SOUTH FAYETTE, ALLEGHENY COUNTY, PA; : the Commonwealth Court at No. 284  
PETERS TOWNSHIP, WASHINGTON COUNTY, : MD 2012, dated July 26, 2012  
PA; DAVID M. BALL, INDIVIDUALLY AND IN HIS :  
OFFICIAL CAPACITY AS COUNCILMAN OF : 52 A.3d 463 (Pa. Cmwlth. 2012)  
PETERS TOWNSHIP; TOWNSHIP OF CECIL, :  
WASHINGTON COUNTY, PA; MOUNT PLEASANT :  
TOWNSHIP, WASHINGTON COUNTY, PA; :  
BOROUGH OF YARDLEY, BUCKS COUNTY, PA; :  
DELAWARE RIVERKEEPER NETWORK; MAYA :  
VAN ROSSUM, THE DELAWARE RIVERKEEPER; :  
MEHERNOSH KHAN, M.D. :

v.

COMMONWEALTH OF PENNSYLVANIA; :  
PENNSYLVANIA PUBLIC UTILITY COMMISSION; :  
ROBERT F. POWELSON, IN HIS OFFICIAL :  
CAPACITY AS CHAIRMAN OF THE PUBLIC :  
UTILITY COMMISSION; OFFICE OF THE :  
ATTORNEY GENERAL OF PENNSYLVANIA; :  
KATHLEEN KANE, IN HER OFFICIAL CAPACITY :  
AS ATTORNEY GENERAL OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
PENNSYLVANIA DEPARTMENT OF :  
ENVIRONMENTAL PROTECTION; and E. :  
CHRISTOPHER ABRUZZO, IN HIS OFFICIAL :  
CAPACITY AS SECRETARY OF THE :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

APPEAL OF: PENNSYLVANIA PUBLIC UTILITY :  
COMMISSION; ROBERT F. POWELSON, IN HIS :  
OFFICIAL CAPACITY AS CHAIRMAN OF THE :  
PUBLIC UTILITY COMMISSION; PENNSYLVANIA :  
DEPARTMENT OF ENVIRONMENTAL :

PROTECTION; AND E. CHRISTOPHER ABRUZZO, :  
IN HIS OFFICIAL CAPACITY AS SECRETARY OF :  
THE DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

: ARGUED: October 17, 2012

ROBINSON TOWNSHIP, WASHINGTON COUNTY, :  
PA; BRIAN COPPOLA, INDIVIDUALLY AND IN HIS :  
OFFICIAL CAPACITY AS SUPERVISOR OF :  
ROBINSON TOWNSHIP; TOWNSHIP OF :  
NOCKAMIXON, BUCKS COUNTY, PA; TOWNSHIP :  
OF SOUTH FAYETTE, ALLEGHENY COUNTY, PA; :  
PETERS TOWNSHIP, WASHINGTON COUNTY, :  
PA; DAVID M. BALL, INDIVIDUALLY AND IN HIS :  
OFFICIAL CAPACITY AS COUNCILMAN OF :  
PETERS TOWNSHIP; TOWNSHIP OF CECIL, :  
WASHINGTON COUNTY, PA; MOUNT PLEASANT :  
TOWNSHIP, WASHINGTON COUNTY, PA; :  
BOROUGH OF YARDLEY, BUCKS COUNTY, PA; :  
DELAWARE RIVERKEEPER NETWORK; MAYA :  
VAN ROSSUM, THE DELAWARE RIVERKEEPER; :  
MEHERNOSH KHAN, M.D. :

: No. 64 MAP 2012

: Appeal from the Order and Opinion of  
: the Commonwealth Court at No. 284  
: MD 2012, dated July 26, 2012

: 52 A.3d 463 (Pa. Cmwlth. 2012)

v. :

COMMONWEALTH OF PENNSYLVANIA; :  
PENNSYLVANIA PUBLIC UTILITY COMMISSION; :  
ROBERT F. POWELSON, IN HIS OFFICIAL :  
CAPACITY AS CHAIRMAN OF THE PUBLIC :  
UTILITY COMMISSION; OFFICE OF THE :  
ATTORNEY GENERAL OF PENNSYLVANIA; :  
KATHLEEN KANE, IN HER OFFICIAL CAPACITY :  
AS ATTORNEY GENERAL OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
PENNSYLVANIA DEPARTMENT OF :  
ENVIRONMENTAL PROTECTION; AND E. :  
CHRISTOPHER ABRUZZO, IN HIS OFFICIAL :  
CAPACITY AS SECRETARY OF THE :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

APPEAL OF: OFFICE OF THE ATTORNEY :  
GENERAL OF PENNSYLVANIA; KATHLEEN :  
KANE, IN HER OFFICIAL CAPACITY AS :  
ATTORNEY GENERAL OF THE :  
COMMONWEALTH OF PENNSYLVANIA :

: ARGUED: October 17, 2012

ROBINSON TOWNSHIP, WASHINGTON COUNTY, PA; BRIAN COPPOLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF ROBINSON TOWNSHIP; TOWNSHIP OF NOCKAMIXON, BUCKS COUNTY, PA; TOWNSHIP OF SOUTH FAYETTE, ALLEGHENY COUNTY, PA; PETERS TOWNSHIP, WASHINGTON COUNTY, PA; DAVID M. BALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF PETERS TOWNSHIP; TOWNSHIP OF CECIL, WASHINGTON COUNTY, PA; MOUNT PLEASANT TOWNSHIP, WASHINGTON COUNTY, PA; BOROUGH OF YARDLEY, BUCKS COUNTY, PA; DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER; MEHERNOSH KHAN, M.D.,

No. 72 MAP 2012  
 Appeal from the Order and Opinion of the Commonwealth Court at No. 284 MD 2012, dated July 26, 2012  
 52 A.3d 463 (Pa. Cmwlth. 2012)

Cross-appellants

v.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA PUBLIC UTILITY COMMISSION; ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION; OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA; KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

ARGUED: October 17, 2012

Cross-appellees

ROBINSON TOWNSHIP, WASHINGTON COUNTY, PA; BRIAN COPPOLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF ROBINSON TOWNSHIP; TOWNSHIP OF NOCKAMIXON, BUCKS COUNTY, PA; TOWNSHIP OF SOUTH FAYETTE, ALLEGHENY COUNTY, PA; PETERS TOWNSHIP, WASHINGTON COUNTY, PA; DAVID M. BALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF

No. 73 MAP 2012  
 Appeal from the Order and Opinion of the Commonwealth Court at No. 284 MD 2012, dated July 26, 2012  
 52 A.3d 463 (Pa. Cmwlth. 2012)



In this matter, multiple issues of constitutional import arise in cross-appeals taken from the decision of the Commonwealth Court ruling upon expedited challenges to Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act (“Act 13”).<sup>1</sup> Act 13 comprises sweeping legislation affecting Pennsylvania’s environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale. The litigation proceeded below in an accelerated fashion, in part because the legislation itself was designed to take effect quickly and imposed obligations which required the challengers to formulate their legal positions swiftly; and in part in recognition of the obvious economic importance of the legislation to the Commonwealth and its citizens.

The litigation implicates, among many other sources of law, a provision of this Commonwealth’s organic charter, specifically Section 27 of the Declaration of Rights in the Pennsylvania Constitution, which states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27 (the “Environmental Rights Amendment”). Following careful deliberation, this Court holds that several challenged provisions of Act 13 are unconstitutional, albeit the Court majority affirming the finding of unconstitutionality is not of one mind concerning the ground for decision. This Opinion, representing the views of this author, Madame Justice Todd, and Mr. Justice McCaffery, finds that

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<sup>1</sup> Act No. 13 of Feb. 14, 2012, P.L. 87, eff. immediately (in part) and Apr. 16, 2012 (in part), 58 Pa.C.S. §§ 2301-3504.

several core provisions of Act 13 violate the Commonwealth's duties as trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment; other challenges lack merit; and still further issues require additional examination in the Commonwealth Court. Mr. Justice Baer, in concurrence, concurs in the mandate, and joins the Majority Opinion in all parts except Parts III and VI(C); briefly stated, rather than grounding merits affirmance in the Environmental Rights Amendment, Justice Baer would find that the core constitutional infirmity sounds in substantive due process.<sup>2</sup> Accordingly, we affirm in part and reverse in part the Commonwealth Court's decision, and remand for further proceedings consistent with specific directives later set forth in this Opinion. See Part VI (Conclusion and Mandate), infra.

## I. Background

Before the Court are the direct appeals of the Commonwealth, by (a) the Office of the Attorney General and (former) Attorney General Linda L. Kelly, and (b) the Public Utility Commission and its Chairman Robert F. Powelson, and the Department of Environmental Protection and its (former) Secretary Michael L. Krancer (together, the "Commonwealth"). We also decide cross-appeals by several Pennsylvania municipalities; by Brian Coppola and David M. Ball, two residents and elected local officials; by the Delaware Riverkeeper Network, a non-profit environmental group, and its Executive Director Maya Van Rossum; and by Mehernosh Khan, a Pennsylvania physician (together, the "citizens").<sup>3</sup> The parties challenge different aspects of the

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<sup>2</sup> This Opinion (representing a plurality view on Part III), offers no view on the merits of the due process argument that is the core focus of the three responsive opinions.

<sup>3</sup> In his dissent, Mr. Justice Saylor notes that appellees/cross-appellants, which we denominate citizens, are instead largely discontent municipalities. Political subdivisions (continued...)

Commonwealth Court's decision, a decision which accepted in part and rejected in part numerous constitutional challenges to Act 13 of 2012.

The Marcellus Shale Formation has been a known natural gas reservoir (containing primarily methane) for more than 75 years.<sup>4</sup> Particularly in northeastern Pennsylvania, the shale rock is organic-rich and thick. Early drilling efforts revealed that the gas occurred in "pockets" within the rock formations, and that the flow of natural gas from wells was not continuous. Nonetheless, geological surveys in the 1970s showed that the Marcellus Shale Formation had "excellent potential to fill the needs of users" if expected technological development continued and natural gas prices increased. Those developments materialized and they permitted shale drilling in the Marcellus Formation to start in 2003; production began in 2005.<sup>5</sup>

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(...continued)

are creations of the General Assembly, but they are places populated by people, created for the benefit of the people that live and work there. See Franklin Twp. v. Commonwealth, 452 A.2d 718, 723 (Pa. 1982) (Opinion Announcing Judgment of Court). Those of the appellees/cross-appellants which are indeed municipalities consist of local governments, with local resident leaders elected by other local residents of the municipalities to represent their interests. Political subdivisions and their leaders frequently find themselves in the position of petitioning the Commonwealth government on behalf of their constituents. See, e.g., City of Philadelphia v. Commonwealth, 838 A.2d 566, 579 (Pa. 2003). And, in this case, as we have very carefully noted, the appellees/cross-appellants include individuals and groups suing **as** citizens, as well as municipal leaders suing both as citizens and as elected officials representing their constituents.

<sup>4</sup> John A. Harper, The Marcellus Shale -- An Old "New" Gas Reservoir in Pennsylvania, *Pennsylvania Geology*, Vol. 38, No. 1, at 2-3 (Spring 2008). *Pennsylvania Geology* is a quarterly published by the Bureau of Topographic and Geologic Survey of the Pennsylvania Department of Conservation and Natural Resources.

<sup>5</sup> Id. at 9. Accord U.S. Dep't of Energy, *Shale Gas: Applying Technology to Solve America's Energy Challenges*, at 1, 3 (March 2011).

In shale formations, organic matter in the soil generates gas molecules that absorb onto the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock and natural gas (e.g., methane) migrates to fill the fractures or pockets. In the Marcellus Shale Formation, fractures in the rock and naturally-occurring gas pockets are insufficient in size and number to sustain consistent industrial production of natural gas. The industry uses two techniques that enhance recovery of natural gas from these “unconventional” gas wells: hydraulic fracturing or “fracking” (usually slick-water fracking) and horizontal drilling. Both techniques inevitably do violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical hole to 5,500 to 6,500 feet -- several hundred feet above the target natural gas pocket or reservoir -- and then directing the drill bit through an arc until the drilling proceeds sideways or horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of water.<sup>6</sup> The development of the natural gas industry in the Marcellus Shale Formation prompted enactment of Act 13.

In February 2012, the Governor of Pennsylvania, Thomas W. Corbett, signed Act 13 into law. Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and added provisions re-codified into six new chapters in Title 58 of the Pennsylvania Consolidated Statutes. The new chapters of the Oil and Gas Act are:

-- Chapter 23, which establishes a fee schedule for the unconventional gas well industry, and provides for the collection and distribution of these fees;

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<sup>6</sup> See Harper, at 9-12. Accord U.S. Dep’t of Energy, at 5 (“more than 10 million gallons of water may be pumped into a single well during the [well-]completion process”).

- Chapter 25, which provides for appropriation and allocation of funds from the Oil and Gas Lease Fund;
- Chapter 27, which creates a natural gas energy development program to fund public or private projects for converting vehicles to utilize natural gas fuel;
- Chapter 32, which describes the well permitting process and defines statewide limitations on oil and gas development;
- Chapter 33, which prohibits any local regulation of oil and gas operations, including via environmental legislation, and requires statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources;
- Chapter 35, which provides that producers, rather than landowners, are responsible for payment of the unconventional gas well fees authorized under Chapter 23.

See 58 Pa.C.S. §§ 2301-3504. Chapter 23's fee schedule became effective immediately upon Act 13 being signed into law, on February 14, 2012, while the remaining chapters were to take effect sixty days later, on April 16, 2012.

In March 2012, the citizens promptly filed a fourteen-count petition for review in the original jurisdiction of the Commonwealth Court, broadly requesting a declaration that Act 13 is unconstitutional, a permanent injunction prohibiting application of Act 13, and legal fees and costs of litigation.<sup>7</sup> The citizens claimed that Act 13 violated the

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<sup>7</sup> The citizens also sought a preliminary injunction (Count XIII of the Citizens' Petition for Review), which the Commonwealth Court granted in part via a single judge order. Cmwlth. Ct. Order, 4/11/2012 (Quigley, S.J.). Senior Judge Keith B. Quigley enjoined those parts of Act 13 which preempted pre-existing local ordinances, pending further order of the court. Moreover, Senior Judge Quigley delayed for a period of 120 days the effective date of that section of Act 13, 58 Pa.C.S. § 3309, which required municipalities to amend and conform their zoning ordinances to Act 13. The Commonwealth appealed the order to this Court. In light of the present decision, the two separate appeals from Senior Judge Quigley's order, one filed by the Office of the (continued...)

Pennsylvania Constitution, specifically, Article I, Section 1 (relating to inherent rights of mankind); Article I, Section 10 (relating in relevant part to eminent domain); Article I, Section 27 (relating to natural resources and the public estate); Article III, Section 3 (relating to single subject bills); and Article III, Section 32 (relating in relevant part to special laws). Moreover, the citizens argued that Act 13 was unconstitutionally vague, and violated the separation of powers doctrine and the due process clause of the U.S. Constitution. See Citizens' Petition for Review, 3/29/12, at 1-108 (Counts I-XIV) (citing PA. CONST. art. I, §§ 1, 10, 27; art. II, § 1; art. III, §§ 3, 32 and U.S. CONST. amend. XIV, § 1). The Commonwealth filed preliminary objections to the citizens' petition for review and, while the objections were pending, the parties also filed cross-applications for summary relief. Upon the request of the Public Utility Commission, the Department of Environmental Protection, and their respective executive officials, the matter was expedited and placed on the Commonwealth Court's earliest list for argument *en banc*. See Cmwth. Ct. Order, 5/9/2012 (*per curiam*).<sup>8</sup>

On June 6, 2012, the parties argued the pending objections and motions for summary relief to an *en banc* panel of the Commonwealth Court. In July 2012, the Commonwealth Court sustained the Commonwealth's preliminary objections to eight counts of the citizens' petition for review; overruled objections to four counts of the

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(...continued)

Attorney General and (former) Attorney General Linda L. Kelly, and the other by the Department of Environmental Protection, the Public Utility Commission, and their respective top officials, are hereby dismissed as moot. See 37 & 40 MAP 2012.

<sup>8</sup> The court also permitted the following *amici curiae* to participate in oral argument, all in support of the Commonwealth: the Pennsylvania Independent Oil and Gas Association, the Marcellus Shale Coalition, MarkWest Liberty Midstream and Resources, LLC, Penneco Oil Company, Inc., and Chesapeake Appalachia, LLC. See Cmwth. Ct. Order, 5/9/2012 (*per curiam*).

petition for review and granted the citizens' application for summary relief on these four counts; and denied the Commonwealth's application for summary relief in its entirety. Accordingly, the *en banc* panel held Act 13 unconstitutional in part and enjoined application of: (1) Section 3215(b)(4) of Chapter 32, and (2) Section 3304 and any "remaining provisions of Chapter 33 that enforce [Section] 3304," *i.e.*, Sections 3305 through 3309. Robinson Twp. v. Commonwealth, 52 A.3d 463, 494 (Pa. Cmwlth. 2012).

The parties filed direct cross-appeals with this Court, which were later consolidated. At the parties' request, briefing and argument were expedited. The Public Utility Commission and its Chairman Robert F. Powelson, along with the Department of Environmental Protection and its then-Secretary Michael L. Krancer filed an appeal and appellants' brief on behalf of the Commonwealth ("Agencies' Brief (as appellants)") separate from the appeal and brief of the Office of the Attorney General and then-Attorney General Linda L. Kelly herself ("OAG's Brief (as appellant)"). The citizens respond to the separate Commonwealth appeals in a joint appellees' brief ("Citizens' Brief (as appellees)"). In the cross-appeals, the citizens file one appellants' brief ("Citizens' Brief (as cross-appellants)"), to which the Commonwealth responds in two separate briefs, *i.e.*, "Agencies' Brief (as cross-appellees)," "OAG's Brief (as cross-appellee)." In the four cross-appeals before this Court, the parties raise a total of fourteen issues (twelve of which are distinct), which we have reordered for clarity.

## **II. Justiciability: Standing, Ripeness, Political Question**

We begin by addressing the several questions of justiciability raised by the parties. See Rendell v. Pa. State Ethics Comm'n, 983 A.2d 708, 717 (Pa. 2009) (standing, ripeness, and political question "give body to the general notions of case or controversy and justiciability"). Issues of justiciability are a threshold matter generally

resolved before addressing the merits of the parties' dispute. Council 13, Am. Fed. of State, County & Mun. Employees, AFL-CIO v. Commonwealth, 986 A.2d 63, 74 n.10 (Pa. 2009) ("Council 13"). The Commonwealth Court sustained the Commonwealth's preliminary objections to the standing to sue of the Delaware Riverkeeper Network and its Executive Director Maya van Rossum, and of Mehernosh Khan, M.D.; overruled objections to the standing to sue and the ripeness of claims of individual citizen-petitioners and of the several municipalities; and overruled objections regarding the application of the political question doctrine to bar this action in its entirety. In their respective cross-appeals, the parties challenge the decisions of the lower court on individual issues that were adverse to their positions.

Parties may raise questions regarding standing, ripeness, and the political question doctrine by filing preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court, similar to those permitted in a civil action. See Pa.R.A.P. 1516(b) and note (Rule 1516(b) is patterned after Rule of Civil Procedure 1017(a) (Pleadings Allowed)). Upon review of a decision sustaining or overruling preliminary objections, "we accept as true all well-pleaded material facts set forth in the [petition for review] and all inferences fairly deducible from those facts." Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012). We will affirm an order sustaining preliminary objections only if it is clear that the party filing the petition for review is not entitled to relief as a matter of law. See Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007).

In contrast to the federal approach, notions of case or controversy and justiciability in Pennsylvania have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations. See Fumo v. City of Philadelphia, 972 A.2d 487, 500 n.5 (Pa.

2009); Rendell, 983 A.2d at 717 & n.9. Justiciability questions are issues of law, over which our standard of review is *de novo* and the scope of review is plenary. Council 13, 986 A.2d at 74 n.10.

### A. Standing and Ripeness

Generally, the doctrine of standing is an inquiry into whether the petitioner filing suit has demonstrated aggrievement, by establishing “a substantial, direct and immediate interest in the outcome of the litigation.” Fumo, 972 A.2d at 496. There is considerable overlap between the doctrines of standing and ripeness, especially where the contentions regarding lack of justiciability are focused on arguments that the interest asserted by the petitioner is speculative, not concrete, or would require the court to offer an advisory opinion. Rendell, 983 A.2d at 718. In this sense, a challenge that a petitioner’s interest in the outcome of the litigation is hypothetical may be pled either as determinative of standing or restyled as a ripeness concern although the allegations are essentially the same. Id. Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute. Pure questions of law, including those in the present cross-appeals, do not suffer generally from development defects and are particularly well suited for pre-enforcement review. Id. at 718 n.13.

#### 1. *Brian Coppola and David M. Ball*

The Commonwealth Court held that Brian Coppola and David M. Ball had standing as elected officials and “as individual landowners and residents” of their respective townships. According to the court, Coppola and Ball live in a residential district in which, contrary to the prior legal regime, Act 13 now permits oil and gas

operations. The value of Coppola's and Ball's existing homes, the panel stated, is affected negatively because the two can neither enjoy their properties as expected, nor guarantee to potential buyers the enjoyment of these properties without intrusion of burdensome industrial uses in their residential districts. Moreover, in their capacity as elected officials of their municipalities, the court concluded, Coppola and Ball both were aggrieved because, under provisions of Act 13, they would be "required to vote for zoning amendments they believe are unconstitutional." Robinson Twp., 52 A.3d at 475-76.

According to the Commonwealth, local officials do not have any cognizable legal interest in their powers to make land use determinations and, therefore, Coppola and Ball suffered no harm from the General Assembly's decision to alter or remove those powers. OAG's Brief (as appellant) at 22-26. While recognizing that distinct interests are implicated, the Commonwealth does not challenge the standing of Coppola and Ball as landowners and residents of townships whose zoning districts are affected by Act 13. See id. at 23 n.8. The citizens respond by subscribing to the Commonwealth Court's reasoning with respect to the standing of individual citizens to sue. Citizens' Brief (as appellees) at 48-62.

As noted, on appeal to this Court, the Commonwealth does not offer any arguments regarding the interests in the outcome of this litigation of Coppola and Ball in their individual capacities as landowners and residents of townships located in areas atop the Marcellus Shale Formation. We have consistently held that we will not raise standing claims *sua sponte*. Rendell, 983 A.2d at 717-18. Moreover, because Coppola and Ball both have standing to sue as landowners and residents and they assert the

same claims in both individual and official capacities, we need not address whether they have a separate interest as local elected officials sufficient to confer standing.<sup>9</sup>

*2. Robinson Township, Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, Borough of Yardley*

The Commonwealth Court also held that Robinson Township, Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, and the Borough of Yardley had standing to sue because “Act 13 imposes substantial, direct and immediate obligations on them that affect their government[al] functions.” In the alternative, the court noted that the municipalities’ claims were “inextricably bound” with rights of property owners, who the Commonwealth conceded had standing to challenge the constitutionality of Act 13. Robinson Twp., 52 A.3d at 475. As a related matter, the Commonwealth Court also addressed the Commonwealth’s ripeness challenge to the municipalities’ claims. The court held that the constitutionality of Act 13 was an issue ripe for review as a pre-enforcement challenge because, once Act 13 went into effect, the townships would “be forced to submit to the regulations [that required modification of their zoning codes] and incur cost[s] and burden[s] that the regulations would impose or be forced to defend themselves against sanctions for non-compliance with the law.” The panel thus concluded that the declaratory judgment action was properly filed. Id. at 479 n.17.

On appeal, the Commonwealth characterizes the harm claimed by the municipalities as illusory because local governments (political subdivisions) have no

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<sup>9</sup> Alternatively, we conclude that, to the extent that the Commonwealth Court addressed the interests in the outcome of this litigation of Ball and Coppola, the court did so persuasively. Accord In re Milton Hershey Sch., 911 A.2d 1258, 1262 (Pa. 2006) (person with special interest in charitable trust may bring action for enforcement of trust).

inherent legal interest in the power to make land use determinations within their boundaries, and because municipalities do not enjoy constitutional protections similar to those of citizens. OAG's Brief (as appellant) at 24. The Commonwealth also asserts that the municipalities' claims are unripe because they are based on what the Commonwealth says is "a wholly speculative parade of horrors" that the municipalities claim "might occur in the future following implementation of Act 13." According to the Commonwealth, the record does not establish that appellee municipalities will be required to modify their zoning ordinances or that they will fail to do so and thereby incur penalties.<sup>10</sup> Agencies' Brief (as appellants) at 40-43.

The citizens respond that the municipalities have standing because Act 13 requires them to act in conflict with their functions, duties, and responsibilities under the Pennsylvania Constitution and other laws. For example, the citizens argue, existing ordinances that address land use in their municipalities were adopted pursuant to powers delegated to them by the General Assembly over a span of years, and provide a balance between citizens' safety, their rights, and orderly community development. The citizens claim that Act 13 displaces existing zoning ordinances and land use interests, prohibits municipalities from discharging their duties to adopt effective legislation to protect the health, safety, and welfare of citizens and the public natural resources from industrial activity, and requires them, instead, to create new exceptions for the oil and gas industry that are inconsistent with long-established municipal land use plans. Moreover, the citizens argue that Act 13 places local government in the untenable

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<sup>10</sup> Finally, the Commonwealth suggests that the panel's exercise of equitable jurisdiction was in error. This assertion is premised solely upon standing defects. Because, as we have already noted, standing and ripeness are prudential rather than jurisdictional concerns for this Court, the Commonwealth's jurisdictional sub-claim is meritless. See Rendell, 983 A.2d at 717 & n.9.

position of having to choose between either violating certain constitutional obligations or violating Act 13's newly-imposed requirements, which carries a risk of severe monetary penalties that most municipalities cannot afford. Municipalities, according to the citizens, are aggrieved because the effect upon their duty and interest in ensuring a healthy environment and a quality of life for their citizenry is direct, substantial, and immediate. Citizens' Brief (as appellees) at 51-60 (citing, *inter alia*, Franklin Twp. v. Commonwealth, 452 A.2d 718, 720 (Pa. 1982) (Opinion Announcing Judgment of Court)). We do not view this question to be close; we agree with the citizens and affirm the Commonwealth Court's decision with respect to the standing of the municipalities and the ripeness of their claims.

This Court has held that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, which interest confers upon the political subdivision standing in a legal action to enforce environmental standards. Susquehanna County v. Commonwealth, 458 A.2d 929, 931 (Pa. 1983) (county has standing to appeal executive agency order related to operation of sanitary landfill by corporate permit holder); Franklin Twp., 452 A.2d at 720 (municipality and county have standing to appeal agency's decision to issue permit to operate solid waste facility). Political subdivisions, the Court has recognized, are legal persons, which have the right and indeed the duty to seek judicial relief, and, more importantly, they are "place[s] populated by people." Id. The protection of environmental and esthetic interests is an essential aspect of Pennsylvanians' quality of life and a key part of local government's role. Local government, therefore, has a substantial and direct interest in the outcome of litigation premised upon changes, or serious and imminent risk of changes, which would alter the physical nature of the political subdivision and of various components of the environment. Moreover, the

same interest in the environment and in the citizenry's quality of life cannot be characterized as remote: "[w]e need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such disaster is immediate." Id. at 720-22. See Susquehanna County, 458 A.2d at 931 ("The aesthetic, environmental and quality of life considerations discussed in Franklin Township are equally applicable here.");<sup>11</sup> cf. Pennsylvania Game Comm'n v. Dep't of Env'tl Res., 555 A.2d 812, 815 (Pa. 1989) (unless otherwise explicitly provided, agency invested with duties or responsibilities regarding certain concerns has implicit power to be litigant in matters touching upon those concerns).

The Franklin Township and Susquehanna County decisions are dispositive of the Commonwealth's appeal with respect to the municipalities' standing and to the ripeness of their claims. Contrary to the Commonwealth's characterization, the municipalities' claims are not rooted simply in an asserted narrow legal interest in retaining powers as against the Commonwealth government to make land use determinations relating to oil and gas production. Rather, the municipalities, much like Messrs. Coppola and Ball, maintain claims premised upon threatened fundamental changes to esthetic and environmental values, which implicate the political subdivisions' responsibilities to protect the quality of life of its citizens. The aggrievement alleged by the political subdivisions is not limited to vindication of individual citizens' rights but extends to allegations that the challenged statute interferes with the subdivisions' constitutional duties respecting the environment and, therefore, its interests and functions as a

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<sup>11</sup> The Franklin Township decision represented a plurality view of three Justices on the Court; three other Justices concurred in the result, and one Justice dissented. One year later, however, the Susquehanna County Court, in a clear majority decision, adopted the reasoning of the Franklin Township plurality.

governing entity. City of Philadelphia v. Commonwealth, 838 A.2d 566, 579 (Pa. 2003) (citing Franklin Twp., *supra*) (city has standing to bring action premised on assertions that challenged statute affects its interests and functions as governing entity). We find that the municipalities' interests are sufficiently substantial, direct, and immediate to confer standing. Furthermore, we also dismiss the Commonwealth's ripeness claim, which is merely a restyling of the remoteness concern already addressed in our standing discussion. See Rendell, 983 A.2d at 718 n.13. The Commonwealth Court's decision is affirmed in this respect.

### 3. *Maya van Rossum and the Delaware Riverkeeper Network*

With respect to Maya van Rossum and the Delaware Riverkeeper Network, the Commonwealth Court sustained the Commonwealth's preliminary objections, and held that these parties failed to plead any direct and immediate interest or harm. According to the court, van Rossum's concern over the negative effect of Act 13 on her personal use and enjoyment of the Delaware River Basin and her work as Executive Director of the Delaware Riverkeeper Network did not amount to a sufficient interest in the outcome of the litigation to confer standing. The Commonwealth Court further explained that, although an association like the Delaware Riverkeeper Network may have standing as a representative of its members who are suffering immediate or threatened injury, the group had "not shown that at least one member has suffered or is threatened with suffering" the requisite type of injury. Robinson Twp., 52 A.3d at 476.

The Delaware Riverkeeper Network challenges the lower court's decision, asserting that its members are residents of areas whose existing protective zoning ordinances "will be eviscerated by Act 13," and that their interests in the values of their homes and businesses (*e.g.*, an organic farm in the Delaware River watershed) are

similar to those of Messrs. Coppola and Ball. The Delaware Riverkeeper Network also emphasizes the deleterious effects of industrial activities close to its members' homes, including effects on their health and their ability to enjoy natural beauty, environmental resources, and recreational activities in the Delaware River corridor, such as fishing, boating, swimming, and bird-watching. The Delaware Riverkeeper Network further explains that drilling guided by Act 13 will affect well water supply as well as the sensitive ecosystems of the Delaware River, from which the group's members derive sustenance and other benefits. Citizens' Brief (as cross-appellants) at 61 (citing Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (“[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”)). According to these citizens, esthetic and environmental well-being, “like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.” Id. (emphasis omitted) (quoting Unified Sportsmen of Pa. v. Pa. Game Comm'n, 903 A.2d 117, 122-24 (Pa. Cmwlth. 2006) (citing Sierra Club v. C.B. Morton, 405 U.S. 727, 734 (1972))). Van Rossum, as Executive Director of the Delaware Riverkeeper Network, alleges similar concerns in the outcome of this litigation.

The Commonwealth responds that the Commonwealth Court's decision should be affirmed because any harm alleged by these particular parties is speculative and remote. The Commonwealth states that there are other parties better positioned to raise claims regarding Act 13's validity and, therefore, this Court need not recognize that these parties have standing. OAG's Brief (as cross-appellee) at 21-22; Agencies'

Brief (as cross-appellees) at 21-22. Moreover, the Commonwealth notes that this Court “need not address the standing of the [Delaware Riverkeeper Network] and van Rossum” because these two appellants “did not seek any unique relief in their own name” and addressing their standing would not affect the disposition of the present appeals. Agencies’ Brief (as cross-appellees) at 29.<sup>12</sup>

We agree with the citizens and reverse the decision of the Commonwealth Court with respect to the standing of the Delaware Riverkeeper Network and van Rossum, and with respect to the ripeness of their claims. The Commonwealth Court’s finding that the Delaware Riverkeeper Network failed to show that any of its members were threatened with an injury sufficient to confer upon the group associational standing is not supported by the record. In response to preliminary objections, the citizens relied on of-record affidavits to show that individual members of the Delaware Riverkeeper Network are Pennsylvania residents and/or owners of property and business interests in municipalities and zoning districts that either already host or are likely to host active natural gas operations related to the Marcellus Shale Formation. See Citizens’ Consolidated Brief in Opposition to [the Commonwealth’s] Preliminary Objections, 5/14/2012, at 22-24. Like Messrs. Coppola and Ball (as to whom the Commonwealth conceded the standing issue), these members asserted that they are likely to suffer

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<sup>12</sup> Although the claims of the Delaware Riverkeeper Network and van Rossum may not be significantly different from those of the citizens found by the Commonwealth Court to have standing, a decision to allow or prohibit the Delaware Riverkeeper Network and van Rossum from participating in this matter obviously may have consequences. For example, party status permits these citizens to offer evidence upon remand, or to apply to the court for an order enforcing our decision. In addition, there is nothing to prevent the parties from seeking to develop or supplement their claims, a not-unlikely-prospect given the expedited nature of this legislation and ensuing litigation. The fact that others have standing does not eliminate the standing of these citizens.

considerable harm with respect to the values of their existing homes and the enjoyment of their properties given the intrusion of industrial uses and the change in the character of their zoning districts effected by Act 13. See, e.g., id. at Exh. 15, 16 (affidavits of G. Swartz and T. Kowalchuk). These individual members have a substantial and direct interest in the outcome of the litigation premised upon the serious risk of alteration in the physical nature of their respective political subdivisions and the components of their surrounding environment. This interest is not remote. See Franklin Twp., 452 A.2d at 720-22; Susquehanna County, 458 A.2d at 931; accord Friends of the Earth, Inc., supra, 528 U.S. at 183.

Under Pennsylvania law, an association has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the action challenged. Pennsylvania Med. Soc'y v. Dep't of Pub. Welfare, 39 A.3d 267, 278 (Pa. 2012); accord South Whitehall Twp. Police Serv. v. South Whitehall Twp., 555 A.2d 793, (Pa. 1989) (collective bargaining agent has standing to sue if members are aggrieved, even if action is not related solely to collective bargaining). Several members of the Delaware Riverkeeper Network have alleged sufficient injury to show that they are aggrieved by the enactment of Act 13. As these members' associational representative, the Delaware Riverkeeper Network has standing. Van Rossum, as the Executive Director of the Delaware Riverkeeper Network, is in a similar legal position and, as a result, has standing in her official capacity to represent the membership's interests in this matter. Cf. Pennsylvania Med. Soc'y, supra. Accordingly, the decision of the Commonwealth Court with respect to the standing of the Delaware Riverkeeper Network and Ms. van Rossum is reversed.

#### 4. *Mehernosh Khan, M.D.*

Finally, the Commonwealth Court held that Dr. Khan lacked standing to sue the Commonwealth in this matter because the interest he asserted was remote. The citizens appeal the Commonwealth Court's decision, explaining that Dr. Khan is a physician who treats patients in an area where drilling operations are taking place, and whose interest in the outcome of this litigation is sufficient to confer standing. The doctor claims that Act 13's restrictions on obtaining and sharing information with other physicians regarding the chemicals used in drilling operations impede his ability to diagnose and treat his patients properly. See 58 Pa.C.S. § 3222.1(b)(10)-(11).<sup>13</sup> In

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<sup>13</sup> Section 3222.1(b) provides, in relevant part:

(10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:

- (i) The information is needed for the purpose of diagnosis or treatment of an individual.
- (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
- (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.

(11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional upon a verbal acknowledgment by the health

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denying Dr. Khan standing, the Commonwealth Court reasoned that Dr. Khan would not have standing until he actually requested confidential information under Section 3222.1(b) of Act 13, and that information either was not supplied at all or was supplied with restrictions interfering with his ability to provide proper medical care to his patients. The court also noted that, if upon receiving information on chemicals protected as trade secrets by Section 3222.1(b), Dr. Khan believes that the chemicals pose a public health hazard, he would have standing then to challenge the confidentiality provisions. See Robinson Twp., 52 A.3d at 477-78. Although the Commonwealth Court articulated its holding to sustain the Commonwealth's objections in terms of lack of standing, the court's reasoning also addresses the Commonwealth's ripeness argument.

On appeal, Dr. Khan argues that the challenged provision prevents physicians from sharing diagnostic test results (e.g., blood test results), and a patient's history of exposure, including the dose and duration of exposure -- all of which are essential tools of treating patients and practicing medicine competently. Dr. Khan continues that the restrictions on sharing fracking chemicals' composition places medical professionals in a position to choose between abiding by the mandatory provisions of Act 13 and adhering to their ethical and legal duties to report findings in medical records and to make these records available to patients and other medical professionals. Dr. Khan's

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professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

injury is therefore actual and immediate, the citizens say, given that the health of patients is jeopardized by a potentially lengthy wait for resolution of a challenge after Section 3222.1(b) goes into effect. Citizens' Brief (as cross-appellants) at 52-56.

The Commonwealth generally subscribes to the Commonwealth Court's reasoning. Additionally, the Commonwealth claims that Dr. Khan's interest is illusory because the restriction Act 13 places upon medical professionals allows the use of confidential information for the health needs of an individual patient, and Dr. Khan does not explain why, as a treating physician, he needs further disclosure for non-medical purposes. OAG's Brief (as cross-appellee) at 22-24. Furthermore, the Commonwealth argues that Dr. Khan's harm is speculative because it is based on the rights of his patients and on "serial 'mights'" which are unfounded. According to the Commonwealth, Section 3222.1(b) is not "a muzzle" on the dissemination of information, but it actually requires disclosures of otherwise protected information. Agencies' Brief (as cross-appellees) at 22-27.

We agree with the citizens that Dr. Khan's interest in the outcome of litigation regarding the constitutionality of Section 3222.1(b) is neither remote nor speculative. Dr. Khan describes the untenable and objectionable position in which Act 13 places him: choosing between violating a Section 3222.1(b) confidentiality agreement and violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care. The Commonwealth's attempt to re-define Dr. Khan's interests and minimize the actual harm asserted is unpersuasive. Our existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable. See, e.g., Cozen O'Connor v. City of Phila. Bd. of Ethics, 13 A.3d 464 (Pa.

2011) (law firm has standing to test validity of Ethics Act provision in advance of undertaking potentially prohibited action where alternative is testing law by defying it and potentially damaging firm's ethical standing and reputation; third option of maintaining client debt on books for decades equally unappealing); Shaulis v. Pa. State Ethics Comm'n, 833 A.2d 123 (Pa. 2003) (attorney has standing to challenge statutory limitation on her practice of law in certain venues without taking prohibited action that would expose her to ethical investigation she was attempting to forestall; third option of foregoing practice in area of expertise equally unappealing); see also Arsenal Coal Co. v. Commonwealth, 477 A.2d 1333 (Pa. 1984) (pre-enforcement review of regulations is appropriate where lengthy process of addressing regulations' validity in enforcement action would result in ongoing uncertainty in industry and potential operational impediments and penalties).

In light of Dr. Khan's unpalatable professional choices in the wake of Act 13, the interest he asserts is substantial and direct. Moreover, Dr. Khan's interest is not remote. A decision in this matter may well affect whether Dr. Khan, and other medical professionals similarly situated, will accept patients and may affect subsequent medical decisions in treating patients -- events which may occur well before the doctor is in a position to request information regarding the chemical composition of fracking fluid from a particular Marcellus Shale industrial operation. Additional factual development that would result from awaiting an actual request for information on behalf of a patient is not likely to shed more light upon the constitutional question of law presented by what is essentially a facial challenge to Section 3222.1(b). Accordingly, we reverse the decision of the Commonwealth Court regarding Dr. Khan's standing and we remand the

matter to the Commonwealth Court for a merits decision of Dr. Khan's substantive claims.<sup>14</sup>

### **B. Political question**

Also in the justiciability rubric, the Commonwealth argues that the Commonwealth Court "went beyond merely assessing the constitutionality of Act 13" and violated the separation of powers doctrine. According to the Commonwealth, the Commonwealth Court interfered with the exercise of the General Assembly's constitutional police powers by "revisiting" and "second-guessing" legislative choices. The Commonwealth accuses the court below of substituting its own "policy judgments and preferences" to dictate how the General Assembly should regulate local government. Citing Article I, Section 27 and Article IX, Section 1 of the Pennsylvania Constitution, the Commonwealth asserts that the General Assembly has the power and exclusive authority to retract local governments' powers to regulate oil and gas operations. See PA. CONST. art. I, § 27; art. XI, § 1 (General Assembly to provide by general law for local government). The lower court, according to the Commonwealth,

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<sup>14</sup> The Commonwealth also offers arguments regarding the merits of Dr. Khan's distinct claims premised upon Article III, Section 3 (bills to contain single subject) and Article III, Section 32 (special laws), including an assertion that Section 3222.1(b) contains limitations on dissemination of confidential information that are no different than those found in federal government regulations. See Agencies' Brief (as cross-appellees) at 27-29; see also Citizens' Petition for Review, 3/29/12, at 97-106 (Counts XI and XII). In their reply brief, the citizens respond that the federal scheme regarding protection of trade secrets is substantially different from Act 13, and address at some length the merits of Dr. Khan's claims. The Commonwealth Court did not reach the merits, however, having dismissed Dr. Khan from the action on standing grounds. In light of the procedural posture of the matter and the distinct and narrow nature of his challenge, we offer no opinion on the merits in advance of remand. See Cozen O'Connor, 13 A.3d at 471.

should have respected Act 13 as an exercise of legislative branch power and should have refrained from acting in this matter at all.<sup>15</sup>

In support of this global position of non-reviewability, the OAG's Brief asserts that the sovereign is the constitutional trustee of Pennsylvania's public natural resources and the General Assembly is vested with exclusive authority to regulate the oil and gas industry. OAG's Brief (as appellant) at 27 (citing PA. CONST. art. I, § 27). The Commonwealth portrays the citizens here as merely discontent with the General Assembly's policy choices, and their challenge as a veiled attempt to change the result of a political clash within the General Assembly, in which the interests of these particular citizens were defeated. According to the Commonwealth, even proceeding to a merits

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<sup>15</sup> To support its allegation that the Commonwealth Court engaged in judicial policy-making, the Agencies' Brief cites comments made during oral argument by the Honorable Dan Pellegrini, President Judge of the Commonwealth Court, and the author of the opinion below. In those exchanges, President Judge Pellegrini recounted the legislative efforts of sister states to promote oil and gas development and the legal predicate for the existence of municipalities in Pennsylvania. Agencies' Brief (as appellants) at 34-40. The record does not support the *ad hominem* attack on President Judge Pellegrini by the agencies. Courts explain their decisions with reasoned expressions, and the Commonwealth Court did so here. On appeal, our review is focused on the decision and the legal grounds upon which the decision is rendered, in light of the claims raised by the parties and of the governing law. We review the decision of the lower court for error and not for alleged motivations of individual panel members, just as we view challenged legislation itself according to its terms and not according to any alleged motivations on the part of individual members of the General Assembly. See City of Philadelphia v. Commonwealth, 838 A.2d 566, 580 (Pa. 2003) (with respect to enrolled bill, "subjective, individualized motivations or impressions of specific legislators [are not] an appropriate basis upon which to rest a determination as to [the bill's] validity"). Even if the Commonwealth Court's reasoned expression provided unpersuasive support for the court's positions, the agencies' opinion that President Judge Pellegrini's questioning from the bench revealed that the *en banc* Court majority was making an inappropriate policy-driven decision on a political question would lack merit. We also note that the Commonwealth offered no objection to President Judge Pellegrini's questioning, along the lines of its argument here, at the time the exchange occurred.

decision here interferes with the General Assembly's "discretionary authority," as the Constitution does not articulate any manageable standards by which the judicial branch can reasonably assess the merits of the General Assembly's policy choices regarding the Commonwealth's natural resources. Id. at 27-30.

The citizens respond that the Commonwealth Court simply decided a constitutional challenge to Act 13 properly subject to judicial review, and pointedly note that the General Assembly does not police the constitutionality of its own acts. According to the citizens, the political question doctrine bars courts from deciding "a very limited subset of cases," *i.e.*, those cases in which courts are considering matters that are committed in the constitutional text to a co-equal branch of government and, in addition, which contain no claims that the co-equal branch of government acted outside the scope of its constitutional authority. The citizens characterize their challenges as soundly based upon the question of whether the General Assembly enacted legislation in accordance with constitutional mandates that exist precisely to restrict its powers. The citizens dismiss as an unsubstantiated label the Commonwealth's claims that their challenge is to unreviewable policy determinations by the General Assembly. According to the citizens, the limitations on the General Assembly's powers derive from the Constitution, not from some general body of law, and alleged good intentions of the legislative branch "do not excuse non-compliance with the Constitution." In this regard, the citizens emphasize that courts, and the Pennsylvania Supreme Court in particular, have the power to determine the constitutionality of statutes, and the General Assembly cannot "instruct" courts as to what measures are constitutional, or are beyond the reach of a constitutional challenge. Citizens' Brief (as appellees) at 63-66.

The Commonwealth Court held that the citizens presented a justiciable question. On this point, the *en banc* panel was unanimous. The court noted that it was simply

required to determine whether Act 13 violates the Pennsylvania Constitution, a task implicating a core judicial function. The court rejected the Commonwealth's arguments, reasoning that adopting the Commonwealth's approach to the political question doctrine would mean that no action of the General Assembly, defended as an exercise of its police power, would ever be subject to a constitutional challenge. Robinson Twp., 52 A.3d at 479.

We agree with the core position of the citizens and the Commonwealth Court. The political question doctrine derives from the principle of separation of powers which, although not expressed in our Constitution, is implied by the specific constitutional grants of power to, and limitations upon, each co-equal branch of the Commonwealth's government. Our Constitution vests legislative power in the General Assembly, which consists of the Senate and the House of Representatives. See PA. CONST. art. II, § 1. The General Assembly is charged with the passage of laws generally and, additionally, with passage of specifically authorized legislation. See PA. CONST. art. III, §§ 1-27. Passage of laws is subject to the restrictions of Article III, Sections 28 through 32, and is further limited fundamentally by those rights and powers reserved to the people in Article I. See PA. CONST. art. III, §§ 28-32; art. I, § 25. The judicial power of the Commonwealth is not vested in the General Assembly, but in a unified judicial system, which includes the Commonwealth Court and, ultimately, this Court, which presides over our branch of government. See PA. CONST. art. V, § 1.

In application, the Court has recognized that “[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law.” Council 13, 986 A.2d at 75 (quoting Thornburgh v. Lewis, 470 A.2d 952, 955

(Pa. 1983)). This is not a radical proposition in American law. See, e.g., Marbury v. Madison, 1 Cranch 137, 166 (1803) (“where a specific duty is assigned by law [to another branch of government], and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy”).<sup>16</sup> Indeed, “[o]rdinarily, the

<sup>16</sup> In the Federalist Paper #48, James Madison observed on the separation of powers in government:

[I]n a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this [legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions.

Federalist Paper #48. Madison continued, quoting Thomas Jefferson’s seminal work, Notes on the State of Virginia, concerning the prospect of the most extreme of abuses:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

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exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers," and abstention under the political-question doctrine is implicated in limited settings. See Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 596 (Pa. 2013) ("HHAP") (quoting Sweeney v. Tucker, 375 A.2d 698, 705 (Pa. 1977)).

The applicable standards to determine whether a claim warrants the exercise of judicial abstention or restraint under the political question doctrine are well settled. Courts will refrain from resolving a dispute and reviewing the actions of another branch only where "the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" Sweeney, 375 A.2d at 706; Council 13, 986 A.2d at 76 (quoting Thornburgh). To illustrate our approach to the political question doctrine, we customarily reference the several formulations by which the U.S. Supreme Court has described a "political question" in Baker v. Carr, 369 U.S. 186, 217 (1962). See, e.g., Council 13; Thornburgh. Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non-judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning

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Id.; see also United States v. Brewster, 408 U.S. 501, 546-47 (1972) (Brennan, J., dissenting, joined by Douglas, J.) ("Jefferson looked on the 'tyranny of the legislatures' as 'the most formidable dread at present, and will be for long years.'").

adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question. See Council 13, 986 A.2d at 75 (quoting Baker, 369 U.S. at 217); see also HHAP, 77 A.3d at 596-98 & n.11 (listing examples).

We have made clear, however, that “[w]e will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty.” Council 13, 986 A.2d at 76 (quoting Thornburgh). “[T]he need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake.” HHAP, 77 A.3d at 597 (citing Sweeney, 375 A.2d at 709 (“[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed.”)); accord Gondelman v. Commonwealth, 554 A.2d 896, 899 (Pa. 1989) (“Any concern for a functional separation of powers is, of course, overshadowed if the [statute] impinges upon the exercise of a fundamental right. . . .”). There is no doubt that the General Assembly has made a policy decision respecting encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation, and such a political determination is squarely within its bailiwick. But, the instant litigation does not challenge that power; it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command. Responsive litigation rhetoric raising the specter of judicial interference with legislative policy does not remove a legitimate legal claim from the Court’s consideration; the political question doctrine is a shield and not a sword to deflect judicial review. Council 13, 986 A.2d at 75-76. Furthermore, a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly’s expression of policy rendered in a polarized political context. See id. at 76; HHAP, 77 A.3d at 598

("political question doctrine does not exist to remove a question of law from the Judiciary's purview merely because another branch has stated its own opinion of the salient legal issue"). Whatever the context may have been, it produced legislation; and it is the legislation that is being challenged. As the U.S. Supreme Court has stated:

The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions, and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

Smyth v. Ames, 169 U.S. 466, 527-28 (1898), overruled on other grounds by Federal Power Comm'n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 602 (1942); accord Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2577-80 (2012) (citing Marbury v. Madison, 1 Cranch at 175-76 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . . And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits."))).

Here, the Commonwealth does not identify any provision of the Constitution which grants it authority to adopt non-reviewable statutes addressing either oil and gas or policies affecting the environment. Organic constitutional provisions on which the

citizens rely offer, as will become evident in our later discussion, the type of judicially discoverable and manageable standards by which courts are able to measure and resolve the parties' dispute without overstepping the Judiciary's own constitutional bounds. Furthermore, this case presents no prospect that the Court would be required to make an initial policy determination outside our judicial function or undertake independent resolution of a policy matter outside the purview of our judicial authority; nor is there an unusual need for unquestioning adherence to the legislative decision already made. Indeed, in terms of the judicial function, at least, this case is not extraordinary at all: all that is required to resolve the parties' various disputes is that we construe and apply constitutional provisions and determine whether aspects of Act 13 violate our charter. The task is neither more nor less intrusive upon a coordinate branch function than in other matters in which we are called upon to determine the constitutional validity of a legislative act. Accord HHAP, 77 A.3d at 598 & n.12 (noting that notion of "respect" due coordinate branches is relatively narrow criterion in political question jurisprudence; judicial finding that Legislature passed unconstitutional law entails no lack of respect in constitutional sense nor does it create political question).

Litigation polemics aside, Act 13 is a legislative act subject to the strictures of the Pennsylvania Constitution and the U.S. Constitution. The Commonwealth offers no persuasive argument that the citizens' varied challenges raise only questions essentially political in nature regarding the validity of Act 13. The parties' dispute implicates questions of whether Act 13 was adopted pursuant to constitutional procedures, and of whether Act 13 impinges upon the rights reserved to citizens and guaranteed by the Pennsylvania Constitution and the U.S. Constitution. The evident investment of the parties to this dispute in the policies articulated in and the politics behind Act 13 do not serve to alter the nature as "questions of law" of the specific legal issues before us. See

Council 13, 986 A.2d at 76. The nature of the citizens' claims requires nothing more than the exercise of powers within the courts' core province: the vindication of a constitutional right. See Thornburgh, 470 A.2d at 955-56. Accordingly, we conclude that the citizens' claims are justiciable and, as a result, the Commonwealth Court's decision on this point is affirmed.

### III. The Constitutionality of Act 13

As noted, on the merits, the Commonwealth Court held that certain specific provisions of Act 13 were unconstitutional. The *en banc* panel enjoined enforcement of Sections 3215(b)(4) and 3304 of Act 13, and of those provisions of Chapter 33 which enforce Section 3304. See Robinson Twp., 52 A.3d at 485, 493 (citing 58 Pa.C.S. §§ 3215(b)(4), 3304-3309). The effect of the injunction was to prohibit the Department of Environmental Protection from granting waivers of mandatory setbacks from certain types of waters of the Commonwealth, see 58 Pa.C.S. § 3215(b)(4); and to permit local government to enforce existing zoning ordinances, and adopt new ordinances, that diverge from the Act 13 legal regime, without concern for the legal or financial consequences that would otherwise attend non-compliance with Act 13, see 58 Pa.C.S. §§ 3304-3309.

The Commonwealth Court rejected the citizens' remaining claims. Specifically, the panel sustained the Commonwealth's preliminary objections to claims: (1) that provisions of Act 13 violate the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution; (2) that Act 13 is a "special law," in violation of Article III, Section 32 of the Pennsylvania Constitution; (3) that Section 3241(a) permits a private taking of property in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution; (4) that Section 3305(a)-(b) delegates judicial and legislative powers to the Public Utility

Commission, an executive agency, in violation of the separation of powers doctrine; and (5) that provisions of Act 13 are unconstitutionally vague.<sup>17</sup>

On appeal, the Commonwealth challenges the lower court's decision regarding Sections 3215(b)(4) and 3304 through 3309, but supports affirmance of the Commonwealth Court in all other respects. The citizens offer several reasons upon which to affirm the aspects of the Commonwealth Court's decision sustaining their challenges. And, the citizens advance other theories in support of the claim that other provisions of Act 13 and Act 13, in its totality, are unconstitutional.

**A. Article I, Section 27 of the Pennsylvania Constitution (Environmental Rights)**

**Article I, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the U.S. Constitution (Due Process);**

**Article II, Section 1 of the Pennsylvania Constitution (Legislative Power)**

We begin by reviewing the parties' respective claims regarding Sections 3215(b)(4) and (d), 3303, and 3304. See Citizens' Petition for Review, 3/29/12, at 27-49, 63-82, 88-91 (Counts I-III, VI, VIII). The Commonwealth Court granted the citizens summary relief on separation of powers and due process theories, holding that Sections 3215(b)(4) and 3304 are unconstitutional.<sup>18</sup> As we will explain in more detail *infra*,

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<sup>17</sup> On appeal, the citizens have abandoned the claim that Act 13 is unconstitutionally vague (Counts IX and X of the citizens' petition for review).

<sup>18</sup> In Count VIII of the Citizens' Petition for Review, the citizens sought "a declaration that the delegation of powers to the Pennsylvania Department of Environmental Protection in Act 13, Section 3215(b)(4) . . . is an unconstitutional breach of the doctrine of Separation of Powers. . . ." See Citizens' Petition for Review, 3/29/12, at 88-91 (Count VIII). The citizens claimed that Section 3215(b)(4) violates Article II, Section 1 of the Pennsylvania Constitution, which vests legislative power in the General (continued...)

Section 3215(b)(4) creates a process by which the Department of Environmental Protection grants waivers to oil or gas well permit applicants from statutory protections of certain types of waters of the Commonwealth. Section 3304, meanwhile, implements a uniform and statewide regulatory regime of the oil and gas industry by articulating narrow parameters within which local government may adopt ordinances that impinge upon the development of these resources. See 58 Pa.C.S. §§ 3215(b)(4), 3304. The court sustained the Commonwealth's preliminary objections with respect to the remaining claims.

In enjoining Section 3304, the Commonwealth Court held that the provision violated the citizens' due process rights by requiring local governments to amend their existing zoning ordinances without regard for basic zoning principles and, thereby, failing to protect interests of property owners from harm and altering the character of neighborhoods. Robinson Twp., 52 A.3d at 484-85. The court explained that zoning laws protect landowners' enjoyment of their property by categorizing uses, designating compatible uses to the same district, and generally excluding incompatible uses from districts, with limited exceptions that do not affect the comprehensive land use scheme of the community. Local government, according to the court, relies on public input to produce a rational plan of development, under which "each piece of property pays, in the form of reasonable regulation of its use, for the protection that the plan gives to all property lying within the boundaries of the plan." Id. at 482. The court stated that the goal of zoning is to preserve the rights of property owners within the constraints of the

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Assembly. The Commonwealth Court disposed of this claim citing the non-delegation doctrine, the theoretical underpinnings of which are in the separation of powers doctrine. 52 A.3d at 490-91 ("Count VIII -- Violation of Non-Delegation Doctrine -- DEP") (citing PA. CONST. art. II, § 1).

maxim “use [your] own property as not to injure your neighbors.” Id. (quoting In re Realen Valley Forge Greenes Assocs., 838 A.2d 718, 728 (Pa. 2003)).

Addressing residential districts in particular, the court noted that “reserving land for single-family residences preserves the character of neighborhoods, securing zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” Id. at 481 (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)). But, the court observed, Act 13 requires municipalities to act affirmatively to allow incompatible uses, such as “drilling operations and impoundments, gas compressor stations, storage and use of explosives” in all zoning districts, including residential, and “applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.” Id. at 484-85. The court held that, because it commands unconstitutional zoning outcomes, Section 3304 violates due process.

The court also rejected the Commonwealth’s attempt to justify Act 13’s abrupt disruption of existing zoning schemes as an exercise of police power rationally related to its stated purposes, *i.e.*, the optimal development of the Commonwealth’s natural resources. According to the court, the interests that justify the exercise of police power in zoning and in the development of the oil and gas industry are not the same. This is so because the interest in oil and gas development is centered on efficient production and exploitation of resources, while the interest in zoning focuses on the orderly development and regulation of land use, consistent with local demographic and environmental concerns. Id. at 483 (quoting Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 865 (Pa. 2009)). Accordingly, the court explained, Act 13’s stated purposes, including its main interest in accommodating the exploitation of the Commonwealth’s oil and gas resources, are not a creditable justification for the Section 3304 zoning guidelines; zoning

action is only justified if compliant with the comprehensive plan of the community. Id. at 483-84 (citing 58 Pa.C.S. § 3202).

Regarding Section 3215(b)(4), which the Commonwealth Court also enjoined, the panel explained that the provision lists specific setbacks between a water source and a gas well bore (the physical well bore is the opening in the ground through which gas is extracted and is generally surrounded by the wider disturbed area of a well site). Waiver of planned statutory setbacks is broadly authorized by Section 3215(b)(4) and neither other parts of Section 3215, nor Act 13 generally, constrain or guide the exercise of discretion by the Department of Environmental Protection, an executive agency, as to when setback waivers are appropriate. The panel concluded that Act 13 gives the executive branch “the power to make legislative policy judgments otherwise reserved for the General Assembly” and is, therefore, unconstitutional on that ground. Id. at 493 (citing PA. CONST. art. II, § 1; Pennsylvanians against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383 (Pa. 2005) (“PAGE”)).

Finally, the Commonwealth Court briefly discussed and ultimately rejected the citizens’ claims regarding both the enjoined provisions and Sections 3215(d) and 3303, premised upon Article I, Section 27 of the Pennsylvania Constitution.<sup>19</sup> With respect to this Environmental Rights Amendment challenge, the Commonwealth Court stated that any municipal obligation “to strike a balance between oil and gas development and the preservation of natural, scenic, historic and esthetic values of the environment” derived from the Municipalities Planning Code, a General Assembly enactment. Because Act 13

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<sup>19</sup> Briefly, Section 3215(d) states that the Department of Environmental Protection “may consider” comments from -- in relevant part -- municipalities in making its well permit determinations, and forecloses any appeal by a municipality from permit decisions. Section 3303 purports to occupy the field of environmental regulation to the extent it implicates oil and gas operations, to the exclusion of any existing or future local ordinances. See 58 Pa.C.S. §§ 3215(d), 3303.

preempts environmental obligations, the panel determined that municipalities are “relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the [Municipalities Planning Code].” The court thus concluded that the citizens failed to state a claim for relief under Article I, Section 27. *Id.* at 488-89 (citing 53 P.S. § 10301(a)(6); Cmty. Coll. of Del. County v. Fox, 342 A.2d 468 (Pa. Cmwlth. 1975)).

Judge Brobson filed a dissenting opinion, joined by Judges Simpson and Covey. The dissent would have held that Act 13, except for Section 3215(b)(4)’s setback waiver provision, is constitutional. According to the dissent, Section 3304 of Act 13 was a legitimate exercise of the police power and it was not the court’s “role to pass upon the wisdom of a particular legislative enactment.” *Id.* at 497-98 (Brobson, J., dissenting, joined by Simpson, Covey, JJ.).

### *1. The Parties’ Arguments*

As appellant, the Commonwealth argues that the Commonwealth Court erred in granting the citizens summary relief as to Sections 3304 and 3215(b)(4) of Act 13. Regarding Section 3304, the Commonwealth argues that the General Assembly delegated zoning powers to municipalities through the Municipalities Planning Code; the Code, like any other statute, is subject to amendment, alteration, and repeal by subsequent enactments, such as Act 13. According to the Commonwealth, the Commonwealth Court turned the relationship between the General Assembly and local government “upside-down” by concluding that Section 3304 is unconstitutional. Agencies’ Brief (as appellants) at 12-15.

Moreover, the Commonwealth states that Act 13, in its entirety, is constitutional. The Commonwealth notes that the General Assembly exercised its “broad police power”

to enact Act 13, which is “a comprehensive reform of the oil and gas laws of this Commonwealth driven by, among other things, policy determinations of promoting the development of the Commonwealth’s vast natural gas reserves; encouraging economic development, job creation and energy self-sufficiency; providing for impact fees to benefit municipalities where unconventional gas drilling occurs; ensuring uniformity of local zoning ordinances throughout the Commonwealth; and revising and updating the Commonwealth’s environmental regulations related to the oil and gas industry.” According to the Commonwealth, Act 13’s stated purposes are valid legislative objectives, and the means for implementing these objectives is based on the General Assembly’s “informed judgment” regarding the balance of interests at issue. *Id.* at 15. The Commonwealth offers that Act 13 is a non-arbitrary and non-discriminatory exercise of the police power. This power, the Commonwealth states, is one of the “least limitable powers” of the General Assembly, and the burden to prove that the General Assembly exceeded its power is heavy. *Id.* at 17 (quoting Eagle Envtl. II, L.P. v. Commonwealth, 884 A.2d 867, 882 (Pa. 2005)).<sup>20</sup>

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<sup>20</sup> Business and industry *amici* writing in support of the Commonwealth note the economic and energy benefits to the people expected from the exploitation of natural gas resources in the Marcellus Shale Formation. One brief emphasizes that the Marcellus Shale deposits offer great potential to answer the present and future energy necessities of the Commonwealth and the nation from an affordable domestic source. The deposits are located in proximity to East Coast metropolitan areas and industrial and commercial centers, which promises to keep gas transportation costs to a minimum. Without offering many details about the amount of recoverable natural gas with current or developing technology, *amici* suggest that the Marcellus Shale Formation holds “trillions of cubic feet of natural gas” that will support the burgeoning natural gas industry for several decades. See, e.g., Brief of *Amicus Curiae* American Petroleum Institute at 2.

According to another brief, the natural gas industry is playing a key role in economic recovery by creating jobs and stimulating service industries in communities across Pennsylvania. See, e.g., Brief of *Amici Curiae* The Pennsylvania Independent (continued...)

The standard to overcome the strong presumption of constitutionality of duly-enacted legislation is whether the statute “clearly, palpably, and plainly” violates the Constitution. Id. at 880. The Commonwealth states that the *en banc* panel failed to apply this deferential standard of review to the citizens’ claims regarding Section 3304.<sup>21</sup>

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Oil and Gas Association *et al.* at 12. The Commonwealth, meanwhile, suggests that the balkanization of land use regulation in the various communities across Pennsylvania has generally hindered the development of the Marcellus Shale play. Act 13, according to the Commonwealth, resolves this problem and fosters optimal development while also adequately respecting property and environmental rights. See Agencies’ Brief at 16 (citing 58 Pa.C.S. § 3202).

<sup>21</sup> According to the Commonwealth, this failure was critical because the lower court was supposedly divided evenly regarding the provision’s constitutionality and, in light of the presumption, the question should have been resolved in favor of constitutionality. Id. at 18 (citing Estate of Fridenberg v. Commonwealth, 33 A.3d 581, 591 (Pa. 2011) (“In reviewing the constitutionality of a statute, we presume the Legislature did not intend for the statute to violate either the United States or this Commonwealth’s Constitution.”)). This particular claim of error involving the standard of review has no merit. The Commonwealth Court has nine commissioned judges. Pursuant to the Commonwealth Court’s Internal Operating Procedures, the present matter was assigned to an *en banc* panel composed of seven commissioned judges of the court chosen in rotation: President Judge Dan Pellegrini, and Judges Bernard L. McGinley, Bonnie Brigance Leadbetter, Robert Simpson, P. Kevin Brobson, Patricia A. McCullough, and Anne E. Covey. See Cmwlth. Ct. I.O.P. §§ 111, 112. The Commonwealth Court has an internal operating procedure by which commissioned judges who did not sit on the panel hearing the case are offered an opportunity to object to the decision, and the writing judge can then make revisions. In close cases concerning whether the entirety of the commissioned judges agree with the result, a majority vote of the commissioned judges determines whether the panel’s opinion will be filed. See id. at §§ 251-256.

In this case, the actual panel hearing the case was divided 4-3. Of the two commissioned judges who were not members of the *en banc* panel, Judge Mary Hannah Leavitt indicated her non-participation, and Judge Renee Cohn Jubelirer indicated her disagreement with the proposed opinion, resulting in a tie vote of the eight participating commissioned judges. As we understand the internal procedure, the disagreement did not oblige or entitle Judge Cohn Jubelirer to file a responsive opinion (continued...)

If the Commonwealth Court had applied the proper standard, the Commonwealth asserts, the court would have concluded that Act 13 is a valid exercise of the police power, and that any and all amendments to local ordinances required by Act 13 would be *a fortiori* valid. Id. at 22-23.<sup>22</sup>

Regarding Section 3215(b)(4), the Commonwealth argues that the lower court erred in determining that the General Assembly failed to make basic policy choices and/or to create adequate standards to guide and restrain the setback waiver decisions

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and, as a result, change the outcome of the panel vote. Id. Per court rule, the court then filed the proposed opinion (and dissent) as circulated by the *en banc* panel members. See id. at § 256(b). That filed opinion represents the decision of the court.

The limited full-court participation before a decision and opinion is filed is a procedural matter, governed by rules that operate independently of the nature of the claims presented, *e.g.*, constitutional or non-constitutional claims. The judges to whom the case was assigned for decision weighed the presumption of constitutionality into their decision, as a matter of substantive law governing the burden of proof on the citizens; and the dissenting opinion did not dispute the governing standard. A majority of the panel concluded that the citizens met their burden as to two claims. Contrary to the Commonwealth's current contention, the presumption of constitutionality did not require the Commonwealth Court to alter its decisional procedures, and the decision in Estate of Fridenberg is not to the contrary.

In any event, this Court's decisional task in passing upon the questions of law posed on appeal is not affected by the happenstance of which party prevailed below.

<sup>22</sup> The parties also make arguments concerning whether this Court reviews a due process claim in the zoning context under a rationally-related test, *i.e.*, whether the statute "seek[s] to achieve a valid state objective by means that are rationally related to that objective," or under heightened scrutiny. See Agencies' Brief (as appellants) at 20 (quoting Khan v. State Bd. of Auctioneer Examiners, 842 A.2d 936, 946-47 (Pa. 2004); Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors, 491 A.2d 86, 90 (Pa. 1985)); Citizens' Brief (as appellees) at 17-20 (citing, *inter alia*, Surrick v. Zoning Hearing Bd., 382 A.2d 105, 108 (Pa. 1977)). In light of our ultimate disposition, we offer no opinion on the issue.

committed to the Department of Environmental Protection. According to the Commonwealth, Section 3215(b)(4) cannot be read separately from the rest of subsection (b), which articulates “rigid setbacks” from particular bodies of water and provides that additional conditions may be employed if necessary to protect the waters of the Commonwealth. The Department, according to the Commonwealth, indeed has discretion to grant waivers but its discretion is restrained by the condition that a permittee must submit a plan identifying additional measures to protect the Commonwealth’s waters. See Agencies’ Brief (as appellants) at 24-28.<sup>23</sup>

From the Commonwealth’s perspective, Section 3215(b) therefore “narrowly” delimits agency discretion and precludes the issuance of arbitrary setback waivers. In addition, under Section 3215(b), the Department may not burden the permittee with more than “necessary” permit conditions. These requirements, according to the Commonwealth, create a floor and a ceiling within which the Department may articulate appropriate permit restrictions. In its determinations, the Commonwealth states, the Department is further “guided and restrained” by the purposes of Act 13 and by the Commonwealth’s other environmental statutes, such as the Clean Water Act. Id. at 29

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<sup>23</sup> The Commonwealth also notes that Section 3215(b) continues substantially the same regime of review and approval of permit proposals as the prior version of the Oil and Gas Act, suggesting that, as a result, the provision should be found constitutional. We agree with the citizens’ assessment, see infra, that the current setback waiver scheme is substantially different from its predecessor. More importantly, we note that this Court has never addressed a constitutional challenge to the predecessor of Section 3215(b) premised upon the same arguments that the citizens make here. Accordingly, to the extent that the Commonwealth is suggesting that we have tacitly approved Section 3215(b), we cannot credit the assertion. Holt v. Legislative Redistricting Comm’n, 38 A.3d 711, 735-36 (Pa. 2012) (legislative redistricting plan “[wa]s not insulated from attack by decisions of this Court finding prior redistricting plans constitutional, unless a materially indistinguishable challenge was raised and rejected in those decisions”).

(citing 58 Pa.C.S. § 3202); see also OAG's Brief (as appellant) at 37 (citing 58 Pa.C.S. § 3257 (existing rights and remedies preserved and cumulative remedies authorized)). The Commonwealth asserts that this Court has never required the General Assembly "to set forth every detail of what is and is not necessary" or to establish exact setbacks for industrial well drilling. Rather, "details of a general program can be left to the particular agency." Agencies' Brief (as appellants) at 30 (citing Dussia v. Barger, 351 A.2d 667, 672 (Pa. 1976)). In the Commonwealth's view, Section 3215(b) does not simply direct the Department to consider certain standards, but creates a process with definite guidelines and a specific performance standard for the Department to follow in determining whether to grant setback waivers. Id. at 31-32 (citing PAGE, 877 A.2d at 418). The statutory scheme then permits the Department to use its expertise to apply express statutory standards. Id. at 32-33 (citing Eagle Env'tl. II, 884 A.2d at 880-81); OAG's Brief (as appellant) at 36.<sup>24</sup>

In response to the Commonwealth's appeal, the citizens request that we affirm the lower court's decision. To start, the citizens claim that Article I, Section 1 of the Pennsylvania Constitution guarantees an individual's rights "to acquire, possess and protect property and to use that property as the individual sees fit." Citizens' Brief (as appellee) at 8 (citing Appeal of Girsh, 263 A.2d 395, 397 n.3 (Pa. 1970)). This right, according to the citizens, is limited by the Commonwealth's police power. The citizens do not dispute that the General Assembly has the authority to preempt local laws, amend the Oil and Gas Act, or simply remove municipalities' zoning power entirely.

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<sup>24</sup> The Commonwealth also suggests that review of the citizens' Section 3215(b) claim is premature because the citizens "do not point to any specific waivers which have been granted or any regulations which have been enacted." OAG's Brief (as appellant) at 35. We have addressed at length why the citizens' interest in the outcome of this litigation is neither remote nor speculative. The similar contention in the context of the Section 3215 claim necessarily fails.

But, the citizens argue, having the power does not equate to the conclusion that the exercise of the power in a particular instance is *per se* proper. According to the citizens, while the General Assembly may dissolve the municipalities' power to zone, the General Assembly may not remove the protections created by existing zoning districts only to replace them with a zoning scheme that is inconsistent with constitutional mandates generally imposed on any legislative zoning effort. Id. at 12-15. The citizens emphasize that the exercise of the police power to zone is limited by the Constitution. Thus, a zoning legislative enactment like Act 13 is constitutional only if it ensures that a use of property does not cause harm to neighboring property rights or interests, and it protects "the lives, health, morals, comfort and general welfare of the populace." Id. at 8, 15 (citing Realen, 838 A.2d at 728). According to the citizens, the purpose of zoning is to develop a comprehensive and orderly land use scheme that segregates incompatible uses, based on the unique characteristics of each community; in this sense, "[t]he police power to zone cannot be exercised in an unreasonable or arbitrary manner" but must balance costs and benefits in each community. Id. at 9-11, 15 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926); Realen, 838 A.2d at 729)).

The citizens state that the General Assembly cannot justify a zoning action violative of these fundamental parameters by reference to a policy to promote oil and gas development in the Commonwealth. The interests implicated in zoning, the citizens assert, are distinct from, and more complex than, those implicated in the narrow arena of oil and gas development. Accordingly, an action that, when viewed in isolation, is perfectly acceptable to accomplish the resource utilization purposes of Act 13 may be unconstitutional from a zoning perspective. The citizens emphasize that Act 13 is a zoning act that must be assessed in accordance with constitutional standards applicable

to all other zoning legislation. According to the citizens, Act 13 confers no benefits to the community sufficient to justify its disruptive effects, and the Commonwealth's blanket assertion that the statute has an appropriate purpose is insufficient to meet constitutional standards. Id. at 14-17.

By any measure, the citizens argue, Act 13 works a remarkable revolution in zoning in this Commonwealth. The Act introduces heavy-duty industrial uses -- natural gas development and processing, including permission to store wastewater (a drilling by-product) -- into all existing zoning districts as of right, including residential, agricultural, and commercial. The intrusion is made, according to the citizens, regardless of whether the district is suitable for industrial use, whether the industrial use is compatible with existing uses and expectations, and whether dictated accompanying setbacks are sufficient to protect the environmental health, safety, and welfare of residents in particular affected communities. The citizens describe the development process of shale drilling for natural gas:

Unconventional well sites are generally developed in different stages and are on average several acres in size. Initially, a road is constructed and a pad is cleared. The impact is typical of any a [sic] noisy, dusty construction site, and the process can take several months to complete. Upon completion of the pad, drilling generally entails twenty-four (24) hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site. There will also be a substantial amount of truck traffic to and from the drill site. Once completed, the well pads will include wellheads, condensate tanks, vapor destruction units with open flames, pipelines and metering stations. These are typically structures that vary tremendously in size, scale and appearance from dwellings or other buildings found in residential and commercial zoning districts. Compressor stations and processing plants are clearly industrial uses as they process raw materials into various products. Unlike

well development, the intensity of activities remains constant.

Id. at 21 n.11. Natural gas extraction, the citizens continue, requires heavy truck traffic, open flames, workers living on-site, and the process unavoidably produces noise, odors, and harmful emissions, including volatile organic compounds and sulfur dioxide, a neurotoxin. Id. at 22, 25.

For example, one affidavit of record recounts the experience of a homeowner in a previously rural, non-industrialized area of Amwell Township, Washington County. See S. Taney Affidavit, 5/3/2012. The homeowner, a nurse, leased her mineral rights and drilling operations (three wells, a fracking fluid impoundment, and a drill cuttings pit) began approximately 1,500 feet from her home. Access to the drilling site occurred mainly via a dirt road running approximately fifteen feet from her residence. The homeowner describes that, during the initial construction process, the access road was used daily and continuously by heavy truck traffic, causing structural damage to her home's foundation, road collapse, as well as large amounts of dust and deterioration to the air quality; the gas company subsequently repaired the damage to her home, and widened and paved the access road to accommodate additional traffic. Moreover, and unsurprisingly, the 24-hour-a-day traffic caused significant noise pollution, which affected the homeowner's ability to enjoy her property.

Once drilling and fracking operations began, and over the next several years, the homeowner noticed significant degradation in the quality of the well water which had supplied her homestead and those of several neighbors with fresh and clean water during the century in which her family had owned the property. In the homeowner's words: "my well water began to stink like rotten eggs and garbage with a sulfur chemical smell[,] . . . when running water to take a bath, my bathtub filled with black sediment and again smelled like rotten eggs." Id. at ¶¶ 12-13. The gas company gave the

homeowner a “water buffalo” as a replacement water source.<sup>25</sup> Air quality also became degraded, beginning “to smell of rotten eggs, sulfur, and chemicals” and seeping into the home and the owner’s belongings. Id. at ¶ 15. Several pets died as a result of their exposure to contaminated water. Finally, upon her physician’s advice, the homeowner abandoned her family home because the exposure to the toxic water and air caused her and her children severe health problems such as constant and debilitating headaches, nosebleeds, nausea, difficulty and shortness of breath, skin rashes and lesions, bone and muscle pain, inability to concentrate, and severe fatigue. Id. at ¶¶ 16, 17.

Moreover, the citizens state, communities “have a reasonable concern over the impact on property values due to the perceived or real risk associated with living near industrial activity.” Property values, according to the citizens, will decrease with the prospect of storing drilling wastewater “less than a football field’s distance from . . . homes,” and the prospect of contamination of the soil, air, and water supply.<sup>26</sup> The citizens state that they “relied on the zoning ordinances in their respective municipalities

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<sup>25</sup> A “water buffalo” is a fresh water supply tank or trailer originally designed for field hydration by the military. See Military Field Hydration, online at [http://olive-drab.com/od\\_medical\\_other\\_hydration.php](http://olive-drab.com/od_medical_other_hydration.php) (last accessed on May 23, 2013); Wastecorp Pumps, Wastecorp Water Trailers, online at [www.wastecorp.com/mudsucker/water-trailer.html](http://www.wastecorp.com/mudsucker/water-trailer.html) (last accessed on May 23, 2013).

<sup>26</sup> A resident of Damascus, Wayne County, who operates a twelve-acre organic farm, describes the economic impact that she expects as a result of her neighbors leasing their gas rights. See T. Kowalchuk Affidavit, 5/10/2012. This homeowner relates that an exploratory well was constructed approximately a half mile from her home in 2010. Because Act 13 would permit drilling closer to her home and farm, the homeowner expects that an actual contamination event, *i.e.*, “industrial activity, spills, blowouts, or subsurface methane migration,” or even simply the appearance or possibility of such occurrences, will affect her organic farming business substantially. In the homeowner’s words: “because the farm is our primary asset and we have invested heavily in it, a contamination event would wipe us out financially.” Id. at ¶ 30.

to protect their investments in their homes and businesses, and to provide safe, healthy, and desirable places in which to live, work, raise families, and engage in recreational activities.” Act 13’s blunt “one size-fits-all” accommodation of the oil and gas industry, the citizens argue, will change the character of existing residential neighborhoods and affect planning for future orderly growth in municipalities with significant shale gas reserves, the very neighborhoods which zoning laws encouraged and currently protect. One aspect of the new law, for example, provides for setbacks of 300 feet from “existing structures,” which does not account for currently undeveloped properties or large parcels, much less roads and property lines. In more sparsely-populated rural communities, the effect of Act 13 will be, according to the citizens, “unlimited drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipeline; installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours of operation, all of which may take place in residentially zoned areas.” The citizens conclude that, as a zoning regulation, Act 13 fails to meet the standards of Article I, Section 1 of the Pennsylvania Constitution, the Fourteenth Amendment of the U.S. Constitution, and the caselaw that interprets those respective constitutional provisions. Citizens’ Brief (as appellants) at 22-27.<sup>27</sup>

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<sup>27</sup> The township manager of Mount Pleasant Township, Washington County, described the results of operating under Act 13-like conditions. See M.A. Stevenson Affidavit, 5/4/2012. Mount Pleasant is a thirty-six square mile community of approximately 3,500 people. When Marcellus Shale development began, the local zoning ordinance permitted oil and gas drilling operations as a use of right in all zoning districts. Gas drilling, as a result, developed unrestrained in all areas and zoning districts between 2004 and 2010-11. Mount Pleasant has 108 gas wells, of which 97 are active, two compressor stations, one dew point control facility, four fracking fluid impoundment areas, and miles of pipeline. The manager relates that, “Mount Pleasant has experienced an overturned tanker truck, an explosion, a spill, and seven fires at well sites.” The Township was forced to close one road and threatened to close another (continued...)

Regarding Section 3215(b), the citizens argue that the General Assembly has granted the Department of Environmental Protection open-ended and unrestricted authority “to make fundamental policy choices concerning the setback distance from oil and gas wells to sensitive features,” in violation of the separation of powers doctrine. Specifically, Section 3215(b)(4) requires that the Department issue waivers of setbacks, without providing substantive guidance on standards pursuant to which the Department may decide waiver applications. “In practice,” the citizens state, “the General Assembly requires the Department to ignore the oil and gas well location setback restrictions contained elsewhere in Section 3215 and to create and apply totally new setbacks in the absence of any substantive standards, guidelines or benchmarks.”

Unlike its predecessor, the citizens explain, Act 13 requires the Department to issue waivers; the repealed Oil and Gas Act simply allowed waivers at the Department’s discretion. Citizens’ Brief (as appellees) at 44 (comparing 58 Pa.C.S. § 3215(b)(4) (Department “shall waive” setbacks) and 58 P.S. § 601.205 (Department “may waive”

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(...continued)

in a residential area because the roads had not been built for the “onslaught of heavy truck traffic.” Id. at ¶ 8. Citizen complaints increased, taking a toll on township resources. Subsequently, the Township revised the zoning ordinance, as proposed by a citizens’ committee, to allow oil and gas operations as conditional uses, and to require that the Board of Supervisors undertake site-by-site reviews of proposed drilling. Id. at ¶¶ 13-17.

Other elected officials highlighted additional concerns specific to their townships. See, e.g., A. Schrader Affidavit, 5/3/2012. In Cecil Township, Washington County, a member of the Board of Supervisors noted that one gas drilling company alone has notified the Township that it intends to drill a minimum of 300 wells, on 40 percent of the land within the municipality’s borders. Among other concerns, the supervisor emphasized that some local homes are situated over abandoned coal mines, some of which “have only 10-20 feet of cover above a mine shaft.” Id. at ¶ 36. Such properties are sensitive to seismic testing using dynamite or thumper trucks that could cause subsidence, as well as to explosions of methane gas “typically found in abandon[ed] mines.” Id.

setbacks)). Act 13 provides guidelines which the Department may consider, but it offers no standards of the factors' weight in the waiver determination. Id. at 46 (citing PAGE, 877 A.2d at 418-19). The citizens also reject any comparison between Section 3215(b) and the review process for permit applications under the Solid Waste Management Act, whose constitutionality was at issue in Eagle Environmental II. They note that the permit application provision of the Solid Waste Management Act is part of a comprehensive regulatory scheme and does not stand as the sole basis for approval of an application. Id. (citing Pennsylvania Code provisions implementing Solid Waste Management Act). According to the citizens, Act 13 grants the Department unbridled and unprecedented discretion, when it comes to granting waivers.

The citizens argue further that the standards described by the Commonwealth as implicit in Section 3215(b) are not evident in the plain language of the provision. Section 3215(b) does not require either a meaningful plan, nor a floor and a ceiling for what may be necessary to protect the Commonwealth's waters and the health of communities. Moreover, Section 3202 creates no standards of decision but simply recites general considerations underlying Act 13. None of the non-textual requirements guide the Department's discretion; rather, the agency operates in a legal environment in which its "powers [are] on par with those possessed by the General Assembly," in violation of the separation of powers doctrine. Id. at 48.

Notably, on cross-appeal, the citizens also address their related Environmental Rights Amendment claims, building upon their prior arguments regarding zoning and the protection of local and environmental interests. According to the citizens, municipalities are agents of the Commonwealth, which share the Commonwealth's duties "as trustees to conserve and maintain Pennsylvania's public natural resources for the benefit of [the Commonwealth's] citizens." Citizens' Brief (as cross-appellants) at 32 (citing United

Artists Theater Circ. v. City of Philadelphia, 635 A.2d 612, 620 (Pa. 1993)). Section 27, according to the citizens, creates a public trust for the benefit of all people, including future generations, and the trustee relationship between the Commonwealth and the people requires no implementing legislation to take effect. The citizens recognize that asserting a Section 27 claim does not entitle them to automatic relief, but they argue that “a balancing must take place” between constitutionally-based conservation interests and the exercise of the police power for other purposes. Id. at 33 (quoting Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976)).

Act 13, the citizens assert, has removed from the municipalities “the ability to strike that balance between oil and gas development and the preservation of the natural, scenic, historic and esthetic values of the environment,” and “essentially requires” that industrial uses be permitted across the Commonwealth. The citizens state that Act 13 eliminated any meaningful role for local government as Section 27 trustee, for example, by removing its principal tool in this regard -- zoning; by denying or constricting any right of community members or local government to be heard in the permitting process; and by prohibiting any appeals by municipalities of Department of Environmental Protection-issued well permits. Id. at 34 (citing 58 Pa.C.S. §§ 3212.1(b) & (c), 3215(d)).<sup>28</sup> The citizens also note that zoning is the primary means by which

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<sup>28</sup> The citizens further assert that Section 3212.1(b)-(c) is unconstitutional because it prohibits local input into well permit decisions. The provision states that: the Department of Environmental Protection may consider comments and responses of municipalities in accordance with Section 3215(d), relating to well locations, albeit that the Department’s consideration of comments does not extend the period for issuing or denying well permits. 58 Pa.C.S. § 3212.1(b)-(c). The Commonwealth Court rejected this claim in disposing of the citizens’ other Article I, Section 27 arguments, without addressing Section 3212.1 specifically. The citizens fail to develop their arguments to a degree sufficient to permit this Court to render a reasoned conclusion on this discrete point.

municipalities implement statewide environmental statutes, such as the Appalachian Trail Act, the Wild and Scenic Rivers Act, and the Commonwealth's Environmental Master Plan.

According to the citizens, the Commonwealth Court erred in failing to recognize that the municipalities' fiduciary obligation under Section 27 to evaluate short-term and long-term discrete and cumulative effects on public resources continues to exist even though the General Assembly bluntly sought to occupy the field of environmental regulation insofar as the oil and gas industry is concerned. See id. at 37-39 (citing 58 Pa.C.S. § 3303). These oil and gas operations, according to the citizens, present risks and "will cause degradation and diminution of trust resources" protected by the Environmental Rights Amendment. The citizens claim that Act 13 removes the municipalities' capacity to evaluate and react appropriately and meaningfully to the potential impact of oil and gas operations and, as a result, impedes the municipalities' ability to comply with their constitutional duties. The basic error, the citizens state, derives from the conclusion that the Municipalities Planning Code is the source of the municipalities' obligations rather than the Constitution. A statutory enactment such as Act 13 simply cannot eliminate organic constitutional obligations. See id. at 36-38.<sup>29</sup>

The Commonwealth responds that Act 13 does not violate the Environmental Rights Amendment, found in Section 27 of Article I of our charter. According to the Commonwealth, municipalities have no powers outside those granted by the General

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<sup>29</sup> In the alternative, the citizens assert that Section 3303 of Act 13 (occupying the field of environmental regulation of oil and gas development) should be read narrowly to mean that the municipalities cannot regulate operations (the "how") but allowing zoning restrictions (the "where"). According to the citizens, the narrow reading is the sole application of Section 3303 that is consistent with Article I, Section 27. See Citizens' Brief (as cross-appellants) at 38-39 (citing Huntley, 964 A.2d at 857). In light of our decision, we express no opinion on the merits of this alternative argument.

Assembly, and the General Assembly has acted via Act 13 to preempt the field and excuse any obligation that municipalities may have had previously “to plan for environmental concerns for oil and gas operations.” Agencies’ Brief (as cross-appellees) at 13 (citing Huntley, 964 A.2d at 862). Section 27, the Commonwealth states, is not a basis to expand the trustee role or the powers of governmental entities, such as municipalities, beyond those granted by the General Assembly. Id. (citing Belden & Blake Corp. v. Commonwealth, 969 A.2d 528, 532-33 (Pa. 2009); Fox, supra, 342 A.2d at 483 (Bowman, J., concurring)). The Commonwealth argues that, “[t]hrough the legislative process,” the General Assembly balanced Section 27 concerns, and the constitutional provision does not confer a right upon the municipalities to challenge the General Assembly’s policy judgments or for citizens to oppose actions of the General Assembly with which they disagree. Id. at 12-15.

The Commonwealth adds that Section 27 “provides specific constitutional authority for the [General Assembly] to enact laws like Act 13 which serve to manage and protect the environment while allowing for the development of Pennsylvania’s valuable natural resources.” Moreover, while the Commonwealth agrees that municipalities have some duties and responsibilities under Section 27, the Commonwealth disputes that Section 27 grants municipalities any power to protect public natural resources beyond that granted by the General Assembly. The Commonwealth claims that, as named trustee, the sovereign is “plainly” given “the authority and the obligation to control Pennsylvania’s natural resources.” The municipalities have no power to assert authority under Section 27 “as against the Legislature.” OAG’s Brief (as cross-appellee) at 28-29. In short, the Commonwealth’s position is that the Environmental Rights Amendment recognizes or confers no right upon citizens and no right or inherent obligation upon municipalities; rather, the

constitutional provision exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania. The Commonwealth thus requests that we affirm the decision of the Commonwealth Court in this respect.

In their reply briefs, all parties generally reprise their initial arguments.

We are asked to determine whether the Commonwealth Court erred in its several decisions regarding the constitutionality of Act 13. As noted, the Commonwealth Court granted the citizens relief on due process and separation of powers grounds, finding merit in the citizens' challenges to discrete provisions of Act 13 governing zoning and agency decision-making. The parties focus their briefing primarily on these issues in their appeals to this Court, while offering overlapping arguments premised upon the Environmental Rights Amendment.

To describe this case simply as a zoning or agency discretion matter would not capture the essence of the parties' fundamental dispute regarding Act 13. Rather, at its core, this dispute centers upon an asserted vindication of citizens' rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners' continued enjoyment of their private property. The citizens' interests, as a result, implicate primarily rights and obligations under the Environmental Rights Amendment -- Article I, Section 27. We will address this basic issue, which we deem dispositive, first.

In doing so, we recognize that the parties do not develop their Environmental Rights Amendment arguments to the same extent as, for example, the due process arguments as to Section 3304 and separation of powers arguments as to Section 3215(b)(4). This is explained, no doubt, by the fact that the citizens were successful in

asserting these claims below, and perhaps by the limited decisional law developed in relation to the Environmental Rights Amendment. In any event, the claims regarding Article I, Section 27 were raised and preserved below and are renewed on appeal; there is no claim of waiver by the Commonwealth. See HHAP, 77 A.3d at 600 & n.15 (internal citations omitted) (“Appellees’ present advocacy intermixes concepts of vested rights under the Due Process Clause and causes of action under the Remedies Clause. Although they place much of their emphasis on the Remedies Clause . . . we consider the due process aspect of Appellees’ argument sufficiently developed to preserve that claim as such.”).

We also perceive no prudential impediment to articulating principles of law that offer guidance to the bench and bar upon the broader legal issue, while providing context to the decision in this case. Accord Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 604-05 (Pa. 2012) (this Court’s “task is not simply to decide this case, but also to provide guidance upon the broader legal issue”); Mercury Trucking, Inc. v. Pa. Pub. Util. Comm’n, 55 A.3d 1056, 1078 (Pa. 2012) (in articulating principle of law, Court is not bound by parties’ agreement on legal point when, in Court’s judgment, legal point is incorrect); Commonwealth v. Collins, 764 A.2d 1056, 1058 n.4 (Pa. 2001) (same). Finally, to the extent a number of the issues in this case, on both sides, have not been better or optimally developed, and the reasoning of the Commonwealth Court on a number of issues likewise is not optimal, we are cognizant of the fact that Act 13 required local government to implement challenged provisions within narrow timeframes, with substantial financial consequences for non-compliance; this necessarily prompted the citizens to commence litigation quickly and to assent to expedited judicial review both below and here. See 58 Pa.C.S. § 3309 (local government has 120 days to amend existing ordinances to comply with Act 13). We are

aware that expedition has salutary features in appropriate cases, such as this one, while the practice also poses burdens and impediments in these cases that we might not see elsewhere.<sup>30</sup>

## 2. *The Scope and Standard of Review*

The constitutional validity of Act 13 presents a pure question of law and, as with any question of law, our review of the lower court's decision is plenary and *de novo*. West Mifflin Area Sch. Dist. v. Zahorchak, 4 A.3d 1042, 1048 (Pa. 2010). In our review, we are not constrained by the Commonwealth Court's reasoning and may affirm on any grounds, as long as the record supports the judgment. Scampone, 57 A.3d at 596.

Regarding any duly enacted statute, courts begin with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, "in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths." Stilp v. Commonwealth, 905 A.2d 918, 938-39 (Pa. 2006); see also 1 Pa.C.S. § 1922(3). Accordingly, a statute is presumed valid and will be declared unconstitutional only if the challenging party carries the heavy burden of proof that the enactment "clearly, palpably and plainly violates the Constitution." See Zahorchak, 4

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<sup>30</sup> In dissent, Justice Saylor takes a unitary approach to the citizens' claims in a manner that tracks the Commonwealth's framing of the parties' dispute. This approach is to characterize the citizens' arguments, whether premised upon the Environmental Rights Amendment or upon due process grounds, as expressions of some municipalities' discontent with the sovereign's policy decision to limit their zoning powers. But, as we explain, the claims and arguments of the citizens are considerably more nuanced and complex. In addition, for reasons also developed at great length *infra*, we obviously reject the claim that our decision today, enforcing the Environmental Rights Amendment, "completely redefine[s] the role of municipalities relative to the sovereign." Dissenting Slip Op. at 8 (Saylor, J., dissenting).

A.3d at 1048. The practical implication of this presumption is that “[a]ny doubts are to be resolved in favor of a finding of constitutionality.” Stilp, 905 A.2d at 939.

Our decision implicates primarily the construction and application of Article I, Section 27 of our Constitution. In the process of interpretation, “[o]ur ultimate touchstone is the actual language of the Constitution itself.” Id. (quoting Ieropoli v. AC&S Corp., 842 A.2d 919, 925 (Pa. 2004)). “[T]he Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” Id. Towards this end, we avoid reading the provisions of the Constitution in any “strained or technical manner.” Jubelirer v. Rendell, 953 A.2d 514, 528 (Pa. 2008). Indeed, “we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.” Commonwealth ex rel. Paulinski v. Isaac, 397 A.2d 760, 766 (Pa. 1979).<sup>31</sup>

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<sup>31</sup> Addressing voter qualifications, this Court in 1868 spoke broadly to the nature of constitutional interpretation in the interplay between rights and state power:

For the orderly exercise of the right [to vote] resulting from these qualifications, it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full and free exercise. But this duty and right, inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excised under the name or preten[s]e of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. . . .

Page v. Allen, 58 Pa. 338 at \*8 (Pa. 1868) (citing PA. CONST. art. III, § 1 (1838)).

The Environmental Rights Amendment has no counterpart in the federal charter and, as a result, the seminal, comparative review standard described in Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), is not strictly applicable here. Nonetheless, some of the Edmunds factors obviously are helpful in our analysis. Jubelirer, 953 A.2d at 524-25; see also Edmunds, 586 A.2d at 895.<sup>32</sup> Thus, in addition to our explicatory analysis of the plain language, we may address, as necessary, any relevant decisional law and policy considerations argued by the parties, and any extrajurisdictional caselaw from states that have identical or similar provisions, which may be helpful and persuasive. See Jubelirer, 953 A.2d at 525 n.12. Furthermore, there is a growing body of law and academic commentary concerning how state constitutional interpretation is to be undertaken. As our colleague Mr. Justice Saylor has noted in a scholarly article, “there is some degree of consensus [among courts interpreting state constitutions] that the overarching task is to determine the intent of voters who ratified the constitution. In furtherance of this aim, courts reference, *inter alia*, text; history (including ‘constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision’); structure; underlying values; and interpretations of other states.” Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule, 59 N.Y.U. Annual Survey of Am. L. 283, 290-91 (2003) (footnotes omitted) (focusing on state provisions that have federal counterparts, and in context of prophylactic rules, author observes that, in era of

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<sup>32</sup> Accord Blum by Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 550 (Pa. 1993) (Larsen, J. concurring, joined by Papadakos, J.) (where appellant grounds claim only upon state constitutional provision, it is unnecessary to subject case to Edmunds analysis; Edmunds analysis “is appropriate only when there is a question of whether our constitution provides a source of individual rights which is alternative to and independent of rights guaranteed by the United States Constitution”).

new federalism, there is diversity but also some consensus among state courts in approach to development of constitutional decisional law).<sup>33</sup>

These observations merely recognize the duty of state court judges to uphold state constitutional provisions along with the provisions of the U.S. Constitution. As a result, state court judges “have an obligation to make some independent assessment of state constitutional provisions.” *Id.* at 289; *see* PA. CONST. art. VI, § 3 (all judicial officers to take solemn oath to “support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth”). Where arguments grounded in the Pennsylvania Constitution have been forwarded or developed, this Court has undertaken the task in earnest. *See, e.g., Blum by Blum v. Merrell Dow Pharm., Inc.*, 626 A.2d 537 (Pa. 1993) (analysis of Article I, Section 6 -- right to trial by jury “as heretofore”); *Byers v. Commonwealth*, 42 Pa. 89 at \*3 (Pa. 1862) (same; stating, *inter alia*, “We do not mean to be understood as asserting that there may not be legislation conferring upon magistrates a power to convict summarily, which would be in violation

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<sup>33</sup> “New federalism,” a characterization dating back to the 1970s, relates to a pattern of state court decisions that offer an independent analysis of arguments premised upon the state constitution, rather than following U.S. Supreme Court precedent interpreting analogous federal constitutional provisions in lock-step, even where the state and federal constitutional language is identical or similar. *See, generally*, William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); *accord* Saylor, 59 N.Y.U. Annual Survey of Am. L. at 287-88. Of note among academic commentary on state constitutionalism, especially regarding Pennsylvania’s decisional law, is the work of Professor Robert F. Williams. *See, e.g.*, Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?, 46 Wm. & Mary L. Rev. 1499 (2005); The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 Okla. City U. L. Rev. 189 (2002); A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine, 3 Widener J. Pub. L. 343 (1993). *See also* Ken Gormley, The Pennsylvania Constitution: A Treatise on Rights and Liberties, at 683-706 (George T. Bisel Company, Inc. 2004) (chapter addressing Article I, Section 27, authored by John C. Dernbach).

of the [C]onstitution. Undoubtedly there may. We speak only of the case before us.”); Edmunds, supra (analysis of Article I, Section 8 -- people secure from searches and seizures); Ieropoli, 842 A.2d at 921 (analysis of Article I, Section 11 -- courts to be open; remedy by due course of law for injury; statute held to be unconstitutional); Commonwealth v. Means, 773 A.2d 143, 151-57 (Pa. 2001) (Opinion Announcing Judgment of Court) (analysis of Article I, Section 13 -- prohibition against excessive bail and fines, and infliction of cruel punishments; statute held to be constitutional); Adoption of Walker, 360 A.2d 603, 605-06 (Pa. 1976) (analysis of Article I, Section 28 -- equality of rights not to be denied or abridged because of sex of individual; statute held to be unconstitutional); Commonwealth v. Butler, 328 A.2d 851, 855 & 858 (Pa. 1974) (same; further noting that denial of equal protection under federal constitution is “independent basis” for decision).

If, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity, conflict, or inconsistency becomes apparent in the plain language of the provision, we follow rules of interpretation similar to those generally applicable when construing statutes. See, e.g., Commonwealth v. Omar, 981 A.2d 179, 185 (Pa. 2009). Relevant here, if the constitutional language is clear and explicit, we will not “delimit the meaning of the words used by reference to a supposed intent.” Id. (quoting Commonwealth ex rel. MacCallum v. Acker, 162 A. 159, 160 (Pa. 1932)). If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history. 1 Pa.C.S. §§ 1921, 1922; see Mercury Trucking, 55 A.3d at 1068; accord Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as

Unique Legal Documents, 27 Okla. City U. L. Rev. 189, 195 & 200 (2002) (state constitutions, ratified by electorate, are characterized as “voice of the people,” which invites inquiry into “common understanding” of provision; relevant considerations include constitutional convention debates that reflect collective intent of body, circumstances leading to adoption of provision, and purpose sought to be accomplished); but see Bowers v. Pa. Labor Rels. Bd., 167 A.2d 480, 487 (Pa. 1961) (relevancy of constitutional debates limited). A specific provision will prevail over a general principle found elsewhere but, because the Constitution is an integrated whole, we are cognizant that effect must be given to all of its provisions whenever possible. Jubelirer, 953 A.2d at 528 (quoting Commonwealth ex rel. Specter v. Vignola, 285 A.2d 869, 872 (Pa. 1971) and Cavanaugh v. Davis, 440 A.2d 1380, 1382 (Pa. 1982)).

Furthermore, in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary. See Holt v. Legislative Redistricting Comm’n, 38 A.3d 711, 759 n.38 (Pa. 2012) (“As a function of our system of government, this Court has the final word on matters of constitutional dimension in Pennsylvania. Our charter . . . is not easily amended and any errant interpretation is not freely subject to correction by any co-equal branch of our government, other than this Court. For this reason, we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned.”); see also Commonwealth v. Dickson, 918 A.2d 95, 101 (Pa. 2007) (“we cannot simply fall back on an attenuated assertion of *sub silentio* legislative acquiescence and wash our hands of the stain” of prior erroneous interpretation of statutory language); see also Freed v.

Geisinger Med. Ctr., 5 A.3d 212 (Pa. 2010); Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002).

### 3. *The Applicable Constitutional Paradigm*

The General Assembly derives its power from the Pennsylvania Constitution in Article III, Sections 1 through 27. The Constitution grants the General Assembly broad and flexible police powers embodied in a plenary authority to enact laws for the purposes of promoting public health, safety, morals, and the general welfare. See Clifton v. Allegheny County, 969 A.2d 1197, 1211 n.19 (Pa. 2009); Adams Sanitation Co., v. Dep't of Env't'l Prot., 715 A.2d 390, 395 (Pa. 1998); Gambone v. Commonwealth, 101 A.2d 634, 636-37 (Pa. 1954); accord Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2577-78 (2012) (federal government is one of enumerated powers; by comparison, state governments have general governance power); Dydell v. Taylor, 332 S.W.3d 848, 853 & n.3 (Mo. 2011) (same). The police power to legislate for the general welfare “embraces regulations designed to promote the public convenience or the general prosperity.” Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 611 (Pa. 1958). But, when the state pursues these ends by regulating or restricting individual rights, the exercise of the police power must be reasonable and non-discriminatory. See United Artists, 635 A.2d at 616 (quoting Andress v. Zoning Bd. of Adjustment, 188 A.2d 709, 712-13 (Pa. 1963)).

Moreover, although plenary, the General Assembly’s police power is not absolute; this distinction matters. Legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth. See PA. CONST. art. III, §§ 28-32

(enumerating restrictions).<sup>34</sup> Specifically, ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. See PA. CONST. art. I, § 25 (reservation of powers in people); see also Nat'l Wood Preservers, Inc. v. Commonwealth, 414 A.2d 37, 44 (Pa. 1980) (citing PA. CONST. art. I, § 27) (“maintenance of the environment is a fundamental objective of state power”). Section 25 of Article I articulates this concept in no uncertain terms: “[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” Accordingly, Article I of our Constitution, as a general matter, is not a discrete textual source of police power delegated to the General Assembly by the people pursuant to which legislation is enacted. See Page, supra, 58 Pa. 338 at \*7; accord Williams, 27 Okla. City U. L. Rev. at 207-08 (*inter alia*, quoting Frank P. Grad, The State Constitution: Its Function and Form for Our Time, 54 Va. L. Rev. 928, 964-65 (1968)) (given nature of state legislatures as bodies already vested with plenary powers, emphasis in state constitutions is on limitations; “very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to the other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation”).<sup>35</sup>

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<sup>34</sup> The U.S. Constitution, of course, imposes additional limitations on the exercise of the General Assembly’s police powers. See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979) (state may not exercise power to protect natural resources in manner that conflicts with constitutional federal prerogatives); see also Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241-42 (1978); Cleaver v. Zoning Bd. of Adjustment, 200 A.2d 408, 412 (Pa. 1964).

<sup>35</sup> A majority of the members of the Court agreed with this construction in Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973) (continued...)

Article I is the Commonwealth's Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such "general, great and essential" quality as to be ensconced as "inviolable." PA. CONST. art. I, Preamble & § 25; see also PA. CONST. art. I, § 2 ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."); accord Edmunds, 586 A.2d at 896 (since 1776, Declaration of Rights has been "organic part" of Constitution, and "appear[s] (not coincidentally) first in that document"). The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution -- vis-à-vis the government created by the people -- are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution. See Appeal of Lord, 81 A.2d 533, 537 (Pa. 1951) ("right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right [that] does not owe its origin to constitutions

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(...continued)

("Gettysburg"), the first case decided by this Court involving the Environmental Rights Amendment. Mr. Justice Roberts wrote that the Commonwealth, prior to the adoption of Article I, Section 27, "possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment which are 'recognized and unalterably established' by Article I, Section 1 of the Pennsylvania Constitution." Id. at 595 (Roberts, J., concurring, joined by Manderino, J.); accord id. at 596 (Jones, C.J., dissenting, joined by Eagen, J.) ("As part of the declaration of rights embraced by Article I, the amendment confers certain enumerated rights upon the people of the Commonwealth and imposes upon the executive branch a fiduciary obligation to protect and enforce those rights."). To the extent that the two-Justice lead opinion in Gettysburg is susceptible to a contrary reading, that opinion is neither precedential, nor supported by the plain language of the Constitution. See id. at 592 (Opinion Announcing Judgment of Court by O'Brien, J., joined by Pomeroy, J.) (Section 27 gave General Assembly new police power to act in areas of purely esthetic or historic concern). Id.

[but] existed before them”); Appeal of White, 134 A. 409, 412 (Pa. 1926) (same); accord Edmunds, 586 A.2d at 896 (Pennsylvania’s original constitution of 1776 “reduce[d] to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter in 1681.”). This concept is illustrated in the basic two-part scheme of our Constitution, which has persisted since the original post-colonial document: one part establishes a government and another part limits that government’s powers. See Western Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1334-35 (Pa. 1986) (Opinion Announcing Judgment of Court) (recounting origin and evolution of Article I rights during post-colonial period). The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, “particular sections of the Declaration of Rights represent specific limits on governmental power.” Id. at 1335 (citing O’Neill v. White, 22 A.2d 25 (Pa. 1941). Commonwealth ex rel. Smillie v. McElwee, 193 A. 628 (Pa. 1937); Commonwealth ex rel. McCormick v. Reeder, 33 A. 67 (Pa. 1895)).<sup>36</sup>

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<sup>36</sup> The Court’s recent decision in Driscoll v. Corbett, 69 A.3d 197 (Pa. 2013) recognized that, in Pennsylvania, “the concept that certain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.” Id. at 208. The Driscoll Court also spoke to, but ultimately did not need to resolve, the question of whether a constitutional provision may be held infirm because it impinged upon Article I rights, and observed that “theoretically at least, there is some possibility that a constitutional amendment might impinge on inherent, inalienable rights otherwise recognized in the Constitution itself.” Id. at 214. The theoretical tension addressed in Driscoll involved whether the right of the people as articulated in Article I of the Constitution were “inviolable” as against the will of the people as expressed elsewhere in the Constitution (in that case in Article V, Section 16(b)). That theoretical tension is not present in this matter, where the citizens are asserting constitutional protection against infringement of their rights by a governmental action -- the enactment of Act 13.

The first section of Article I “affirms, among other things, that all citizens ‘have certain inherent and inalienable rights.’” Pap’s, 812 A.2d at 603 (quoting PA. CONST. art. I, § 1). Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27, the Environmental Rights Amendment:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27 (Natural resources and the public estate).<sup>37</sup>

Before examining the application of Section 27 to the controversy before us, it is necessary to identify and appreciate the rights protected by this provision of the Constitution. See Saylor, 59 N.Y.U. Annual Survey of Am. L. at 309-10 (footnotes omitted) (“Methodologically, it seems to be a shared ideal that courts [conducting state constitutional analyses] should at the outset identify the constitutional value or norm at issue; and this should be accomplished via principles of state constitutional interpretation. Thus, the initial task resides in the domain of state constitutional law, encompassing the attendant debate concerning the fertility of unique state sources, content, and context as bases for independent interpretation.”). Much as is the case with other Declaration of Rights provisions, Article I, Section 27 articulates principles of relatively broad application, whose development in practice often is left primarily to the judicial and legislative branches. Accord Mesivtah Eitz Chaim of Bobov, Inc. v. Pike

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<sup>37</sup> Unlike the Environmental Rights Amendment, the two other provisions of the Constitution that relate to the environment, which empower the Commonwealth to raise funds for conservation purposes, are included in Article VIII, addressing taxation and finance. See PA. CONST. art. VIII, §§ 15, 16.

County Bd. of Assessment Appeals, 44 A.3d 3, 7 (Pa. 2012) (“Mesivtah”) (“While the General Assembly necessarily must attempt to interpret the Constitution in carrying out its duties, the judiciary is not bound to the legislative judgment concerning the proper interpretation of constitutional terms.”). Articulating judicial standards in the realm of constitutional rights may be a difficult task, as our developing jurisprudence vis-à-vis rights affirmed in the Pennsylvania Constitution well before environmental rights amply shows. See, e.g., Pap’s, 812 A.2d at 603 (freedom of expression); In re D.M., 781 A.2d 1161 (Pa. 2001) (unreasonable searches and seizures); United Artists, 635 A.2d at 615-19 (taking without just compensation). The difficulty of the task, however, is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights. See Pap’s, 812 A.2d at 607 (uncertainty of constitutional rights under evolving federal standard will not deter this Court “from effectuating [a] separate judgment under the Pennsylvania Constitution”); cf. Commonwealth v. Gilmour Mfg. Co., 822 A.2d 676, 683 (Pa. 2003) (“mere administrative ease cannot justify a regulation which is inconsistent with the language and purpose of the statute”). Nor is the difficulty of articulating standards an appropriate ground upon which a court may abdicate its duty and authority to interpret the Pennsylvania Constitution. Mesivtah, 44 A.3d at 7 (“ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court”). See, generally, Saylor, 59 N.Y.U. Annual Survey of Am. L. at 310 (footnotes omitted) (“Experience teaches that determining the character and scope of vital state constitutional provisions is in itself a difficult task, one that has at times been omitted, perhaps by inadvertence, for convenience, or by necessity for lack of consensus. But there is little foundation for proceeding further absent concrete grounding in some identified, fundamental value. As a threshold matter, a determination should also be made whether the salient, constitutional value is,

in some way, under-protected by the application of the prevailing rule or standard (or the absence of implementing doctrine), since, if impingement is lacking, constitutional rulemaking for the sake of implementation would be unjustified.”).

The actions brought under Section 27 since its ratification, which we will describe further below, have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and, as we explain below, as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment. See District of Columbia v. Heller, 554 U.S. 570, 625 (2008); Mayle v. Pa. Dep’t of Highways, 388 A.2d 709, 717-18 (Pa. 1978) (overruling long-standing precedent establishing judicial sovereign immunity rule justified in part upon constitutional grounds, as inconsistent with plain language of Constitution); Dickson, 918 A.2d at 108-09 (upon first opportunity to address plain language of statute, Court disapproved long-standing Superior Court precedent as inconsistent with plain language of statute); Gilmour Mfg. Co., 822 A.2d at 681 (upon first opportunity to determine whether long-standing administrative regulation is consonant with enabling statute, court found regulation inconsistent). Accord Saylor, 59 N.Y.U. Annual Survey of Am. L. at 310. The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters. See Scampone, 57 A.3d at 604-05 (decisional law generally develops incrementally; we render determinations that spring from facts before us, while recognizing that task is not simply to decide this case, but also to provide guidance upon broader legal issue. “By necessity, this undertaking

requires breadth of vision and consideration of both sides of the coin: the facts of a given case on one side, and the law, which will almost always be more conceptual, on the other.”).

#### 4. *Plain language*

Initially, we note that the Environmental Rights Amendment accomplishes two primary goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights. Section 27 is structured into three mandatory clauses that define rights and obligations to accomplish these twin purposes; and each clause mentions “the people.”<sup>38</sup>

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens’ rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree. Accord 1970 Pa. Legislative Journal-House 2269, 2272 (April 14, 1970) (Section 27 “can be viewed almost as two separate bills -- albeit there is considerable interaction between them, and the legal doctrines invoked by each should tend mutually to support and reinforce the other because of their inclusion in a single

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<sup>38</sup> The Environmental Rights Amendment originated in the Pennsylvania House of Representatives as House Bill No. 958. The bill eventually received unanimous support in both houses and, perhaps as a direct result, its legislative record consists simply of a statement in support offered by its primary sponsor, Representative Franklin L. Kury. The statement includes a pre-adoption “Analysis of HB 958, the Proposed Pennsylvania Environmental Declaration of Rights” by Robert Broughton, Associate Professor of Law at Duquesne University Law School.

amendment.”). Facing a claim premised upon Section 27 rights and obligations, the courts must conduct a principled analysis of whether the Environmental Rights Amendment has been violated. See Payne, 361 A.2d at 273.

To determine the merits of a claim that the General Assembly’s exercise of its police power is unconstitutional, we inquire into more than the intent of the legislative body and focus upon the effect of the law on the right allegedly violated. See, e.g., Lehman v. Pa. State Police, 839 A.2d 265, 270-71 (Pa. 2003). The General Assembly’s declaration of policy does not control the judicial inquiry into constitutionality. Indeed, “for this Court to accept the notion that legislative pronouncements of benign intent can control a constitutional inquiry . . . would be tantamount to ceding our constitutional duty, and our independence, to the legislative branch.” Stilp, 905 A.2d at 945.

#### I. *First Clause of Section 27 -- Individual Environmental Rights*

According to the plain language of Section 27, the provision establishes two separate rights in the people of the Commonwealth. The first -- in the initial, prohibitory clause of Section 27 -- is the declared “right” of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.<sup>39</sup> This clause affirms a limitation on the state’s power to act contrary to this right. While

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<sup>39</sup> The Environmental Rights Amendment speaks of the rights of “the people.” The only other constitutional provision similarly formulated is interpreted to guarantee a constitutional right personal to each citizen. Compare PA. CONST. art. I, § 27 with PA. CONST. art. I, § 8 (“The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures . . . .”); see, e.g., Commonwealth v. Russo, 934 A.2d 1199 (Pa. 2007) (criminal defendant’s evidentiary challenge premised upon Section 8 of Article I); Edmunds, 586 A.2d at 898 (unlike federal counterpart, Article I, Section 8 analysis premised, *inter alia*, upon individual right to privacy); accord 1970 Pa. Legislative Journal-House 2269, 2273 (April 14, 1970) (first clause of Section 27 affirms constitutional right “in individual citizens”).

the subject of the right certainly may be regulated by the Commonwealth, any regulation is “subordinate to the enjoyment of the right . . . [and] must be regulation purely, not destruction”; laws of the Commonwealth that unreasonably impair the right are unconstitutional. Page, 58 Pa. 338 at \*8; see also Hartford Accident & Indem. Co. v. Ins. Comm’r, 482 A.2d 542, 548-49 (Pa. 1984); Butler, 328 A.2d at 855-56.

The terms “clean air” and “pure water” leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters. Moreover, the constitutional provision directs the “preservation” of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the

constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.<sup>40</sup>

Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently. Franklin Twp., 452 A.2d at 722 & n.8 (citing Section 27, Court stated that protection and enhancement of citizens' quality of life "is a constitutional charge which must be respected by all levels of government in the Commonwealth"); see Hartford, 482 A.2d at 549 (Declaration of Rights provision "circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law."). Meanwhile, as with any constitutional challenge, the role of the judiciary when a proper and meritorious challenge is brought to court includes the obligation to vindicate Section 27 rights. See Pap's, 812 A.2d at 611 (although Court generally looks to federal law in articulating freedom of expression constitutional jurisprudence, where federal law is unsettled, "Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable . . . . There is an entirely different jurisprudential and constitutional imperative at work when this Court, which is the final word on the meaning of our own charter in a properly joined case or controversy, is charged with the duty to render a judgment."); accord Pa. Legislative Journal-House at 2272 (proposed amendment is more than statement of policy; it is intended to create legally enforceable right to protect and enhance environmental quality); Franklin L. Kury, Clean Politics, Clean Streams: A Legislative Autobiography

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<sup>40</sup> We recognize that there is existing lower court jurisprudence which suggests, to the contrary, that Section 27 rights are merely co-extensive with statutory protections. See, e.g., Larwin Multihousing Pa. Corp. v. Com., 343 A.2d 83, 89 n.9 (Pa. Cmwlth. 1975). This suggestion is discussed in more detail *infra*.

and Reflections, app. C (2011) (appendix includes copy of questions and answers document distributed to public prior to referendum on Environmental Rights Amendment).<sup>41</sup> Courts may fashion an appropriate remedy to vindicate the environmental rights at issue. See Edmunds, 586 A.2d at 905-06 (rejecting federal good faith exception to exclusionary rule -- a judicially-created remedy for constitutional violation -- in search warrant cases, and finding broader protection for privacy under Article I, Section 8 of Pennsylvania Constitution provision addressing search warrants).

Also apparent from the language of the constitutional provision are the substantive standards by which we decide a claim for violation of a right protected by the first clause of Section 27. The right to “clean air” and “pure water” sets plain conditions by which government must abide. We recognize that, as a practical matter,

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<sup>41</sup> Among the questions and answers distributed prior to the May 18, 1971 referendum and intended to aid voters in understanding the proposed constitutional amendment was the following:

Q. Will the amendment make any real difference in the fight to save the environment?

A. Yes, once [the amendment] is passed and the citizens have a legal right to a decent environment under the State Constitution, every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people’s rights before it acts. If the public’s rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate law suit . . . .

Q. Will there be any “teeth” in the law, if passed?

A. It will be up to the courts to apply the three broad principles [articulated in the amendment] to legal cases. However, having this law passed will strengthen substantially the legal weapons available to protect our environment from further destruction . . . .

air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern “clean air” and “pure water” standards and, as with any other technical standards, the courts generally defer to agency expertise in making a factual determination whether the benchmarks were met. Accord 35 P.S. § 6026.102(4) (recognizing that General Assembly “has a duty” to implement Section 27 and devise environmental remediation standards). That is not to say, however, that courts can play no role in enforcing the substantive requirements articulated by the Environmental Rights Amendment in the context of an appropriate challenge. Courts are equipped and obliged to weigh parties’ competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality. Accord Montana Env’l Info. Ctr. v. Dep’t of Env’l Quality, 988 P.2d 1236, 1249 (Mont. 1999) (constitutional “inalienable . . . right to a clean and healthful environment” did not protect merely against type of environmental degradation “conclusively linked” to ill health or physical endangerment and animal death, but could be invoked to provide anticipatory and preventative protection against unreasonable degradation of natural resources).

Section 27 also separately requires the preservation of “natural, scenic, historic and esthetic values of the environment.” PA. CONST. art. I, § 27. By calling for the “preservation” of these broad environmental values, the Constitution again protects the people from governmental action that unreasonably causes actual or likely deterioration of these features. The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government

acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster. Accord John C. Dernbach, Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II – Environmental Rights and Public Trust, 104 Dickinson L. Rev. 97, 17-20 (1999).

The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I. See PA. CONST. art. I, § 25 (“everything” in Article I is excepted from government’s general powers and is to remain inviolate); accord 1970 Pa. Legislative Journal-House at 2272 (“If we are to save our natural environment we must therefore give it the same Constitutional protection we give to our political environment.”); Kury, app. C (Questions and answers).<sup>42</sup> This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights as guaranteed in Sections 1, 9, and 10. PA. CONST. art. I, §§ 1, 9, 10, 27; see, generally, Norton v. Glenn, 860 A.2d 48, 58 (Pa. 2004) (referring to “seesawing balance between the constitutional rights of freedom of expression and of safeguarding one’s reputation: protection of one of those rights quite often leads to diminution of the

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<sup>42</sup> The questions and answers document also explained the effect of the amendment on governmental power:

Q. Won’t the right of eminent domain still exist?

A. Yes, however, it will have to be exercised in conformity with this amendment. A highway department or utility company could not take land without fully considering the public’s right to a decent environment. [The amendment] should force a much more judicious use of eminent domain.

other”); Driscoll v. Corbett, 69 A.3d 197, 210 (Pa. 2013) (referring to “manifest need” to balance citizens’ competing constitutionally-grounded rights to equal protection of laws and to amend governing charter as they see fit).

Relatedly, while economic interests of the people are not a specific subject of the Pennsylvania Declaration of Rights, we recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest. In this respect, and relevant here, it is important to note that we do not perceive Section 27 as expressing the intent of either the unanimous legislative sponsors or the ratifying voters to deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people. But, to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development. See John C. Dernbach, Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I – An Interpretive Framework for Article I, Section 27, 103 Dickinson L. Rev. 693, 718-20 (1999); accord 1970 Pa. Legislative Journal-House at 2270 (“the measure of our progress is not just what we have but how we live, that it is not man who must adapt himself to technology but technology which must be adapted to man”).

## II. *The Second and Third Clauses of Section 27 -- The Public Trust*

The second right reserved by Section 27 is the common ownership of the people, including future generations, of Pennsylvania's public natural resources.<sup>43</sup> On its terms, the second clause of Section 27 applies to a narrower category of "public" natural resources than the first clause of the provision. The drafters, however, left unqualified the phrase public natural resources, suggesting that the term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns. Accord 1970 Pa. Legislative Journal-House at 2274. At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property. See, e.g., 30 Pa.C.S. § 721 (fish: acquisition of property by Commonwealth); 34 Pa.C.S. § 103(a) (Commonwealth's ownership of game or wildlife); 71 P.S. §

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<sup>43</sup> The sovereign's powers flowing from the fiction of public "ownership" over natural resources is limited as recognized in Hughes v. Oklahoma, 441 U.S. 322 (1979) (state may not exercise power over natural resources in manner that conflicts with constitutional federal prerogatives). Hughes overruled a prior case, Geer v. State of Conn., 161 U.S. 519 (1896), in which the Court had recognized a state's power to regulate the taking and limit out-of-state transportation of wildlife based on the premise of the sovereign's ownership of the state's wildlife. The sovereign ownership concept eroded over the years and, in Hughes, the High Court overruled Geer, stating that the state ownership doctrine was a legal fiction, which did not conform to practical realities. Hughes, 441 U.S. at 334-35. In subsequent cases, the Hughes decision has been interpreted not to modify the state government's duties to its citizens that arise under the concept of common ownership of the people or the sovereign's duties as public trustee. See, e.g., Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 495 n.12 (Alaska 1988); Complaint of Steuart Transp. Co., 495 F.Supp. 38, 40 (E.D. Va. 1980) (right and duty to protect and preserve public's interest in natural wildlife resources does not derive from ownership of resources but from duty owing to the people) (citing Toomer v. Witsell, 334 U.S. 385, 408 (1948)).

1340.302(a) (acquisition and disposition of Commonwealth-owned forests). See also 35 P.S. §§ 691.1, 691.501, 691.503 (pollution of Commonwealth's waters, as broadly defined by act, is public nuisance; protection required); 35 P.S. § 1451 (public interest in quantity of water; authorizes immediate action by governor to conserve natural resources threatened by drought and forest fire); 35 P.S. §§ 4003, 4013 (violation of Air Pollution Control Act and related regulations, orders, permits is public nuisance); 35 P.S. §§ 4501, 4502 (immunity for shooting ranges in public nuisance suits for noise pollution; assumes noise pollution regulated at local level); accord Dernbach, 104 Dickinson L. Rev. at 10-11.

The legislative history of the amendment supports this plain interpretation. In its original draft, the second clause of the proposed Environmental Rights Amendment included an enumeration of the public natural resources to be protected. The resources named were “the air, waters, fish, wildlife, and the public lands and property of the Commonwealth . . . .” But, after members of the General Assembly expressed disquietude that the enumeration of resources would be interpreted “to limit, rather than expand, [the] basic concept” of public natural resources, Section 27 was amended and subsequently adopted in its existing, unrestricted, form. The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law. See 1970 Pa. Legislative Journal-House at 2271-75.

The third clause of Section 27 establishes the Commonwealth's duties with respect to Pennsylvania's commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations). The provision establishes the public trust doctrine with respect to these

natural resources (the corpus of the trust), and designates “the Commonwealth” as trustee and the people as the named beneficiaries. Payne, 361 A.2d at 272. The terms of the trust are construed according to the intent of the settlor which, in this instance, is “the people.” See Estate of Sykes, 383 A.2d 920, 921 (Pa. 1978) (“To ascertain this intent, a court examines the words of the instrument and, if necessary, the scheme of distribution, the circumstances surrounding execution of the [instrument] and other facts bearing on the question.”).

“Trust” and “trustee” are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted. Accord 1 Pa.C.S. § 1903(a) (technical words that have acquired peculiar and appropriate meaning to be interpreted according to such meaning); Michigan Coalition of State Employee Unions v. Michigan Civil Serv. Comm’n, 634 N.W.2d 692, 698 (Mich. 2001) (“[I]f a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended.”). The statement offered in the General Assembly in support of the amendment explained the distinction between the roles of proprietor and trustee in these terms:

Under the proprietary theory, government deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.

1970 Pa. Legislative Journal-House at 2273. See also Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983) (“[P]ublic trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the

state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.""). The trust relationship does not contemplate a settlor placing blind faith in the uncontrolled discretion of a trustee; the settlor is entitled to maintain some control and flexibility, exercised by granting the trustee considerable discretion to accomplish the purposes of the trust. See Lang v. Commonwealth, 528 A.2d 1335, 1345 (Pa. 1987). An exposition here is not necessary on all the ramifications that the term trustee may have in the context of Section 27. As in our discussion of the Environmental Rights Amendment generally, we merely outline foundational principles relevant to our disposition of this matter. See Scampone, supra.

This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust. The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania's government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government. See Franklin Twp., 452 A.2d at 722 & n.7; accord Geer v. State of Conn., 161 U.S. 519, 529 (1896) (with development of free institutions, power lodged in state is to be exercised "as trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good") overruled on other grounds by Hughes v. Oklahoma, 441 U.S. 322 (1979) (see explanatory footnote 43, *supra*).

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. See PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality. See In re Mendenhall, 398 A.2d 951, 953 (Pa. 1979) (citing RESTATEMENT (SECOND) OF TRUSTS § 174) (duty of prudence generally requires trustee to exercise ordinary skill, prudence, and caution in managing corpus of trust); Lang, supra, 528 A.2d at 1342 (citing RESTATEMENT (SECOND) OF TRUSTS § 170) (trustee has duty of loyalty to administer trust solely in beneficiary's interest and not his own); In re Hamill's Estate, 410 A.2d 770, 773 (Pa. 1980) (citing RESTATEMENT (SECOND) OF TRUSTS § 232) (trustee has duty of impartiality).

As the parties here illustrate, two separate Commonwealth obligations are implicit in the nature of the trustee-beneficiary relationship. The first obligation arises from the prohibitory nature of the constitutional clause creating the trust, and is similar to other negative rights articulated in the Declaration of Rights. Stated otherwise, the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties. In this sense, the third clause of the Environmental Rights Amendment is complete

because it establishes broad but concrete substantive parameters within which the Commonwealth may act. Compare PA. CONST. art. I, § 27 with, e.g., PA. CONST. art. I, § 28. This Court perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review. See, e.g., Adoption of Walker, 360 A.2d at 605-06 (Adoption Act provision is unconstitutional because it denies unwed fathers parental privileges accorded to unwed mothers solely on basis of gender, in violation of Article I, Section 28, which states that “[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual”); Hartford, 482 A.2d at 549 (insurance commissioner’s decision to rescind approval of company’s gender-based rate schedule proper because commissioner had duty to interpret statutory language prohibiting “unfairly discriminatory rates” to include Article I, Section 28 gender-based considerations).

The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action. Accord Geer, 161 U.S. at 534 (trusteeship for benefit of state’s people implies legislative duty “to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state”). The General Assembly has not shied from this duty; it has enacted environmental statutes, most notably the Clean Streams Act, see 35 P.S. § 691.1 *et seq.*; the Air Pollution Control Act, see 35 P.S. § 4001 *et seq.*; and the Solid Waste Management Act, see 35 P.S. § 6018.101 *et seq.* As these statutes (and related regulations) illustrate, legislative enactments serve to define regulatory powers and duties, to describe prohibited conduct of private individuals and entities, to provide procedural safeguards, and to enunciate technical standards of environmental protection. These administrative details are appropriately addressed by

legislation because, like other “great ordinances” in our Declaration of Rights, the generalized terms comprising the Environmental Rights Amendment do not articulate them.<sup>44</sup> The call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people. Accord Jose L. Fernandez, State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?, 17 Harv. Envtl. L. Rev. 333, 352 (1993) (if constitutional provision appears to be complete and enforceable, language inviting legislative action should not be interpreted “as expressing an intent to withhold enforcement until the legislature acts”). See, e.g., PA. CONST. art. I, § 11 (“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”); Mayle, 388 A.2d at 717-18 (Article I, Section 11 affirms right to remedy by due course of law and second clause, which preserves for General Assembly opportunity to make Commonwealth immune in certain cases, does not establish sovereign immunity as “constitutional rule unless the Legislature decides otherwise.”).

Of course, the trust’s express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.

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<sup>44</sup> Mr. Justice Holmes famously used the phrase “great ordinances” to describe the provisions of the Bill of Rights of the U.S. Constitution. Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting, joined by Brandeis, J.). Accord Vreeland v. Byrne, 370 A.2d 825, 831-32 (N.J. 1977).

Accord 1970 Pa. Legislative Journal-House at 2273; Nat'l Audubon Soc'y, 658 P.2d at 727-29 (public trust doctrine permits sovereign to utilize trust resources required for prosperity and habitability of state, even if uses harm trust corpus; but, before state courts and agencies approve use of trust resources, they must consider effect of use upon public trust interests and attempt, so far as feasible, to avoid or minimize any harm to those interests; in that dispute, absence of “objective study” of impact on natural resource was deemed to hamper proper decision).

Within the public trust paradigm of Section 27, the beneficiaries of the trust are “all the people” of Pennsylvania, including generations yet to come. The trust’s beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests of present and future beneficiaries. See In re Hamill’s Estate, 410 A.2d 770, 773 (Pa. 1980) (citing RESTATEMENT (SECOND) OF TRUSTS § 232). Dealing impartially with all beneficiaries means that the trustee must treat all equitably in light of the purposes of the trust. Accord 20 Pa.C.S. § 7773.<sup>45</sup> Here, the duty of impartiality implicates questions of access to and distribution of public natural resources, including consumable resources such as water, fish, and game. See Dernbach, 104 Dickinson L. Rev. at 14. The second, cross-generational dimension of Section 27 reinforces the conservation imperative: future generations are among the beneficiaries entitled to equal access and distribution of the resources, thus, the trustee cannot be short-sighted. Accord 1970 Pa. Legislative Journal-House at 2273 (“[s]ince the public trust

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<sup>45</sup> Although the Environmental Rights Amendment creates an express trust that is presumptively subject to the Uniform Trust Act, see 20 Pa.C.S. §§ 7702, 7731, the “ultimate power and authority to interpret” the constitutional command regarding the purposes and obligations of the public trust created by Section 27 “rests with the Judiciary, and in particular with this Court.” Mesivtah, 44 A.3d at 7.

doctrine would implicitly preclude the wasting of resources, the explicit inclusion of future generations as part of the relevant public might be considered superfluous,” although situations may arise where such inclusion may prove wise). Moreover, this aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term. See id.<sup>46</sup>

### 5. *Other Considerations*

Section 27 is explicit regarding the respective rights of the people and obligations of the Commonwealth, and considerations upon which we typically rely in statutory construction confirm our development of the basic principles enunciated by its drafters. Among the relevant considerations are the occasion and necessity for the constitutional provision, the legislative history and circumstances of enactment and ratification, the

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<sup>46</sup> In undertaking its constitutional cross-generational analysis, the Commonwealth trustee should be aware of and attempt to compensate for the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office. See Barton H. Thompson Jr., Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance, 27 Rutgers L.J. 863, 900-01 (1996); see, e.g., Fox, 342 A.2d at 482 (“The only environmental result from which any serious injury might result is the possible future loss of current open space to future residential and commercial development, which may be a remote consequence of the installation of the sewer lines. This, however, is not the type of harm which would justify the [Department of Environmental Protection] in now refusing a sewer construction permit, and, as to current pollution, of course, the [Environmental Hearing Board] has clearly found that such would be kept to a minimum.”).

mischief to be remedied and the object to be attained. See Omar, 981 A.2d at 185; 1 Pa.C.S. § 1921(c).

It is not a historical accident that the Pennsylvania Constitution now places citizens' environmental rights on par with their political rights. Approximately three and a half centuries ago, white pine, Eastern hemlock, and mixed hardwood forests covered about 90 percent of the Commonwealth's surface of over 20 million acres. The Pennsylvania Lumber Museum, History, online at [www.lumbermuseum.org/history.php](http://www.lumbermuseum.org/history.php) (last accessed on May 23, 2013). Two centuries later, the state experienced a lumber harvesting industry boom that, by 1920, had left much of Pennsylvania barren. "Loggers moved to West Virginia and to the lake states, leaving behind thousands of devastated treeless acres," abandoning sawmills and sounding the death knell for once vibrant towns. Regeneration of our forests (less the diversity of species) has taken decades. See id.; accord Pa. Dep't of Env'tl. Protection, Pennsylvania Forestry, online at [www.portal.state.pa.us/portal/server.pt?open=514&objID=588459&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588459&mode=2) (last accessed on May 23, 2013).

Similarly, by 1890, "game" wildlife had dwindled "as a result of deforestation, pollution and unregulated hunting and trapping." Pa. Game Comm'n, About the Pennsylvania Game Commission, online at [www.portal.state.pa.us/portal/server.pt?open=514&objID=983474&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=983474&mode=2) (last accessed on May 23, 2013). As conservationist John M. Phillips<sup>47</sup> wrote, "In 1890, the

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<sup>47</sup> John M. Phillips (1861-1953) of Pittsburgh, Pennsylvania, was a founder and long-time president of the Phillips Mine Supply Company. He was also a long-term president of the Board of Game Commissioners of Pennsylvania; a trustee of the American Wildlife Institute; and a member of the National Executive Board of the Boy Scouts of America. Pa. Hist. & Museum Comm'n, The Pennsylvania State Archives, online at [www.phmc.state.pa.us/bah/dam/mg/mg161.htm](http://www.phmc.state.pa.us/bah/dam/mg/mg161.htm) (last accessed on May 23, 2013).

game had practically disappeared from our state. . . . We had but few game laws and those were supposed to be enforced by township constables, most of whom were politicians willing to trade with their friends the lives of our beasts and birds in exchange for votes.” Explore Pa. History, First State Game Lands Historical Marker, online at <http://explorepahistory.com/hmarker.php?markerId=1-A-140> (last accessed on May 23, 2013). In 1895, the General Assembly created the Pennsylvania Game Commission and, two years later, adopted a package of new game laws to protect endangered populations of deer, elk, waterfowl, and other game birds. Over the following decades, the Game Commission sought to restore populations of wildlife, by managing and restocking species endangered or extinct in Pennsylvania, establishing game preserves in state forests, and purchasing state game lands. Sustained efforts of the Game Commission over more than a century (coupled with restoration of Pennsylvania’s forests) returned a bounty of wildlife to the Commonwealth. See id.; see also Pa. Game Comm’n, Wildlife Conservation History (1643 to Present), online at [www.portal.state.pa.us/portal/server.pt?open=514&objID=683433&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=683433&mode=2) (last accessed on May 23, 2013).

The third environmental event of great note was the industrial exploitation of Pennsylvania’s coalfields from the middle of the nineteenth well into the twentieth century. During that time, the coal industry and the steel industry it powered were the keystone of Pennsylvania’s increasingly industrialized economy. See Pa. Dep’t of Env’tl. Protection, Operation Scarlift: The After Effects of Over 100 Years of Coal Mining in Pennsylvania and Current Programs to Combat Them (1967), online at [www.portal.state.pa.us/portal/server.pt/community/mine\\_reclamation\\_-\\_operation\\_scarlift](http://www.portal.state.pa.us/portal/server.pt/community/mine_reclamation_-_operation_scarlift) (last accessed on May 23, 2013). The two industries provided employment for large numbers of people and delivered tremendous opportunities for

small and large investors. “[W]hen coal was a reigning monarch,” the industry operated “virtually unrestricted” by either the state or federal government. The result, in the opinion of many, was devastating to the natural environment of the coal-rich regions of the Commonwealth, with long-lasting effects on human health and safety, and on the esthetic beauty of nature. These negative effects include banks of burning or non-burning soft sooty coal and refuse; underground mine fires; pollution of waters from acid mine drainage; subsidence of the soil; and landscapes scarred with strip mining pits and acid water impoundments. See id. In the mid-1960s, the Commonwealth began a massive undertaking to reclaim over 250,000 acres of abandoned surface mines and about 2,400 miles of streams contaminated with acid mine drainage, which did not meet water quality standards. See Pa. Dep’t of Env’tl. Protection, Pennsylvania’s Comprehensive Plan for Abandoned Mine Reclamation (1998), online at [www.portal.state.pa.us/portal/server.pt?open=514&objID=588910&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588910&mode=2) (last accessed on May 23, 2013). The cost of projects to date has been in the hundreds of millions of dollars, and the Department of Environmental Protection has predicted that an estimated 15 billion dollars is in fact necessary to resolve the problem of abandoned mine reclamation alone. Id.

The overwhelming tasks of reclamation and regeneration of the Commonwealth’s natural resources, along with localized environmental incidents (such as the 1948 Donora smog tragedy in which twenty persons died of asphyxiation and 7,000 persons were hospitalized because of corrosive industrial smoke; the 1959 Knox Mine disaster in which the Susquehanna River disappeared into the Pittston Coal Vein; the 1961 Glen Alden mine water discharge that killed more than 300,000 fish; and the Centralia mine fire that started in 1962, is still burning, and led to the relocation of all residents in 1984) has led to the gradual enactment of statutes protecting our environment. The drafters of

the Environmental Rights Amendment recognized and acknowledged the shocks to our environment and quality of life:

We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our 'delicate, pleasant and wholesome' air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles. We smashed our highways through fertile fields and thriving city neighborhoods. We cut down our trees and erected eyesores along our roads. We uglified our land and we called it progress.

1970 Pa. Legislative Journal-House at 2270 (quoting anonymous 1698 description of Penn's Woods air).

With these events in the recent collective memory of the General Assembly, the proposed Environmental Rights Amendment received the unanimous assent of both chambers during both the 1969-1970 and 1971-1972 legislative sessions. See Joint Resolution No. 4 of 1970, H.B. No. 958 & Joint Resolution No. 3 of 1971, H.B. No. 31 (enacted); see also PA. CONST. art. XI, § 1 (Proposal of amendments by the General Assembly and their adoption).<sup>48</sup> Pennsylvania voters ratified the proposed amendment

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<sup>48</sup> During the 1969-1970 session (House Bill 958), the proposed amendment received 188 votes in favor and 0 against in the House, and 39 votes in favor and 0 against in the Senate; on second consideration (House Bill 31), the amendment received similar unanimous support of 199 votes in favor and 0 against in the House, and 45 votes in favor and 0 against in the Senate. Representative Kury of Northumberland, as primary sponsor of the bill, noted that the proposed amendment was "a great step forward in assuring for ourselves and our posterity a natural environment of quality, rather than relegating ourselves to extinction or a mere survival level of existence." 1970 Pa. Legislative Journal-House at 2271. Representative Kury introduced into the record with the unanimous assent of the House a statement and supplemental legal analysis from Professor Robert Broughton, which offered the anticipatory elucidation of the proposed amendment to which we cite throughout this Opinion. See id. at 2272-81.

of the citizens' Declaration of Rights on May 18, 1971, with a margin of nearly four to one, receiving 1,021,342 votes in favor and 259,979 opposed. Dernbach, 103 Dickinson L. Rev. at 695 n.2 (citing Franklin L. Kury, The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested, 1 Vill. Envtl. L.J. 123, 123 (1990)); see also Gettysburg, 311 A.2d at 596 n.1 (Jones, C.J., dissenting) (amendment received more affirmative votes than any candidate seeking election to statewide office that same day).<sup>49</sup>

The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. In addition to Pennsylvania, Montana and Rhode Island are the only other states of the Union to do so. See PA. CONST. art. I, § 27 (1971); MT. CONST. art. II, § 3 (1889); R.I. CONST. art. I, § 17 (1970). Three other states -- Hawaii, Illinois, and Massachusetts -- articulate and protect their citizens' environmental rights in separate articles of their charters. See HI. CONST. art. XI, §§ 1, 9 (1978); ILL. CONST. art. XI, §§ 1, 2 (1971-72); MA. CONST. amend. 49 (1972). Of these three states, Hawaii and Illinois, unlike Pennsylvania, expressly require further legislative action to vindicate the rights of the people. By comparison, other state charters articulate a "public policy" and attendant directions to the state legislatures to pass laws for the conservation or protection of either all or enumerated natural resources. See, e.g., AK. CONST. art. VIII, §§ 1-18 (1959); COLO. CONST. art. XXVII, § 1 (1993); LA. CONST. art. IX, § 1 (1974); N.M. CONST.

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<sup>49</sup> Pennsylvania voters considered five constitutional amendments at the referendum of May 18, 1971. Of the four other proposed amendments, two were adopted by much smaller margins than Section 27, and two were defeated. Dernbach, 103 Dickinson L. Rev. at 695 n.2 (citing Kury, 1 Vill. Envtl. L.J. at 123-24 n.2). To say the Environmental Rights Amendment was broadly supported by the people and their representatives would be an understatement.

art. XX, § 21 (1971); N.Y. CONST. art. XIV, §§ 1-5 (1941); TX. CONST. art. XVI, § 59 (1917); VA. CONST. art. XI, §§ 1-4 (1971).<sup>50</sup> Some charters address the people's rights to fish and hunt, often qualified by the government's right to regulate these activities for the purposes of conservation. See, e.g., KY. CONST. § 255A (2012); VT. CONST. Ch. II, § 67 (1777); WI. CONST. art. I, § 26 (2003). Still other state constitutions simply authorize the expenditure of public money for the purposes of targeted conservation efforts. See, e.g., OR. CONST. art. IX-H, §§ 1-6 (1970); W.V. CONST. art. VI, §§ 55, 56 (1996). Finally, many of the remaining states do not address natural resources in their organic charters at all. See, e.g., NV. CONST. art. I, § 1 *et seq.*

That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life. Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. The drafters and the citizens of the Commonwealth who ratified the Environmental Rights

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<sup>50</sup> Representative Kury explained that New York State's environmental amendment inspired his proposal for the Pennsylvania amendment. Kury, Clean Politics, Clean Streams, at 69. But, Kury viewed the New York amendment as "too detailed and focused on environmental matters peculiar to that state" and proposed instead an amendment that would give the natural environment the same kind of constitutional protection as had been given to political rights. Id.; compare N.Y. CONST. art. XIV, §§ 1-5 (Conservation) with PA. CONST. art. I § 27. Unlike Pennsylvania's Environmental Rights Amendment, the New York environmental conservation provisions are not part of that State's Bill of Rights. See N.Y. CONST. art. I, § 1 *et seq.*

Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.<sup>51</sup>

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<sup>51</sup> We also note that natural gas industry development in the Marcellus Shale Formation affects interests of citizens of neighboring states. The Marcellus Shale Formation underlies approximately two-thirds of Pennsylvania's territory and extends to about 36 percent of the Delaware River Basin. See Delaware River Basin Comm'n, Natural Gas Drilling, online at [www.nj.gov/drbc/programs/natural/](http://www.nj.gov/drbc/programs/natural/) (last accessed on May 23, 2013). The Delaware River Basin Commission is a regional body created by compact between the federal government and the four basin states (Pennsylvania, New York, New Jersey, and Delaware) in 1961 to oversee a unified approach to managing the river system. The Commission includes the four basin state governors and the North Atlantic Division Engineer from the U.S. Army Corps of Engineers, who serves as the federal government's representative. The Commission has legal authority over water quality and water quantity-related issues throughout the Delaware River Basin.

The Commission has suggested that hydraulic fracturing techniques require large amounts of fresh water to release the natural gas. Although a significant amount of the fresh water used is recaptured, the fracking fluid "includes natural gas and chemicals added to facilitate the extraction process, as well as brine and other contaminants released from the formation." Id. In connection with natural gas drilling, the Commission identified "three major areas of concern":

1. Gas drilling projects in the Marcellus Shale or other formations may have a substantial effect on the water resources of the [Delaware River B]asin by reducing the flow in streams and/or aquifers used to supply the significant amounts of fresh water needed in the natural gas mining process.

(continued...)

### 6. Existing Jurisprudence Regarding Article I, Section 27

For the most part, to date, the promise of the Environmental Rights Amendment to protect and conserve the quality of our environment has been realized via legislative enactments and executive agency action. The question of how Article I, Section 27 obligations restrain the exercise of police power by the government (e.g., to regulate an industry), although a significant matter, has not presented itself for judicial resolution and this Court has had no opportunity to address the original understanding of the constitutional provision in this context until now. See Heller, 554 U.S. at 625-26. Subsequent to ratification, the Court entertained claims regarding the application of Section 27 in factual scenarios that generally fell within two categories: (1) challenges to specific private or governmental development projects, which implicated alleged violations of constitutional environmental rights and (2) challenges to local or statewide environmental quality laws, which implicated alleged violations of constitutional property rights. In light of the challenges, precedent has tended to define the broad constitutional rights in terms of compliance with various statutes and, as a result, to minimize the constitutional import of the Environmental Rights Amendment. Moreover, existing precedent has failed to differentiate between challenges based on whether they

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(...continued)

2. On-site drilling operations may potentially add, discharge or cause the release of pollutants into the ground water or surface water.
3. The recovered “frac[k] water” must be treated and disposed of properly.

Id.

implicated the people's rights under the first or second clauses of Section 27, or the Commonwealth's trustee duties under the second and third clauses, or both. Courts seemingly applied the same analytical scheme to both types of challenges, which introduced additional confusion for the bench and bar and, as a practical matter, has impeded efforts to develop a coherent environmental rights jurisprudence.

### I. *Environmental Challenges to Development Projects*

The leading cases in the first category of decisions are the 1973 decision in Gettysburg, *supra*, and the 1975-76 Commonwealth Court and Supreme Court opinions in Payne, *supra*. In Gettysburg, Commonwealth parties sought to enjoin the construction of an observation tower on private property neighboring the Gettysburg Battlefield, in Cumberland Township, Adams County. 311 A.2d at 589-90. The Commonwealth parties alleged that the proposed construction disrupted the skyline, dominated the setting, and eroded and despoiled the natural beauty and historic environment of the site. Cumberland Township and Adams County, the affected local governments, had no land use legislation to restrict the development, however, and, as a result, the Commonwealth sought relief only under Article I, Section 27 of the Constitution. This Court affirmed the lower court's denial of relief. The decision of the Court was deeply divided: Messrs. Justice O'Brien and Pomeroy would have held that the Environmental Rights Amendment was not self-executing and because, in their view, the Commonwealth could not bring suit absent legislation implementing the amendment, the action had to be dismissed without reaching its merits, *id.* at 590-95; Mr. Justice Nix concurred in the result with no opinion; Messrs. Justice Roberts and Manderino, who did not specifically address the question of self-execution, would have reached the merits of the Commonwealth's claim and would have affirmed, finding no

error with the lower courts' conclusion that the Commonwealth had not carried its burden of proof, id. at 595-96; and finally, Mr. Chief Justice Jones and Mr. Justice Eagen would have held that Section 27 was self-executing and would have reversed on the merits, concluding that the evidence of record did not support the lower court's decision, id. at 597-99.<sup>52</sup> Because no majority rule or reasoning emerged from the several opinions, the Gettysburg decision offered little guidance regarding the standards applicable in deciding an Article I, Section 27 challenge.

The Court's next opportunity to address the substantive standards of proof required to obtain relief under Section 27 likewise offered little guidance. In Payne, residents of the City of Wilkes-Barre sought to enjoin the plan of the Pennsylvania Department of Transportation to widen River Street at the expense of one-half acre of the River Common, a local park; the project also required removal of several large trees

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<sup>52</sup> One commentator has observed that, "For a constitutional provision to be self-executing, the provision must provide the court with a complete and enforceable rule . . . . [T]he constitutional language must supply a sufficient rule by means of which the right which the provision grants may be enjoyed and protected." Fernandez, 17 Harv. Envtl. L. Rev. at 333; see also Williams, 27 Okla. City U. L. Rev. at 221. On the issue of whether Section 27 of Article I was self-executing, no majority holding or reasoning emerged from the Gettysburg Court. Meanwhile, the Commonwealth Court in that case had held earlier that Section 27 was self-executing. See Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 892 (Pa. Cmwlth. 1973). The parties here do not dispute the self-executing nature of Section 27 in such terms, albeit aspects of the Commonwealth's arguments concerning justiciability implicate the point. Nor do the parties dispute that the Commonwealth may adopt legislation on the issues addressed in Section 27 pursuant to its police power. We note that the characterization of the Gettysburg Court's ultimate stance on these points in United Artists Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 620 (Pa. 1993), is erroneous. In United Artists, the Court stated that "a plurality of the [Gettysburg] Court held that [Section 27] was not self-executing, and legislative action was necessary to accomplish [its] goals." In fact, only two of the seven Justices in Gettysburg subscribed to that view; two Justices concluded the opposite; and three Justices did not address the issue. The prevailing view, insofar as the Gettysburg case was concerned, was the Commonwealth Court's holding that the provision was self-executing.

and the elimination of a pedestrian walk. The residents/challengers argued that the Commonwealth violated its duties as trustee of Pennsylvania's public natural resources by approving the River Street project. In affirming the Commonwealth Court's denial of relief, this Court held, *inter alia*, that the residents had not met their burden of proof. 361 A.2d at 273. According to the Court, the residents were seeking automatic relief by merely asserting a common right to a protected value under the trusteeship of the state. But, the Court stated, the proper approach was to balance interests in conservation of natural resources and maintenance of an adequate highway system, a task that the legislation pursuant to which the River Street project had been approved, Act 120 of 1970, already accomplished. See id. (citing 71 P.S. § 511 *et seq.* (Powers and Duties of Department of Transportation)). The residents, therefore, were not entitled to relief under Section 27. Notably, however, the Court directed that in its role as trustee, the Commonwealth (via agency action) had an obligation to avoid any environmental harm if possible but, absent a feasible alternative to the proposed development, had to permit the land use "in such a way as to minimize the environmental or ecological impact of the use." Id. at 272-73.

The Payne Court also addressed a three-part test, which the Commonwealth Court had adopted to explicate the residents' burden of proof under Section 27. The Court did not adopt that test but noted that the standard was equivalent to appellate review of the agency's River Street project decision under Act 120. See id. at 273 n.23; accord Eagle Env'tl. II, 884 A.2d at 879 (although recognizing that balancing must take place, Payne Court did not require any specific balancing test between Commonwealth's duty to protect environment and other duties to public).

The Commonwealth Court in Payne, acting *en banc* and in its original jurisdiction, had dismissed the matter and entered a decree *nisi*. Payne v. Kassab, 312 A.2d 86, 97

(Pa. Cmwlth. 1973). Notably, the court held that Section 27 was intended to allow “controlled development of resources rather than no development,” and rejected the residents’ argument that Section 27 had to be read in absolute terms so as to require an injunction any time a historical area was affected by a proposed development. In the court’s formulation, relief under Section 27 required consideration of the following factors: “(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?” Id. at 94. Applying the test it devised, the Commonwealth Court concluded that the River Street project was constitutionally permissible. Subsequently, the court entered a final decree upon its earlier decision, Payne v. Kassab, 323 A.2d 407 (Pa. Cmwlth. 1974); that decision was appealed by the residents and, as explained, our Court affirmed without elaborating further on the applicable substantive standards for obtaining Section 27 relief.

In subsequent cases implicating Section 27 challenges, the Commonwealth Court has generally applied its Payne test to a wide array of factual circumstances. See, e.g., Energy Conservation Council of Pa. v. Pub. Util. Comm’n, 25 A.3d 440, 453 (Pa. Cmwlth. 2011) (Public Utility Commission did not violate Section 27 by approving power line project and permitting construction to begin before receipt of National Park Service permit); Concerned Residents of Yough, Inc. v. Dep’t of Env’tl. Res., 639 A.2d 1265, 1274-75 (Pa. Cmwlth. 1994) (citizens have no Section 27 claim based on esthetic and noise concerns relating to use of property by solid waste management facility; Solid Waste Management Act regulates every aspect of solid waste disposal and balanced

environmental concerns through legislative process); see also Borough of Moosic v. Pa. Pub. Util. Comm'n, 429 A.2d 1237 (Pa. Cmwlth. 1981); Fox, supra, 342 A.2d 468. Notably, although the test was developed in the context of a challenge pursuant to the second and third clauses of Section 27 (implicating trustee duties), the Commonwealth Court has applied it irrespective of the type of environmental rights claim raised.

More importantly, the Payne test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text. In its subsequent applications, the Commonwealth Court has indicated that the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly's policy choices, rather than by the plain language of the amendment. See, e.g., Larwin Multihousing Pa. Corp. v. Com., 343 A.2d 83, 89 n.9 (Pa. Cmwlth. 1975) ("It is difficult to understand what protections are afforded by [Section 27] not already supplied by the township zoning ordinance and the comprehensive statutes of the Commonwealth concerning streams, air pollution and sewage disposal."). But, while the Payne test may have answered a call for guidance on substantive standards in this area of law and may be relatively easy to apply, the test poses difficulties both obvious and critical. First, the Payne test describes the Commonwealth's obligations -- both as trustee and under the first clause of Section 27 - - in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court's Payne decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control. Accord

Fernandez, 17 Harv. Envtl. L. Rev. at 358 (“When a state court declines to enforce a constitutional provision on the ground that it is not self-executing, it restricts its own role in the governing process.”); see, e.g., Borough of Moosic, supra; Fox, supra.<sup>53</sup> The branches of government have independent constitutional duties pursuant to the Environmental Rights Amendment, as these duties are interpreted by the judicial branch and this Court in particular. See Mesivtah, 44 A.3d at 7. Because of these critical difficulties, we conclude that the non-textual Article I, Section 27 test established in

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<sup>53</sup> In Fox, for example, the Commonwealth Court held that the decision of the former Department of Environmental Resources to grant a permit to run a sewer extension line along a stream was proper under the Clean Streams Act. The panel therefore vacated the decision of the Environmental Quality Board, which had remanded the matter to the Department for consideration, in light of the Department’s constitutional trustee duties, of the impact on constitutional environmental values of the proposed development. In the panel’s view, while the Department could consider such impact pursuant to other environmental statutes, the review of a permit decision under the Clean Streams Act was more limited. According to the Commonwealth Court, the Board’s decision would have required the Department to overstep its statutory authority under the Clean Streams Act, an action which the Environmental Rights Amendment did not authorize. 342 A.2d at 482-83. The Commonwealth Court’s conclusions that the Amendment limits rather than expands executive agency authority, and that executive agency authority to act is limited by its enabling legislation, are certainly reasonable. The difficulty with the Fox decision is in how the court went about reaching those conclusions. Thus, the Commonwealth Court indicated that satisfying the Payne test (pursuant to which legislative enactments are deemed to delineate the parameters of constitutional trustee duties, rather than the plain language of the constitutional provision) was sufficient to dispose of any constitutional challenge to an agency decision. The court seemingly relieved executive agencies of the obligation to apply statutes and exercise their statutory discretion in a manner consonant with the Constitution, indicating that mere compliance with the enabling statute and relevant regulations was sufficient to satisfy constitutional strictures. See Hartford, 482 A.2d at 549. The Commonwealth Court’s subsequent application of Fox in Borough of Moosic reflects this narrow understanding of an agency’s constitutional duties. 429 A.2d at 1240 (borough has no standing to intervene and present evidence of environmental harm to Public Utility Commission because consideration of constitutional environmental concerns falls outside Commission’s statutory authority).

Payne and its progeny is inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.

## II. *Challenges that Implicate a Balancing of Article I Rights*

In a second line of decisions, our Court has addressed challenges to environmental legislation intended to protect the rights articulated in the Environmental Rights Amendment. In these matters, the Court has generally cited Section 27 as stating a public policy favoring environmental interests which the legislation sought to implement. See, e.g., Nat'l Wood Preservers, Inc., supra, 414 A.2d 37. In National Wood Preservers, owners leased a property for use by a business interest using chemicals to preserve wood. The business disposed of waste liquids containing toxic chemicals by discharging them into a well, which drained into the groundwater beneath the property and then into a nearby stream. Following an investigation, the then Department of Environmental Resources ordered the owners and the business enterprise to abate the harmful condition, pursuant to Section 316 of the Clean Streams Law. Id. at 39-40 (citing 35 P.S. § 691.1). On appeal, this Court held that the agency orders were appropriate under Section 316. The Court, *inter alia*, rejected the appellants' argument that Section 316 was an impermissible exercise of police power, holding that enforcement of the provision did not constitute a taking under Article I, Section 10 of the Pennsylvania Constitution and the Fourteenth Amendment of the U.S. Constitution. According to the Court, in adopting the provision, the General Assembly acted in the interest of the public because "maintenance of the environment is a fundamental objective of state power," and a duty imposed upon the Commonwealth.

Id. at 44 (citing PA. CONST. art. I, § 27). The Court also rejected the argument that Section 316 was an oppressive exercise of the police power, and held that ownership or occupancy were sufficient predicates for requiring corrective orders under the circumstances: “[t]he notion of fault is least functional . . . when balancing the interests of a state in the exercise of its police power, because the beneficiary is not an individual but the community.” Id. at 47 n.18. See also Commonwealth v. Blosenski Disposal Serv., 566 A.2d 845 (Pa. 1989) (warrantless inspection provisions of Solid Waste Management Act did not violate search and seizure clause of Pennsylvania Constitution, Article I, Section 8, especially because provision implements Section 27); Commonwealth v. Parker White Metal Co., 515 A.2d 1358, 1370 (Pa. 1986) (provisions of Solid Waste Management Act creating criminal sanctions allowing prosecutorial discretion did not violate equal protection clause of Pennsylvania Constitution, Article I, Section 26, but provided flexible and effective means to enforce statute that implements Section 27).

In 1993, the Court rejected another challenge to the constitutionality of legislation adopted to vindicate Section 27 rights. See United Artists, 635 A.2d at 614. Appellant, the owner of the Boyd Theater in Philadelphia, challenged the historic landmark designation of the interior and exterior of the theater as a violation of the takings clauses of the Pennsylvania and U.S. Constitutions. On appeal, this Court vacated the historical designation order because the City had exceeded the scope of its statutory authority by designating the interior of the theater historic. In doing so, the Court nevertheless expressly upheld the constitutionality of the local ordinance, holding that the ordinance did not constitute a taking under either the U.S. Constitution or the Pennsylvania Constitution. Id. at 614-15 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128-29 (1978)). The Court also rejected the contention that the Pennsylvania

Constitution guaranteed more expansive rights than its federal counterpart with respect to governmental takings. In undertaking its analysis under the then-recent decision in Edmunds, *supra*, which reinvigorated Pennsylvania constitutional law, the Court noted that Section 27 “reflects a state policy encouraging the preservation of historic and aesthetic resources” and that the local ordinance was consistent with the policy. Id. at 620.

Generally, litigation efforts of private interests to limit the exercise of the General Assembly’s police power to protect the environment by asserting competing constitutional rights have been unsuccessful, in recognition of the Section 27 imperative. This second line of precedents is consistent with an interpretation of the Environmental Rights Amendment as encompassing a duty of the General Assembly to act in a manner that protects Pennsylvania’s public natural resources from degradation and diminution.

### III. *The Limitations of Existing Decisional Law in Light of the Present Dispute*

Nothing in this Court’s precedent offers substantive and controlling guidance with respect to the type of claims that the citizens assert in this matter. The two lines of cases described above illustrate simply that the legislative and executive branches have taken the initiative in adding substance to the rights guaranteed by Section 27, as the drafters of the constitutional provision anticipated. Contrary to the same drafters’ expectations, however, the provision has not yet led to the development of an environmental rights jurisprudence comparable to the tradition of political rights jurisprudence. The absence of such jurisprudence, however, does nothing to diminish the textual, organic rights. See Pap’s, 812 A.2d at 605 (absence of earlier jurisprudence involving freedom of expression under Pennsylvania Constitution may be

explained by fact that “Pennsylvania legislators, executives, and judges were all true to their oaths of fidelity to our Constitution”). In any event, this Court has an obligation to vindicate the rights of its citizens where the circumstances require it and in accordance with the plain language of the Constitution. Id.

### **B. The Relevant Provisions of Act 13**

The adoption of Act 13 by the General Assembly accomplished the first major overhaul in nearly three decades of Title 58 of the Pennsylvania Consolidated Statutes, the Oil and Gas Act. The General Assembly declared its intent to permit optimal development of the Commonwealth’s oil and gas resources, to protect the safety of personnel and facilities in covered industries, to protect the safety and property rights of persons residing in areas hosting oil and gas operations, and to protect natural resources, environmental rights and values secured by the Constitution of Pennsylvania. See 58 Pa.C.S. § 3202 (Declaration of purpose of chapter). Act 13 was initially introduced in the House of Representatives (House Bill 1950), where it was adopted on November 17, 2011, by a vote of 107 to 76. On December 14, 2011, the Senate adopted an amended bill by a vote of 28 to 22. Because the House did not concur in the amendments and the Senate insisted on the amendments, House Bill 1950 was sent to a conference committee on February 6, 2012. The conference committee adopted its report the same day and presented it to the two legislative houses on February 7, 2012. Against some protests that the call for votes did not permit further debate and amendment (see, e.g., 2012 Pa. Legislative Journal -- Senate 105, 108), the Senate adopted the conference committee’s report on February 7, 2012, by a vote of 31 to 19, and the House adopted the same report on February 8, 2012, by

a vote of 101 to 90. The General Assembly sent the bill to Governor Corbett on February 10, 2012, and the Governor signed it on February 14, 2012.

On appeal to this Court, the citizens request that we declare Act 13 unconstitutional in its entirety. This request for relief is premised primarily upon claims that discrete provisions central to Act 13 are unconstitutional: Sections 3303, 3304, and 3215(b)(4) and (d); but, the citizens also address other provisions, *i.e.*, Sections 3305 through 3309. 58 Pa.C.S. §§ 3303-3309; 3215(b), (d).<sup>54</sup>

The Chapter 33 provisions -- Sections 3303 through 3309 -- address local ordinances relating to oil and gas operations. Section 3303 states that “environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances.” The General Assembly’s stated intent in Act 13 is to preempt and supersede “local regulation of oil and gas operations regulated by the [statewide] environmental acts, as provided in this chapter[, Chapter 33].”

In addition, Section 3304 institutes uniformity among local ordinances Commonwealth-wide, to allow, as stated, for “the reasonable development of oil and gas resources,” by both precluding local governments from acting in certain ways, and then requiring local government to take certain dictated actions while approving and permitting oil and gas operations within the parameters articulated by the provision. Section 3304 thus commands that all political subdivisions:

- (1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the

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<sup>54</sup> The citizens also raise discrete claims implicating other provisions of Act 13, which we will address in part IV of this Opinion (Other Claims).

storage and use of explosives throughout every local government.

(2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government.

(3) May not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than the conditions, requirements or limitations imposed on other industrial uses or other land development within the particular zoning district where the oil and gas operations are situated within the local government.

(4) Shall have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.

(5) Shall authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all zoning districts.

(5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or permit only as a conditional use, wells or well sites otherwise permitted under paragraph (5) within a residential district if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. In a residential district, all of the following apply:

(i) A well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building.

(ii) Except as set forth in paragraph (5) and this paragraph, oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.

(6) Shall authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building.

(7) Shall authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, if the natural gas compressor building meets the following standards:

(i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and

(ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(8) Shall authorize a natural gas processing plant as a permitted use in an industrial zoning district and as conditional uses in agricultural zoning districts if all of the following apply:

(i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.

(ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(9) Shall impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC.

(10) May not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil

and gas wells or the assembly and disassembly of drilling rigs.

(11) May not increase setback distances set forth in Chapter 32 (relating to development) or this chapter. A local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

58 Pa.C.S. § 3304.

Reviewing the amended Act, few could seriously dispute how remarkable a revolution is worked by this legislation upon the existing zoning regimen in Pennsylvania, including residential zones. In short, local government is required to authorize oil and gas operations, impoundment areas, and location assessment operations (including seismic testing and the use of explosives) as permitted uses in all zoning districts throughout a locality. Local government is also required to authorize natural gas compressor stations as permitted uses in agricultural and industrial districts, and as conditional uses in all other zoning districts. Local governments are also commanded to authorize natural gas processing plants as permitted uses in industrial districts and as conditional uses in agricultural districts. Moreover, Section 3304 limits local government to imposing conditions: on construction of oil and gas operations only as stringent as those on construction activities for industrial uses; and on heights of structures, screening and fencing, lighting and noise only as stringent as those imposed on other land development within the same zoning district. Local government is also simply prohibited from limiting subterranean operations and hours of operation for assembly and disassembly of drilling rigs, and for operation of oil and gas wells, compressor stations, or processing plants. Localities also may not increase setbacks from uses related to the oil and gas industry beyond those articulated by Act 13. In

addition, the dictated approach to setbacks focuses only on “existing buildings,” offering residents and property owners no setback protections should they desire to develop further their own properties. That local government’s zoning role is reduced to *pro forma* accommodation is confirmed by the fact that review under local ordinances of proposed oil and gas-related uses must be completed in 30 days for permitted uses, and in 120 days for conditional uses. The displacement of prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property is unprecedented.

The subsequent provisions of Chapter 33, Sections 3305 through 3309, create an enforcement mechanism to facilitate implementation of the preceding parts of the Act, Chapter 32 and Sections 3302 through 3304. Thus, Section 3305 authorizes the Public Utility Commission to issue advisory opinions to municipalities regarding the compliance of proposed local ordinances with the dictates of Act 13 and, upon request by a resident or an oil and gas entity, to issue orders to enforce compliance of enacted local ordinances with Act 13 requirements. The Commission’s orders related to enacted ordinances are subject to *de novo* review in the Commonwealth Court, while the advisory opinions are deemed unappealable. Moreover, Section 3306 authorizes civil actions in the Commonwealth Court to enjoin the enforcement of a local ordinance alleged to be contrary to Chapters 32 and 33 of Act 13 or the Municipalities Planning Code.

A failure to comply with Act 13’s requirements that local government act swiftly to accommodate Act 13’s new regimen has significant financial consequences for local government as well. Section 3307(a) authorizes the shifting of attorneys’ fees and costs to local government, if the court determines that “local government enacted or enforced a local ordinance with willful or reckless disregard” of Act 13. Section 3308 also deems a municipality ineligible to receive unconventional gas well fees if the Public Utility

Commission, the Commonwealth Court, or this Court issues an order that a local ordinance violated Act 13. Under Section 3309, local government has but a 120-day grace period following the effective date of Act 13 in which to take action to overturn the locality's prior land use planning scheme and to bring existing local ordinances into compliance with the new regime.

In Chapter 32, Section 3215 imposes modest oil and gas well location restrictions in reference to sensitive water resources, as follows:

(b) Limitation.-- (1) No well site may be prepared or well drilled within 100 feet or, in the case of an unconventional well, 300 feet from the vertical well bore or 100 feet from the edge of the well site, whichever is greater, measured horizontally from any solid blue lined stream, spring or body of water as identified on the most current 7 1/2 minute topographic quadrangle map of the United States Geological Survey.

(2) The edge of the disturbed area associated with any unconventional well site must maintain a 100-foot setback from the edge of any solid blue lined stream, spring or body of water as identified on the most current 7 1/2 minute topographic quadrangle map of the United States Geological Survey.

(3) No unconventional well may be drilled within 300 feet of any wetlands greater than one acre in size, and the edge of the disturbed area of any well site must maintain a 100-foot setback from the boundary of the wetlands.

58 Pa.C.S. § 3215(b)(1)-(3). However, even these modest restrictions can be averted by the gas industry, with the Pennsylvania Department of Environmental Protection given considerable authority under the Act to grant waivers of setbacks:

(4) The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the

waters of this Commonwealth. The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth. Notwithstanding section 3211(e), if a waiver request has been submitted, the department may extend its permit review period for up to 15 days upon notification to the applicant of the reasons for the extension.

58 Pa.C.S. § 3215(b). In short, notwithstanding the purported protection of sensitive waters via setbacks, pursuant to Section 3215(b)(4), oil and gas operators are **entitled** to automatic waivers of setbacks “upon submission of a plan identifying the additional measures, facilities or practices as prescribed by the [Department of Environmental Protection] to be employed during well site construction, drilling and operations.” A waiver “shall include additional terms and conditions required by the [D]epartment necessary to protect the waters of this Commonwealth,” consistent with regulations that “shall” be developed by the Environmental Quality Board. 58 Pa.C.S. § 3215(b)-(c), (e)(1). Remarkably, if a drilling permit that contains Department-imposed conditions is appealed, it is not the industry, but the Department, that “has the burden of proving that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.” 58 Pa.C.S. § 3215(e)(2).<sup>55</sup>

In a further blanket accommodation of industry and development, Section 3215(d) limits the ability of local government to have any meaningful say respecting drilling permits and well locations in their jurisdictions. Under Act 13, a municipality in

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<sup>55</sup> Other parts of Section 3215 provide similar measures for granting waivers or variances with respect to development-sensitive features, such as water wells and floodplains. See 58 Pa.C.S. § 3215(a), (f). In each instance, development and disturbance of the environment is preferred over the natural state, along the same statutory approach articulated in Section 3215(b). The citizens do not assert separate claims premised upon either subsection (a) or (f) of Section 3215; nevertheless, in light of our present decision, enforcement of these provisions obviously is constitutionally suspect.

which an unconventional gas well is proposed may submit written comments “describing local conditions or circumstances” which the municipality would like the Department of Environmental Protection to consider. But, the Department is not obligated to act upon local comments, although it may do so. In another remarkable provision, the Act further provides that, “[n]otwithstanding any other law, no municipality . . . shall have a right of appeal or other form of review from the [D]epartment’s decision.” 58 Pa.C.S. § 3215(d).

### **C. Article I, Section 27 Rights in Application**

We underscore that the citizens raise claims which implicate primarily the Commonwealth’s duties as trustee under the Environmental Rights Amendment.<sup>56</sup> The Commonwealth’s position on the municipalities’ role following Act 13’s land use revolution respecting oil and gas operations is similar to its stance regarding the authority of the judiciary to entertain and decide this dispute: in the Commonwealth’s view, there is no role. According to the Commonwealth, the question here is strictly one of policy, which only the General Assembly may formulate pursuant to its police powers and authority as trustee of Pennsylvania’s public natural resources. By the Commonwealth’s reasoning, municipalities have no authority to articulate or implement a different policy, and they have no authority even to claim that the General Assembly’s policy violates the Commonwealth’s organic charter. The Commonwealth suggests that Act 13 is an enactment based on valid legislative objectives and, therefore, falls properly within its exclusive discretionary policy judgment.

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<sup>56</sup> We recognize that the rights under the first clause of Article I, Section 27 of individual appellants -- Messrs. Ball and Coppola, and Ms. van Rossum -- may also be implicated here. These appellants, however, have not developed arguments regarding the merits of such claims sufficient to enable us to render a reasoned decision. Accordingly, we express no opinion on the issue of whether Act 13 violates the rights of individual plaintiffs under the first clause of the Environmental Rights Amendment.

In contrast, the citizens construe the Environmental Rights Amendment as protecting individual rights and devolving duties upon various actors within the political system; and they claim that breaches of those duties or encroachments upon those rights is, at a minimum, actionable. According to the citizens, this dispute is not about municipal power, statutory or otherwise, to develop local policy, but it is instead about compliance with constitutional duties. Unless the Declaration of Rights is to have no meaning, the citizens are correct.

In relevant part, as we have explained previously, the Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly. See PA. CONST. art. I, §§ 25, 27.

The Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations. See Commonwealth ex rel. Logan v. Hiltner, 161 A. 323, 325 (Pa. 1932) ("It is a settled rule of constitutional construction that prohibitive and restrictive provisions are self[-]executing and may be enforced by the courts independently of any legislative action."); accord Payne, 361 A.2d at 272 (Environmental Rights Amendment creates public trust and names Commonwealth trustee; "[n]o implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own *ipse dixit*."). This view is not an outlier. Washingtonian Home of Chicago v. City of Chicago, 41 N.E. 893, 896 (Ill. 1895) ("[W]here [constitutional] provisions are negative

or prohibitory in their character, they execute themselves. Where [the Constitution] limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, none would contend that the power might be exercised or the act performed until prohibited by the general assembly. The constitution undeniably has as much vigor in prohibiting the exercise of power or the performance of an act as the general assembly.”); Fernandez, 17 Harv. Envtl. L. Rev. at 353-54 (“If, despite the absence of a remedy, a provision directly vests a right on a party, the court may declare the provision to be self-executing and fashion a remedy itself.”). Statutes and regulations addressing the right are “subordinate to the enjoyment of the right, the exercise of which is regulated. It must be regulation purely, not destruction.” Page v. Allen, 58 Pa. 338 at \*8 (Pa. 1868). As a corollary, the Legislature may not abridge, add to, or alter the constitutional qualification of a right by statute. See id.

We recognize that, along with articulating the people’s rights as beneficiaries of the public trust, the Environmental Rights Amendment also encourages the General Assembly to exercise its trustee powers to enact environmental legislation that serves the purposes of the trust. But, in this litigation, the citizens’ constitutional challenge is not to the General Assembly’s power to enact such legislation; that is a power the General Assembly unquestionably possesses. The question arising from the Commonwealth’s litigation stance is whether the General Assembly can perform the legislative function in a manner inconsistent with the constitutional mandate. See also Goodheart v. Casey, 565 A.2d 757, 760 (Pa. 1989).

Act 13 is not generalized environmental legislation, but is instead a statute that regulates a single, important industry -- oil and gas extraction and development. Oil and gas resources are both privately owned and partly public, *i.e.*, insofar as they are on

public lands. Act 13 does not remotely purport to regulate simply those oil and gas resources that are part of the public trust corpus, but rather, it addresses the exploitation of all oil and gas resources throughout Pennsylvania. Act 13's primary stated purpose is not to effectuate the constitutional obligation to protect and preserve Pennsylvania's natural environment. Rather, the purpose of the statute is to provide a maximally favorable environment for industry operators to exploit Pennsylvania's oil and natural gas resources, including those in the Marcellus Shale Formation. See 58 Pa.C.S. § 3202 (primary purpose is to permit "optimal development of oil and gas resources"). The authority to regulate the oil and gas industry in this context derives, therefore, from the General Assembly's plenary power to enact laws for the purposes of promoting the general welfare, including public convenience and general prosperity, rather than from its corresponding duties as trustee of Pennsylvania's public natural resources. See Clifton, 969 A.2d at 1211 n.19; Best, 141 A.2d at 611. The public natural resources implicated by the "optimal" accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania's environment, which are part of the public trust.

As we have explained, Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike.

When coal was “King,” there was no Environmental Rights Amendment to constrain exploitation of the resource, to protect the people and the environment, or to impose the sort of specific duty as trustee upon the Commonwealth as is found in the Amendment. Pennsylvania’s very real and mixed past is visible today to anyone travelling across Pennsylvania’s spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania’s natural assets. Pennsylvania’s past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

The type of constitutional challenge presented today is as unprecedented in Pennsylvania as is the legislation that engendered it. But, the challenge is in response to history seeming to repeat itself: an industry, offering the very real prospect of jobs and other important economic benefits, seeks to exploit a Pennsylvania resource, to supply an energy source much in demand. The political branches have responded with a comprehensive scheme that accommodates the recovery of the resource. By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth

century, since there was no Environmental Rights Amendment. The response is available now.

The challenge here is premised upon that part of our organic charter that now explicitly guarantees the people's right to an environment of quality and the concomitant expressed reservation of a right to benefit from the Commonwealth's duty of management of our public natural resources. The challengers here are citizens -- just like the citizenry that reserved the right in our charter. They are residents or members of local legislative and executive bodies, and several localities directly affected by natural gas development and extraction in the Marcellus Shale Formation. Contrary to the Commonwealth's characterization of the dispute, the citizens seek not to expand the authority of local government but to vindicate fundamental constitutional rights that, they say, have been compromised by a legislative determination that violates a public trust. The Commonwealth's efforts to minimize the import of this litigation by suggesting it is simply a dispute over public policy voiced by a disappointed minority requires a blindness to the reality here and to Pennsylvania history, including Pennsylvania constitutional history; and, the position ignores the reality that Act 13 has the potential to affect the reserved rights of every citizen of this Commonwealth now, and in the future. We will proceed now to the merits.

### *1. Section 3303*

We begin by addressing the citizens' claims regarding the constitutionality of Section 3303 of Act 13. We recognize that, as the Commonwealth states, political subdivisions are "creations of the state with no powers of their own." Fross v. County of Allegheny, 20 A.3d 1193, 1202 (Pa. 2011). Municipalities have only those powers "expressly granted to them by the Constitution of the Commonwealth or by the General

Assembly, and other authority implicitly necessary to carry into effect those express powers.” Id. Within this construct, the General Assembly has the authority to alter or remove any powers granted and obligations imposed by statute upon municipalities. See, e.g., Huntley, 964 A.2d at 862 (even where state has granted powers to act in particular field, such powers do not exist if Commonwealth preempts field). By comparison, however, constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute. See Mesivtah, 44 A.3d at 9 (statute “cannot excuse the constitutional minimum” for meeting public charity exemption from taxation); Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals, 919 A.2d 206, 223 (Pa. 2007) (General Assembly cannot authorize exemption from taxation going beyond what is permitted by constitutional text and, if exemption is deemed to exceed what is authorized, courts are duty-bound to strike it down); Stilp, 905 A.2d at 943 (quoting Jorgensen v. Blagojevich, 811 N.E.2d 652, 669-70 (Ill. 2004) (“No principle of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem.”)). Moreover, the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties. Cf. Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 196-97 (Pa. 1971) (“Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice . . .”).

With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but “the Commonwealth” as trustee. We have explained that, as a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people. The municipalities

affected by Act 13 all existed before that Act was adopted; and most if not all had land use measures in place. Those ordinances necessarily addressed the environment, and created reasonable expectations in the resident citizenry. To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns. The constitutional command respecting the environment necessarily restrains legislative power with respect to political subdivisions that have acted upon their Article I, Section 27 responsibilities: the General Assembly can neither offer political subdivisions purported relief from obligations under the Environmental Rights Amendment, nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties. Indeed, if the General Assembly had subsumed local government entirely by Act 13 -- it did not, instead it required local government essentially to be complicit in accommodating a new environmental regime irrespective of the character of the locale -- the General Assembly could not eliminate the commands of Article I, Section 27. Rather, the General Assembly would simply have shifted the constitutional obligations onto itself. And those obligations include the duty to "conserve and maintain" the public natural resources, including clean air and pure water, "for the benefit of all the people." The Commonwealth, by the General Assembly, declares in Section 3303 that environmental obligations related to the oil and gas industries are of statewide concern and, on that basis, the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations. Act 13 thus commands municipalities to ignore their obligations under Article I, Section 27 and further directs municipalities to

take affirmative actions to undo existing protections of the environment in their localities. The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment. Accordingly, we are constrained to hold that, in enacting this provision of Act 13, the General Assembly transgressed its delegated police powers which, while broad and flexible, are nevertheless limited by constitutional commands, including the Environmental Rights Amendment.

## 2. Section 3304

Next, we address the Commonwealth's claims regarding the constitutionality of Section 3304, a provision that elaborates upon local regulation of oil and gas development in Pennsylvania. In regulating the oil and gas industry, the General Assembly exercises its constitutional police powers (to promote general welfare, convenience, and prosperity) but it must also exercise its discretion as trustee of the public natural resources (to "conserve and maintain" public natural resources for the benefit of the people), permitting changes to the corpus of the trust to encourage sustainable development where appropriate. See Payne, 361 A.2d at 273 ("[i]t is manifest that a balancing must take place . . ."). Discretion, in the trustee context, equates to a legal discretion cabined by the language of the trust and the trustee's fiduciary duties, rather than to mere subjective judgment. Struthers Coal & Coke Co. v. Union Trust Co., 75 A. 986, 988 (Pa. 1910); see In re Sparks' Estate, 196 A. 48, 57 (Pa. 1938). Proper exercise of a trustee's discretion is measured by benefits "bestow[ed] upon all [the Commonwealth's] citizens in their utilization of natural resources" rather than "by the balance sheet profits and appreciation [the trustee] realizes from its resources operations." See 1970 Pa. Legislative Journal-House at 2273; id. at 2270

("[T]he measure of our progress is not just what we have but how we live. . . ."). In this sense, the trustee may use the assets of the trust only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries. Metzger v. Lehigh Valley Trust & Safe Deposit Co., 69 A. 1037, 1038 (Pa. 1908).

With respect to Act 13, the General Assembly certainly recognized, among other things, its twin constitutional duties to provide for the general welfare and prosperity by "permit[ting] optimal development of oil and gas resources of this Commonwealth," and for the protection of "natural resources, environmental rights and values secured by the Constitution of Pennsylvania." 58 Pa.C.S. § 3202. A declaration of intent, regardless of its validity or its beneficence, is neither dispositive nor is it even particularly probative of whether the means articulated in the legislative enactment, by which the intent is pursued, are constitutional. See Stilp, 905 A.2d at 945. We pass upon a constitutional challenge to the legislative enactment not by measuring the wisdom of the means chosen by the General Assembly to pursue its policy, but by measuring the enactment against the relevant constitutional command.

We have explained that, among other fiduciary duties under Article I, Section 27, the General Assembly has the obligation to prevent degradation, diminution, and depletion of our public natural resources, which it may satisfy by enacting legislation that adequately restrains actions of private parties likely to cause harm to protected aspects of our environment. We are constrained to hold that Section 3304 falls considerably short of meeting this obligation for two reasons.

First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the

constitutionally-protected aspects of the public environment and of a certain quality of life. In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions. See, e.g., 75 Pa.C.S. § 4706(b.1)(1) & 67 Pa. Code § 177.51 (c)-(f) (vehicle emissions inspection requirements stricter in metropolitan areas, Philadelphia and Pittsburgh). Moreover, the Commonwealth is now over three centuries old, and its citizens settled the territory and built homes and communities long before the exploitation of natural gas in the Marcellus Shale Formation became economically feasible. Oil and gas operations do not function autonomously of their immediate surroundings. Act 13 emerged upon this complex background of settled habitability and ownership interests and expectations.

Despite this variety in the existing environmental and legislative landscape, Act 13 simply displaces development guidelines, guidelines which offer strict limitations on industrial uses in sensitive zoning districts; instead, Act 13 permits industrial oil and gas operations as a use “of right” in **every zoning district throughout the Commonwealth**, including in residential, commercial, and agricultural districts. See 58 Pa.C.S. § 3304(a), (b)(1), (5)-(9). Insofar as Section 3304 permits the fracking operations and exploitation of the Marcellus Shale at issue here, the provision compels exposure of otherwise protected areas to environmental and habitability costs associated with this particular industrial use: air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape. The entirely new legal regimen alters existing expectations of communities

and property owners and substantially diminishes natural and esthetic values of the local environment, which contribute significantly to a quality of environmental life in Pennsylvania. Again, protected by their organic charter, these communities and property owners could reasonably rely upon the zoning schemes that municipalities designed at the General Assembly's prompt, schemes in which participation was mandatory and which imposed costs (for example, land use restrictions) upon participants, in addition to benefits. The costs, under the local schemes, presumably were rationally related to the scheme's benefits. For communities and property owners affected by Act 13, however, the General Assembly has effectively disposed of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions, and has sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts. In constitutional terms, the Act degrades the corpus of the trust. Cf. HHAP, 77 A.3d at 604 & n.20 (passing upon due process challenge, describes effect of challenged retrospective legislation on appellees' settled rights; cites U.S. Supreme Court as "warning that settled expectations should not be lightly disrupted, and highlighting the importance of scrutinizing retrospective laws with particular caution because of the Legislature's unmatched powers to sweep away settled expectations suddenly and without individualized consideration").

A second difficulty arising from Section 3304's requirement that local government permit industrial uses in all zoning districts is that some properties and communities will carry much heavier environmental and habitability burdens than others. Accord Agencies' Brief (as appellees), at 5-9 (admitting that uniform provisions of Act 13, including Section 3304, have "potentially different impacts on differently situated communities and property owners"). This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of

“all the people.” PA. CONST. art. I, § 27. A trustee must treat all beneficiaries equitably in light of the purposes of the trust. See Hamill’s Estate, 410 A.2d at 773; 20 Pa.C.S. § 7773. Again, we do not quarrel with the fact that competing constitutional commands may exist, that sustainable development may require some degradation of the corpus of the trust, and that the distribution of valuable resources may mean that reasonable distinctions are appropriate. But, Act 13’s blunt approach fails to account for this constitutional command at all and, indeed, exacerbates the problem by offering minimal statewide protections while disabling local government from mitigating the impact of oil and gas development at a local level. See 58 Pa.C.S. § 3304(b)(2)-(4), (10)-(11). Section 3304 requires either that no “conditions, requirements or limitations” be imposed on certain aspects of oil and gas location or operations or that such conditions, requirements, or limitations be no “more stringent” than those imposed on other industrial uses in the municipality (relating to construction activities) or other land development in the zoning district (relating to heights of structures, screening and fencing, lighting or noise). Remarkably, Section 3304 then goes even further, as it prohibits local government from tailoring protections for water and air quality (*e.g.*, through increased setbacks) and for the natural, scenic, and esthetic characteristics of the environment (*e.g.*, through increased setbacks, screening, fencing, reduced hours of operation requirements) in the affected areas within a municipality. Id. Imposing statewide environmental and habitability standards appropriate for the heaviest of industrial areas in sensitive zoning districts lowers environmental and habitability protections for affected residents and property owners below the existing threshold and permits significant degradation of public natural resources. The outright ban on local regulation of oil and gas operations (such as ordinances seeking to conform

development to local conditions) that would mitigate the effect, meanwhile, propagates serious detrimental and disparate effects on the corpus of the trust.

To be sure, the Commonwealth and its *amici* make compelling policy arguments that Pennsylvania's populace will benefit from the exploitation of the natural gas found in the Marcellus Shale Formation. Shale gas, according to the Commonwealth and its *amici*, has the potential to be a long-term source of energy that is cheap to transport to large metropolitan centers and businesses on the East Coast, and that can provide a welcome source of tax and other income for the Commonwealth and local communities.<sup>57</sup> The Commonwealth offers that it has devised the best means by which to take advantage of Pennsylvania's rich shale gas resources, including by anticipating what it believes would be local efforts to derail industry development and by preventing what it says would be a "balkanization" of legal regimes with which the industry would have to comply.

If economic and energy benefits were the only considerations at issue, this particular argument would carry more weight. But, the Constitution constrains this Court not to be swayed by counter-policy arguments where the constitutional command is clear. In this sense, the Commonwealth fails to respond in any meaningful way to the citizens' claims that Act 13 falls far short of providing adequate protection to existing

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<sup>57</sup> The U.S. Department of Energy suggests that in 2011, the U.S. consumed about 23 trillion cubic feet ("Tcf") of natural gas per year, of which 20 Tcf were produced domestically. The Department cited the projection that there are 827 Tcf of recoverable natural gas from all U.S. shales (including Marcellus), which represents an approximately 36-year supply at current consumption levels. In 2009, shale gas production amounted to 14 percent of the total volume of natural gas produced in the U.S. and 12 percent of the natural gas consumed domestically. The Marcellus Shale play contributed to approximately 2 Tcf of a total of 3.5 to 4.5 Tcf of shale gas produced in 2009-2010. By 2035, it is projected that the shale gas share will increase to 45 percent of the total volume of gas produced in the U.S. U.S. Dep't of Energy, *supra*, at 4.

environmental and habitability features of neighborhoods in which they have established homes, schools, businesses that produce or sell food and provide healthcare, and other ventures, which ensure a quality of human life. In our view, the framers and ratifiers of the Environmental Rights Amendment intended the constitutional provision as a bulwark against enactments, like Act 13, which permit development with such an immediate, disruptive effect upon how Pennsylvanians live their lives. To comply with the constitutional command, the General Assembly must exercise its police powers to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy, and esthetically-pleasing environment. Cf. Schuylkill Trust Co. v. Schuylkill Mining Co., 57 A.2d 833, (Pa. 1948) (same principle applicable outside trustee/beneficiary relationship, in context where both legal and equitable interests exist: holder of legal title to mining property (owner) has right to mine property and even to exhaust mineral wealth, with no charge of waste by holder of equitable interest not in possession (mortgage holder), except where holder of legal title engages in mining operations in unskilled or careless manner that renders irreparable damage to property).

For these reasons, we are constrained to hold that the degradation of the corpus of the trust and the disparate impact on some citizens sanctioned by Section 3304 of Act 13 are incompatible with the express command of the Environmental Rights Amendment. We recognize the importance of this legislation, and do not question the intentions behind it; we recognize, too, the urgency with which the political branches believe they must act to secure the benefits of developing the unconventional natural gas industry. By any measure, this legislation is of sweeping import. But, in that urgency, it is apparent that the Article I, Section 27 constitutional commands have been swept aside. Act 13's unauthorized use of the public trust assets is unprecedented and constitutionally infirm,

even assuming that the trustee believes it is acting solely and in good faith to advance the economic interests of the beneficiaries. See Metzger, 69 A. at 1038.<sup>58</sup>

### 3. *Section 3215(b)*

Finally, we address the Commonwealth's claims regarding the constitutionality of Section 3215(b)(4). At the outset, we agree with the Commonwealth that Section 3215(b)(4) cannot be considered in isolation, and that we must review the entire decisional process regarding the protection of certain bodies of water described in Section 3215(b) to render a proper decision.<sup>59</sup> Even placed into this broad context, the Commonwealth's characterization of the provision is, nevertheless, unpersuasive.

Section 3215(b) states mandatory setbacks for the gas industry but, even then, the provision also requires the Department of Environmental Protection to waive the setbacks on condition that the permit applicant submit "a plan" to protect Commonwealth waters. The Act requires the Department to articulate protective terms and conditions it deems "necessary," but upon appeal by the applicant, the Department has the burden to justify these conditions. In the process of granting these permits, the Act empowers the

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<sup>58</sup> Section 3304 also has a similar effect to Section 3303, in that it removes local government's necessary and reasonable authority to carry out its trustee obligations by prohibiting the enactment of ordinances tailored to local conditions. As we explained relative to Section 3303, the General Assembly may not command municipalities to ignore their obligations under Article I, Section 27 and, thereby, abridge citizens' constitutional rights indirectly. See Mesivtah, 44 A.3d at 9 (statute "cannot excuse the constitutional minimum" for meeting public charity exemption from taxation); cf. Carroll, 274 A.2d at 196-97 (Judiciary "must possess" inherent power to carry out its mandated responsibilities). Accordingly, for this additional reason, Section 3304 is unconstitutional.

<sup>59</sup> There is no dispute that regulation of the Commonwealth's waters implicates public natural resources that are a subject of the Article I, Section 27 trust.

Department to “consider” local comments, but it is not required to act upon local concerns. Unlike the industry, local government may not seek review of permit decisions. See 58 Pa.C.S. § 3215(b), (d)-(e); see also 58 Pa.C.S. § 3212.1(b). Section 3215(b) presents twin difficulties.

Initially, neither Section 3215(b), nor any other provision of Act 13, describes what additional measures are “necessary” for a waiver of setbacks to be appropriate. The Commonwealth insists that Act 13 impliedly creates a floor and a ceiling on the type of conditions the Department may impose on a permit applicant. In the Commonwealth’s view, the Department’s discretion is limited by Act 13’s express intent and by the Commonwealth’s various existing environmental statutes. But, predictably enough given the broad language of Section 3215, the Commonwealth fails to identify any actual substantive conditions that may be deemed necessary for the purposes of Act 13. Rather, the necessary protections are determined according to criteria that the Environmental Quality Board shall articulate, which are to account for the impact on public natural resources of oil and gas operations; notably, those criteria must ensure optimal development of the industry. See 58 Pa.C.S. § 3215(e).<sup>60</sup> The direction to the Department

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<sup>60</sup> The Environmental Quality Board is to articulate criteria for granting permits premised on consideration of the impact on public natural resources, including publicly owned parks, forests, game lands and wildlife areas; national or state scenic rivers; national natural landmarks; habitats of rare and endangered flora and fauna and other critical communities; historical and archaeological sites listed on the federal or state list of historic places; and sources used for public drinking supplies. It is worth noting that the Commonwealth does not specify whether any independent scientific study has been commissioned or what data will be used to assess the impact on any or all of the public natural resources that the Board is to consider in promulgating regulations. In addition to strengthening the citizens’ claims that the statutory scheme offers no clear standards for determining permit applications, the absence of data also suggests that the Commonwealth has failed to discharge its trustee duty of gathering and making available to the beneficiaries complete and accurate information as to the nature and amount of the trust property. In re Rosenblum’s Estate, 328 A.2d 158, 164-65 (Pa. (continued...))

of Environmental Protection then is merely “to consider” the Environmental Quality Board’s criteria in granting well permits. At that point, again, review is limited to industry challenges. Neither local government nor affected citizens may pursue an appeal.

Even accounting for all elements of the statutory scheme in a manner most deferential to Act 13’s statutory purpose, we are constrained to conclude that what the crucial term “necessary” entails in the context of Section 3215(b) remains malleable and unpredictable. The statute does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver of the Section 3215(b) setbacks. The statement of legislative intent, which simply articulates broad principles, offers no additional clarification regarding the environmental standard governing either the applicant or the Department of Environmental Protection. Moreover, Act 13 offers no reference, however oblique, to any requirement that the Department is obligated to consider the Commonwealth’s environmental statutes in rendering its permit decisions or imposing well permit conditions under Act 13. Section 3257 of Act 13, for example, which the Commonwealth cites as incorporating standards of environmental statutes into the Section 3215(b) decision, declares as a general matter (while offering specific examples) merely that Chapter 32 of Act 13 “provide[s] additional and cumulative remedies to control activities related to drilling for or production of oil and gas in this Commonwealth, and nothing contained in this chapter abridges or alters rights of action or remedies existing, or which existed previously, in equity or under common or statutory law,

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1974) (citing RESTATEMENT (SECOND) OF TRUSTS § 173) (right of access to trust records is essential part of beneficiary’s right to complete information concerning administration of trust; right of inspection has independent source in beneficiary’s property interest in trust estate); see also RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (“[B]eneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.”).

criminal or civil.” 58 Pa.C.S. § 3257. The provision makes no reference to whether or how substantive standards of existing environmental acts enter into a well permit determination, let alone into a Section 3215(b)(4) decision. Considered in its totality, the Section 3215(b) scheme lacks identifiable and readily-enforceable environmental standards for granting well permits or setback waivers, which yields at best arbitrary terms and conditions and, at worst, wholly ineffective protections for the waters of the Commonwealth. In this sense, the Act has failed to ensure compliance with the express command of the Environmental Rights Amendment that the Commonwealth trustee “conserve and maintain,” *inter alia*, the waters of the Commonwealth.

To exacerbate this problem, the decisional process of Section 3215 creates incentives to define “necessary” conditions by nominal standards, and invites arbitrary decision-making with a disparate impact on trust beneficiaries. From the outset, Section 3215(b) appears to provide for nothing more than a set of voluntary setbacks or, as an alternative, the opportunity for a permit applicant to negotiate with the Department of Environmental Protection the terms or conditions of its oil or natural gas well permit. If an applicant appeals permit terms or conditions -- and only the applicant can appeal -- Section 3215 remarkably places the burden on the Department to “prov[e] that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.” 58 Pa.C.S. § 3215(e). Viewed in terms of the constitutional mandates, this is topsy-turvy: Act 13 places on the Department the burden of proof and persuasion, and the people are allocated thereby the risk of an erroneous decision by the Environmental Quality Board. See Sanchez, 36 A.3d at 65. This naturally invites the Department to articulate “necessary” conditions as minimal standards that an applicant would accept without litigation. The scheme also provides the oil and gas operator leverage in the first instance to negotiate permit terms and conditions to optimize industrial development, even at the expense of

protected environmental and habitability concerns. The statutory scheme overall dilutes the Department's authority to regulate and enforce adequate environmental standards, and fosters departures from the goal of sustainable development.

Finally, Section 3215(d) marginalizes participation by residents, business owners, and their elected representatives with environmental and habitability concerns, whose interests Section 3215 ostensibly protects. See 58 Pa.C.S. § 3202 (Declaration of purpose of chapter). The result is that Section 3215 fosters decisions regarding the environment and habitability that are non-responsive to local concerns; and, as with the uniformity requirement of Section 3304, the effect of failing to account for local conditions causes a disparate impact upon beneficiaries of the trust. Moreover, insofar as the Department of Environmental Protection is not required, but is merely permitted, to account for local concerns in its permit decisions, Section 3215(d) fails to ensure that any disparate effects are attenuated. Again, inequitable treatment of trust beneficiaries is irreconcilable with the trustee duty of impartiality. See Hamill's Estate, 410 A.2d at 773; 20 Pa.C.S. § 7773.

Calling upon agency expertise to make permit decisions that comply with the Commonwealth's trustee obligations does not dissipate the structural difficulties with a statutory scheme that fails both to ensure conservation of the quality and quantity of the Commonwealth's waters and to treat all beneficiaries equitably in light of the purposes of the trust. In these respects, we are constrained to conclude that Act 13 has failed to properly discharge the Commonwealth's duties as trustee of the public natural resources.<sup>61</sup>

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<sup>61</sup> We note that the citizens challenged only Section 3215(b)(4) and (d) of Act 13, rather than Section 3215 in its entirety.

#### 4. *Mandate*

For these reasons, we agree with the citizens that, as an exercise of police power, Sections 3215(b)(4) and (d), 3303, and 3304 are incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources. Accordingly, we hold that these provisions are unconstitutional. Because we find that Sections 3215(b)(4) and 3304 violate the Environmental Rights Amendment, we do not address the related claims that these provisions violate, respectively, the separation of powers doctrine and the due process clauses of the Pennsylvania Constitution and the U.S. Constitution. See Citizens' Petition for Review, 3/29/12, at 27-49, 88-91 (Counts I-III, VIII).

The Commonwealth Court's decision is affirmed in part, albeit on different grounds, and reversed in part.<sup>62</sup>

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<sup>62</sup> Mr. Justice Eakin's dissent, which would deny relief *in toto*, joins Justice Saylor's dissent and then addresses four distinct points: (1) standing; (2) waiver of the Environmental Rights Amendment claim; (3) a comment that Act 13 is about the choice between a pipeline and transportation of natural gas by tractor-trailers; and (4) a claim that the finding of unconstitutionality represents a reweighing of policy and a substitution of the Court's judgment for that of the General Assembly, with the Court "act[ing] legislatively" as a result, and not "serv[ing] the Commonwealth as we should." We respectfully disagree with the dissent in all respects.

The issues involved here are considerably less monolithic, and correspondingly more complex, than the dissent allows. The standing and waiver issues have been addressed at length in text. The dissent's bare assertions neither acknowledge nor engage the precedent as cited and applied. The third point, which begins with the statement "This Act is about a pipeline," scarcely implicates the provisions of Act 13 actually challenged here. Gas must be extracted before it is transported.

On the last issue, it is erroneous to state that we are directing what policy choices or laws the General Assembly should make vis-à-vis natural gas extraction; the extent of the holding is that Act 13, as enacted, violates the Environmental Rights Amendment. The Amendment so construed is not "judicial legislation;" it is part of the Declaration of Rights enshrined in the Constitution. We believe it has meaning. The (continued...)

#### IV. Other Claims

##### A. Article III, Section 32 of the Pennsylvania Constitution (Special Laws)

Next, we address the citizens' claims that Sections 3218.1, 3304 through 3307, and Act 13 globally, violate the prescription of the Pennsylvania Constitution against enactment of special laws. See Citizens' Petition for Review, 3/29/12, at 49-61 (Count IV). The Commonwealth Court sustained the Commonwealth's preliminary objections and dismissed Count IV of the citizens' Petition for Review, which articulated these claims. With little analytical development, the court concluded that Section 3304 and, therefore, Act 13 does not violate Article III, Section 32 of the Pennsylvania Constitution because, although the statute treats the oil and gas industry differently than other extraction industries, "the distinction is based on real differences that justify varied classifications for zoning purposes." The court did not address specifically the merits of the citizens' remaining claims regarding Sections 3218.1 and 3305 through 3307 of Act 13. Robinson Twp., 52 A.3d at 487.

The citizens appeal the Commonwealth Court's decision and begin by criticizing the "blanket conclusion" that Act 13's special treatment of the oil and gas industry is justified. According to the citizens, the lower court failed to articulate any explanation

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Amendment announces rights and obligations to protect environmental values of which legislation cannot run afoul. Some may view the dissent's preference to label the dispute "political" and move on as a refusal to discharge the judicial obligation.

There are constitutional restraints upon all branches of government, and our finding that this particular legislation crosses this constitutional line is not a substitution of our own preferences for those of the General Assembly. It construes the organic command and thereby defines the parameters within which the General Assembly is fully free to act. This is true with all judicial decisions resolving constitutional challenges to legislation. In our view, the notion that judicial decisions passing upon such challenges represent "judicial legislation" -- unless the legislative act is rubber-stamped -- misconceives our own duty.

for why the different treatment of the industry in each of the discrete challenged provisions has a reasonable relationship with the proffered distinction, and is justified by a legitimate state interest. The court's error, the citizens continue, stems from the General Assembly's inability to provide adequate justification in this regard. In this sense, according to the citizens, the preferential treatment the General Assembly has afforded the oil and gas industry cannot be explained solely on the ground that natural gas extraction provides "an economic boost to Pennsylvania communities."

The citizens concede that the oil and gas industry may be inherently different from any other industry. But, they claim that the distinctions offered by the Commonwealth are not reasonably related to, nor do they justify, Act 13's preferential treatment of the oil and gas industry with respect: to zoning restrictions (Section 3304); to the zoning review process (Sections 3304 through 3306); to penalties on local government (Section 3307); and to limitations on the protection of private water systems (Section 3218.1). The citizens offer separate arguments for why each challenged provision violates the constitutional prescription against enactment of special laws. Citizens' Brief (as cross-appellants), at 17-29.<sup>63</sup>

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<sup>63</sup> Regarding Section 3218.1, the citizens argue that, while Act 13 provides for notification to any public drinking water facility in the event of an oil or gas drilling-related spill, the statute requires no such notifications to any other drinking water sources or persons, including owners of private wells. See 58 Pa.C.S. § 3218.1. But, the citizens note, private water wells are the prevalent drinking water sources in the rural areas where gas drilling will primarily be taking place; and the danger to public health and welfare posed by drilling is exacerbated because private wells are not subject to routine testing and monitoring, as is the case with public water sources. The citizens claim that there is no justification for treating private wells differently than public water sources for the purposes of notification. See Citizens' Brief (as appellants) at 28.

Although arguments related to this provision, more than other arguments forwarded under the "special law" heading, appear to implicate substantive constitutional rights under Article I discussed in other parts of this Opinion, the citizens (continued...)

The Commonwealth responds with a global argument that Act 13 is not a “special law,” stating that its provisions are focused on the industry to permit optimal development of oil and gas resources while protecting health, safety, property and the environment. The Commonwealth says Act 13 applies uniformly throughout the state rather than impermissibly creating an immutable class of one. Moreover, the Commonwealth argues that as long as the General Assembly could reasonably have believed that Act 13’s classifications serve legitimate state purposes, the Court must defer to its judgment.

The Commonwealth further claims that the citizens misconstrue the governing standards, and fail to offer any persuasive precedent for the proposition that the General Assembly cannot articulate statewide standards for an industry. According to the Commonwealth, Section 32 prohibits “granting special privileges to one person, one company, or one county” but not from creating a class consisting of “one type of member.” Moreover, the Commonwealth states that caselaw does not require or authorize a reviewing court “to parse through a law in infinite detail in order to justify every arguable distinction the General Assembly made.” Finally, the Commonwealth dismisses the citizens’ challenges to the individual provisions as mere complaints about “potentially different impacts on differently situated communities and property owners.” According to the Commonwealth, looking at the impact of a statute on individual persons, communities, or municipalities is not a proper basis upon which to find that a

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here offer this provision only as an example of why Act 13 is a special law, which the General Assembly is prohibited from enacting under Article III, Section 32. The citizens do not develop any substantive arguments regarding Section 3218.1 premised upon Article I rights; accordingly, we express no opinion on the issue.

law is prohibited special legislation. See Agencies' Brief (as appellees), at 5-9; accord OAG's Brief (as appellee), at 24-25.

This part of the citizens' cross-appeal arises from the Commonwealth Court's decision to sustain preliminary objections in the nature of a demurrer to Count IV of the Petition for Review. As already noted, we may affirm an order sustaining preliminary objections only if the party filing the petition for review is not entitled to relief as a matter of law. See Stilp, 940 A.2d at 1232 n.9. In our review, "we accept as true all well-pleaded material facts set forth in the [petition for review] and all inferences fairly deducible from those facts." Thierfelder, 52 A.3d at 1253. "A challenge to the constitutionality of legislation poses a question of law, and thus, our review is plenary and non-deferential." Pennsylvania Tpk. Comm'n v. Commonwealth, 899 A.2d 1085, 1094 (Pa. 2006).

We have previously noted that the overarching purpose of Article III of our Constitution is "to place restraints on the legislative process and encourage an open, deliberative, and accountable government." PAGE, 877 A.2d at 395. Article III enumerates constitutional requirements that govern procedural aspects of legislative enactment. Stilp, 905 A.2d at 951. First adopted in the Pennsylvania Constitution of 1874, Section 32 of Article III was intended to end "the flood of privileged legislation for particular localities and for private purposes which was common in 1873." Pennsylvania Tpk. Comm'n, 899 A.2d at 1094. Over time, Section 32 -- akin to the equal protection clause of the Fourteenth Amendment -- has been recognized as implicating the principle "that like persons in like circumstances should be treated similarly by the sovereign." Id.

This Court does not apply Section 32 to divest the General Assembly of its general authority either to identify classes of persons and the different needs of a class, or to provide for differential treatment of persons with different needs. Our

constitutionally mandated concerns are to ensure that the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and “rest[s] upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation.” *Id.* at 1095 (citing Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1088-89 (Pa. 2003); Curtis v. Kline, 666 A.2d 265, 268 (Pa. 1995)). A legislative classification must be based on “real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition.” *Id.* (citing Harrisburg Sch. Dist. v. Hickok, 761 A.2d 1132, 1136 (Pa. 2000)). In its review, a court may hypothesize regarding the reasons why the General Assembly created the classifications. *Id.* Alternately, a court may deem a statute or provision *per se* unconstitutional “if, under the classification, the class consists of one member and is closed or substantially closed to future membership.” *Id.* at 1098.

In our constitutional analysis of a statute, we are also mindful that, although Act 13 does not itself address severability, the Statutory Construction Act creates the presumption that the provisions of every statute are severable. See 1 Pa.C.S. § 1925 (constitutional construction of statutes). In this sense, where a petitioner’s challenge to an act is premised upon claims that discrete provisions of the act violate the Constitution, a proper analysis begins with the application of the law to the individual provisions challenged. See, e.g., Zahorchak, 4 A.3d at 1048-49; PAGE, 877 A.2d at 415-19.<sup>64</sup> The Commonwealth’s suggestion that a reviewing court is not required to

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<sup>64</sup> In appropriate circumstances, the Court may, of course deem an entire act unconstitutional on the basis that it is special legislation. See, e.g., Pennsylvania Tpk. Comm’n, 899 A.2d at 1098 (First-Level Supervisor Collective Bargaining Act is special law because (1) differential treatment was not justified by any real distinction between Turnpike Commission’s first-level supervisors and other Commonwealth-employed first- (continued...))

parse the law and “justify” every distinction may be appropriate in some circumstances, but we do not find it persuasive here to prohibit the court’s review of the citizens’ properly preserved and articulated individual challenges.

In our view, the Commonwealth Court plainly erred in sustaining the Commonwealth’s preliminary objections and failing to address individually the citizens’ claims regarding the discrete provisions of Act 13 that were challenged. The record shows that, in their Petition for Review, the citizens offered discrete arguments that enumerated provisions of Act 13 violated Article III, Section 32 of our Constitution; the citizens requested, *inter alia*, a declaration that Act 13 was unconstitutional and any other relief the court might find proper. In response, the Commonwealth Court proceeded to assess the constitutionality of Section 3304, and Act 13 as a vague whole, based on an overly broad distinction and absent any analysis of whether the distinction had any fair and substantial relationship to the challenged provisions’ object, in light of the distinct constitutional breaches alleged by the citizens.

In short, the Commonwealth Court sustained the Commonwealth’s preliminary objections upon a basis insufficient as a matter of law. Identifying the oil and gas industry as a class that may be subject to different treatment at law and concluding that regulation of oil and gas operations accomplishes a legitimate state purpose are only the beginning of the special legislation constitutional inquiry. It is neither sufficient to look at the oil and gas industry and determine whether it is different from other industries, nor simply to accept that the declared benign purpose of Act 13 controls the constitutional inquiry, as the Commonwealth argues. See, e.g., Stilp, 905 A.2d at 945.

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(...continued)

level supervisors and, alternately, (2) Act created one-member class that was closed or substantially closed to future membership).

Rather, the required inquiry is into the effect of the provisions challenged by the citizens, with respect to whether the admitted different treatment of the oil and gas industry represented by Act 13 rests upon some ground of difference that is reasonable rather than arbitrary and has a fair and substantial relationship to the object of each challenged provision. See Pennsylvania Tpk. Comm'n, 899 A.2d at 1094. To illustrate the point, it is simple enough to explain why the oil and gas industry is *sui generis*, and simple enough to declare that a statutory scheme designed to facilitate extraction promises economic benefits. But, those facts hardly explain why, for example, in the event of a “spill,” notice is required to public water suppliers but not to owners of private wells. Finally, to the extent that the citizens also offered the alternate theory, as the Commonwealth suggests, that Act 13 is *per se* unconstitutional because it creates a class of one, the Commonwealth Court also failed to dispose of that claim.

For these reasons, we vacate the decision of the Commonwealth Court in this respect and remand the matter to that court for an appropriate merits disposition in accordance with this Opinion.

**B. Article I, Sections 1 and 10 of the Pennsylvania Constitution and the Fifth Amendment of the U.S. Constitution (Eminent Domain)**

Next, we address the citizens’ claim that Section 3241 authorizes unconstitutional takings of property for private purposes, in violation of the eminent domain provisions of the Pennsylvania Constitution and the U.S. Constitution. See Citizens’ Petition for Review, 3/29/12, at 61-63 (Count V).<sup>65</sup> The Commonwealth Court sustained the Commonwealth’s

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<sup>65</sup> Section 3241 provides, in relevant part that:

[A] corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may  
(continued...)

preliminary objections and dismissed the citizens' claim on the ground that the citizens failed "to demonstrate that any of their property has been or is in imminent danger of being taken, with or without just compensation." Moreover, the court held that the citizens failed to follow the appropriate and exclusive procedure to challenge a taking articulated in Section 306 of the Eminent Domain Code and, accordingly, the court concluded that it had no jurisdiction over the matter. See Robinson Twp., 52 A.3d at 487-88 (citing 26 Pa.C.S. § 306(a)(1)).

On appeal, the citizens argue that the Commonwealth Court misapprehended the nature of their claim. According to the citizens, their claim was not an eminent domain challenge but a facial challenge to the constitutionality of the statutory provision, which the court should have addressed on the merits. Regarding the merits of their constitutional claim, the citizens state that Section 3241 permits a private corporation to exercise the state's eminent domain power for the storage of its private natural gas; the private storage of natural gas, according to the citizens, does not serve any public purpose that justifies the taking of private property. Furthermore, the citizens note that the corporations described in Section 3241 do not clearly qualify for the public utility exception to the rule against the taking of property for a private use. Citizens' Brief at 29-31 (citing 26 Pa.C.S. § 204; In re Opening Private Rd. for Benefit of O'Reilly, 5 A.3d 246, 253 n.5, 258 (Pa. 2010)).

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(...continued)

appropriate an interest in real property located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.

58 Pa.C.S. § 3241(a).

Relying upon the Commonwealth Court's reasoning, the Commonwealth responds that the citizens' claim is not ripe for consideration because no property has yet been taken. According to the Commonwealth, the Eminent Domain Code provides an adequate avenue for relief if, in the future, the citizens' property will be subject to a taking. Furthermore, the Commonwealth asserts that Section 3241 contains appropriate parameters to ensure that the primary purpose of any taking pursuant to that provision will serve the public. Section 3241(a), the Commonwealth states, is narrow in that only public utilities may appropriate an interest in private property pursuant to the provision. OAG's Brief (as cross-appellee) at 25-27; Agencies' Brief (as cross-appellees) at 10-12.<sup>66</sup> For the reasons that follow, we agree with the citizens that the Commonwealth Court erred in dismissing the citizens' claim premised upon the arguments offered by the Commonwealth and without reaching the merits.

The provision upon which the Commonwealth Court relied to sustain the preliminary objections, Section 306(a)(1) of the Eminent Domain Code, is not applicable here: the citizens have not been served with notice of condemnation and, as a result, the provision's procedure is not applicable on its terms. 26 Pa.C.S. § 306(a)(1) ("Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking."). Indeed, this is not a condemnation matter and, as a result, is not subject to the exclusive procedure of the Eminent Domain Code. See 26 Pa.C.S. § 102(a). Rather, the citizens filed their claim pursuant to the Declaratory Judgment Act. The purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty

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<sup>66</sup> The Commonwealth also emphasizes that Section 3241 is a recodification of a provision of Act 13's predecessor, Section 601.401. Compare 58 Pa.C.S. § 3241 with 58 P.S. § 601.401. According to the Commonwealth, the eminent domain power in Section 3241 is not new but was codified almost thirty years ago. We note that this is the first opportunity for this Court to address the constitutionality of either provision premised upon the arguments that the citizens make here.

and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.” 42 Pa.C.S. § 7541(a). According to the Declaratory Judgment Act, “[t]he General Assembly finds and determines that the principle rendering declaratory relief unavailable in circumstances where an action at law or in equity or a special statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished.” 42 Pa.C.S. § 7541(b). Declaratory relief, according to the Act, is “additional and cumulative” to other available remedies. *Id.* The citizens’ constitutional challenge here seeks relief from uncertainty and insecurity with respect to rights under Section 3241.

According to the citizens, Section 3241 is incompatible with constitutional limitations on the General Assembly’s exercise of police power to permit eminent domain takings. Waiting for a test case implicating a taking under Section 3241 -- and subject to the Eminent Domain Code’s exclusive procedures -- is certainly an available avenue for testing the constitutionality of the provision. But, as a facial challenge to the validity of a statutory provision and pure question of law, the citizens’ claim is also generally appropriate for pre-enforcement review in a declaratory judgment action. *See Bayada Nurses, Inc. v. Commonwealth*, 8 A.3d 866, 874-76 (Pa. 2010). A party challenging the availability of pre-enforcement review may, of course, assert concerns that issues or facts are not adequately developed, and question whether its adversary will suffer any hardships if review is delayed. *Id.* at 874. But, that is not how this litigation developed. Rather, the Commonwealth elected to dispute the availability of pre-enforcement declaratory relief with respect to Section 3241 from a jurisdictional perspective, rather than offering any arguments that the facts or issues are underdeveloped or that delaying review would not cause the citizens any hardship. The Commonwealth Court’s conclusory analysis reflects these arguments and, as a result, was misdirected.

For these reasons, while offering no view on the merits, we vacate the Commonwealth Court's decision on this issue and remand this claim to the lower court for further proceedings consistent with this analysis.

### C. Separation of Powers Doctrine

Finally, we address the citizens' contention that Section 3305(a) and (b) violates the separation of powers doctrine. See Citizens' Petition for Review, 3/29/12, at 82-87 (Count VII).

The separation of powers principle is "[o]ne of the distinct and enduring qualities of our system of government," which has been present in our Constitution since the first convention prepared the document in 1776. Jubelirer, 953 A.2d at 529. Our Constitution vests legislative power in the General Assembly; executive power in the Executive Department consisting, *inter alia*, of the Governor, the Attorney General, and various administrative agencies, as provided by law; and judicial power in a unified judicial system and, ultimately, in the Supreme Court. See PA. CONST. art. II, § 1; art. IV, § 1; art. V, § 1. The judiciary interprets and applies the law, and its proper domain "is in the field of the administration of justice under the law." Commonwealth v. Sutley, 378 A.2d 780, 783 (Pa. 1977). Meanwhile, the duty of the executive branch is to ensure the faithful execution of laws. See PA. CONST. art. IV, § 2.

The core tenet of the separation of powers principle is that a branch of government is prohibited from exercising the functions committed exclusively to a co-equal branch. Sutley, 378 A.2d at 783. Perfect separation of duties between the branches is not required; indeed, the constitutional construct permits "a degree of interdependence and reciprocity between the various branches." Id. Moreover, "dividing lines among the three branches are sometimes indistinct and are probably incapable of any precise definition."

Sweeney, 375 A.2d at 705 (quoting Stander v. Kelley, 250 A.2d 474, 482 (Pa. 1969) (Opinion Announcing Judgment of Court)). We address each of the challenged provisions in light of these general principles.

### 1. Section 3305(b)

In relevant part, Section 3305(b) provides that the Public Utility Commission may issue orders determining whether a local ordinance violates Chapters 32 and 33 of Act 13 or the Municipalities Planning Code, upon request from an owner or operator of an oil or gas operation, or from a local resident. The order is subject to *de novo* review in the Commonwealth Court, where it becomes part of the record. 58 Pa.C.S. § 3305(b). The Commonwealth Court sustained the Commonwealth's preliminary objections to the citizens' challenge to Section 3305(b), holding that this provision did not violate the separation of powers doctrine because the judiciary retains ultimate power to review the constitutionality of local ordinances via *de novo* review of the Public Utility Commission's final order. Robinson Twp., 52 A.3d at 489-90.

On appeal, the citizens challenge the lower court's disposition, renewing their argument below that Section 3305(b) violates the separation of powers doctrine by concentrating judicial power in an executive agency. According to the citizens, only the judicial branch has the authority to pass on the constitutionality of laws; but, by permitting an executive agency to review zoning ordinances, which necessarily implicate constitutional issues, the General Assembly has delegated the exclusive judicial power to pass upon the constitutionality of laws to an executive agency. See Citizens' Brief (as cross-appellants) at 40 (citing Village of Euclid, 272 U.S. at 365; Boundary Drive Assocs. v. Shrewsbury Twp. Bd. Supervisors, 491 A.2d 86, 90 (Pa. 1985); Commonwealth v. Mockaitis, 834 A.2d 488, 499 (Pa. 2003), First Jud. Dist. v. Pa. Human Rels. Comm'n, 727

A.2d 1110, 1112 (Pa. 1999), Marbury, 1 Cranch at 25-26). The Commonwealth Court, the citizens claim, failed to recognize that any review of a zoning ordinance implicates questions of constitutionality.

The citizens assert that the Public Utility Commission is neither a court nor a quasi-judicial tribunal, which distinguishes the agency from zoning hearing boards that have “exclusive jurisdiction” under the Municipalities Planning Code to render adjudications on the validity of land use ordinances. The citizens argue that the Public Utility Commission is not a quasi-judicial tribunal because it is exempt in its Act 13 proceedings from due process requirements, rules against *ex parte* communications, evidentiary rules, Administrative Agency Law procedures, and the Sunshine Act. Act 13 also does not permit appeal of a Commission’s advisory opinion. These defects, according to the citizens, render the Act 13 delegation an improper exercise of quasi-judicial power that permits the Public Utility Commission “to strong-arm financially-strapped municipalities into accepting a slanted administrative ruling.” Id. at 44. The citizens allege that the review process, coupled with the threatened withholding of natural gas revenue and severe penalties, concentrates the power to devise oil and gas policy into the hands of the executive branch. The citizens conclude that the Public Utility Commission is an executive agency that is unconstitutionally exercising judicial power.

The Commonwealth responds that the citizens’ claim “consists primarily of *ad hominem* attacks on the General Assembly, the Governor and the Commission” and that the citizens’ true grievance is that “they do not like the way Act 13 is designed to operate.” Agencies’ Brief (as cross-appellees) at 17. The Commonwealth also argues that Section 3305 merely authorizes the Commission to review ordinances for compliance with Act 13 and the Municipalities Planning Code, and not for constitutionality. Id. at 17. According to the Commonwealth, the citizens set up a false premise with the argument that any zoning

claim involves a constitutional challenge and that whether a zoning claim involves a constitutional challenge cannot be resolved in the abstract. Id. at 18-19 (citing Hoffman Mining Co. v. Zoning Hearing Bd., 32 A.3d 587, 590 (Pa. 2011) (Surface Mining Act does not preempt setback provision of local ordinance)). Moreover, the Commonwealth states, any blanket contention that an executive agency may not address any issue with constitutional overtones is unfounded. Id. at 19 (citing Lehman, 839 A.2d at 276 (agency exercises expertise and develops factual record necessary to decide as-applied constitutional challenge)). The Commonwealth posits that the citizens commit a “fundamental error” in their reasoning by insisting that the General Assembly may not set parameters for local government and enforce them; the Constitution provides the municipalities with no authority as against the General Assembly. Id. at 20. Finally, the Commonwealth adds that Section 3305(b) does not violate the separation of powers principle because a person aggrieved by an order of the Commission may appeal *de novo*, and the Commonwealth Court is the final arbiter of an ordinance’s constitutional validity. OAG’s Brief (as appellee) at 31.

In essence, the citizens base their separation of powers argument regarding Section 3305(b) on two premises: that all zoning challenges necessarily implicate constitutional claims, and that administrative agencies have no authority to pass upon constitutional issues. For the proposition that all zoning cases implicate constitutional issues, the citizens cite two cases: Village of Euclid and Boundary Drive Associates. Although both decisions addressed constitutional claims, neither decision stands for the broad principle for which it is cited. In Village of Euclid and Boundary Drive Associates, the plaintiffs -- industrial concerns -- challenged local ordinances as an unconstitutional taking and a violation of the due process clause, respectively; the U.S. Supreme Court and this Court decided the cases in the context of the arguments presented and the

pertinent constitutional principles. We have explained that court decisions are to be read against their facts because “decisional law generally develops incrementally, within the confines of the circumstances of cases as they come before the Court.” Scampone, 57 A.3d at 604 (quoting Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478, 489–90 (Pa. 2009)). “For one thing, it is very difficult for courts to determine the range of factual circumstances to which a particular rule should apply in light of the often myriad possibilities.” Id. Relevant here, the citizens extrapolate from two cases that the myriad “zoning” claims that result across the range of factual circumstances would all be categorized under a “constitutional” decision rubric. Such a broad proposition does not follow.

But even accepting, for the purposes of decision, the citizens’ first proposition, the conclusion that the General Assembly improperly delegated judicial power to the Public Utility Commission in this instance does not withstand scrutiny. Initially, we note that the cases cited by the citizens for the second proposition (that executive agencies have no authority to pass upon constitutional issues) do not speak directly to the issue for which they are cited; additionally, the citizens fail to explain their reliance upon these cases. See First Jud. Dist., 727 A.2d at 1112 (administrative agency has no jurisdiction “to investigate and adjudicate complaints filed against the judicial branch of government” because such action would interfere with Supreme Court’s exclusive power to supervise practice, procedure, and conduct of all courts); Mockaitis, 834 A.2d at 500 (General Assembly cannot “deputize” judicial employees to perform duties exclusively reserved to legislative or executive branch). Furthermore, decisional law more pertinent to the citizens’ claim is to the contrary.

As a general matter, a claimed lack of “authority” to decide a particular case is based upon either an assertion that the tribunal is not competent to determine

controversies in the general class or a claim that the tribunal lacks power to order or effect certain relief. We explained the distinction in Mockaitis:

Some litigants, while believing they are raising a claim of subject matter jurisdiction, are actually posing a challenge to the tribunal's authority, or power, to act. See Riedel v. Human Rels. Comm'n of Reading, 739 A.2d 121, 124 (Pa. 1999). This confusion between the meaning of the terms "jurisdiction" and "power" is not surprising. While the terms are not synonymous, they are often used interchangeably by judges and litigants alike. Id. In Riedel, we teased out the distinctions between these terms, explicating that "jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result." Id.

834 A.2d at 495. Here, the citizens suggest that the Public Utility Commission is not competent to decide zoning matters as a class, because such cases necessarily implicate a constitutional issue. They argue that such cases are within the exclusive jurisdiction of courts and zoning hearing boards acting within their quasi-judicial capacity.

Administrative agencies are created by the General Assembly, as part of the executive branch, to aid in the faithful execution of laws. See PA. CONST. art. IV, § 1 ("Executive Department . . . shall consist of[, *inter alia*,] such other officers as the General Assembly may from time to time prescribe."). The General Assembly may assign the administrative agency the task of deciding disputes regarding the application or enforcement of a particular statute, subject to appellate review of right in a court of record. See PA. CONST. art. V, § 9. "Constitutional questions, like all others, can and are legitimately channeled by the legislature in their passage through the judicial process," including administrative review. Borough of Green Tree v. Bd. of Prop.

Assessments, 328 A.2d 819, 823 (Pa. 1974) (Opinion Announcing Judgment of Court). In Borough of Green Tree, the Court rejected the invitation to “dispense[] with the requirement that a litigant follow statutorily-prescribed remedies merely because a constitutional question is present in the case.” Id. at 824; accord Kowenhoven v. County of Allegheny, 901 A.2d 1003, 1012 n.8 (Pa. 2006) (no suggestion “that ordinary administrative review may be bypassed as a matter of course simply by adding a constitutional claim, no matter how tenuous, to an assessment grievance”); Elgin v. Dep’t of Treasury, 132 S.Ct. 2126, 2136 (2012) (exclusivity of statutory remedy does not turn on constitutional nature of plaintiff’s claim). The General Assembly created the Public Utility Commission and, among other duties, empowered the Commission to pass upon the general class of disputes regarding whether local ordinances comply with parts of Act 13. See 66 Pa.C.S. § 301(a); 58 Pa.C.S. § 3305(b). In this sense, the predicate for the Commission’s authority to act in this general class of cases is certainly present. In asserting jurisdiction over disputes pursuant to Section 3305(b) of Act 13, the Public Utility Commission is exercising executive powers duly granted by the General Assembly.

The issue of jurisdiction over Section 3305(b) disputes is distinct from the question of whether the Public Utility Commission has the ability to order requested relief in cases in which a party asserts a question of constitutionality. See Mockaitis, supra. As we noted earlier, our jurisprudence does not preclude administrative agencies from passing upon constitutional claims in the first instance. Kowenhoven, 901 A.2d at 1012 n.8 (court may exercise equitable jurisdiction over dispute implicating “a substantial question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy”); accord Elgin, 132 S.Ct. at 2138, (“[W]e see nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-

Article III entity that has jurisdiction over an action but cannot finally decide the legal question[, such as the constitutional claim at issue,] to which the facts pertain.”). Under governing law, therefore, the citizens’ claim that Section 3305(b) violates separation of powers principles must fail. The Commonwealth Court’s decision is affirmed in this respect.<sup>67</sup>

## 2. Section 3305(a)

Section 3305(a), meanwhile, provides that a municipality may request from the Public Utility Commission a written advisory opinion regarding whether a **proposed** local ordinance would violate Chapters 32 and 33 of Act 13 or the Municipalities Planning Code. The advisory opinion statutorily is not subject to appeal. The subsequent provisions of Chapter 33 -- Sections 3306 through 3309 -- create no

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<sup>67</sup> The citizens also assert broadly that only quasi-judicial bodies, rather than any administrative agencies vested with jurisdiction, may render decisions on constitutional issues. The citizens create a dubious dichotomy: administrative agencies function as quasi-judicial bodies because they have legislative authorization to execute the law in the context of disputes. While Administrative Agency Law compliance issues and complaints of unfairness may raise questions regarding whether the administrative process is adequate, or concerns of due process and of vindication of the right of appeal, these concerns alone do not implicate the principle of separation of powers. The citizens’ challenge here is premised solely upon the separation of powers. We affirm the Commonwealth Court’s decision on a different basis here because, like the parties, the court conflated the separation of powers principle and due process interests. In this regard, we note that the Commonwealth Court’s unexplained conclusion that a right to *de novo* appeal from an order of the Public Utility Commission under Section 3305(b) would *per se* satisfy any valid separation of powers concerns is questionable. See, e.g., Daniels v. W.C.A.B. (Tristate Transport), 828 A.2d 1043, 1051 (Pa. 2003) (statute imposing on administrative agency obligation to “provide the basis for meaningful appellate review” for purpose of facilitating judicial review presumptively raised separation of powers concern; but, obligation was sufficiently broad and statute imposed no specific remedy for failure to comply so that “determination of exactly what is necessary to provide a basis for effective judicial review under the statute ultimately rest[ed] with the judiciary” and raised no valid separation of powers concern).

enforcement mechanism related to Section 3305(a); these provisions address actions commenced by parties other than municipalities seeking declarations that **enacted** local ordinances violate Act 13 or the Municipalities Planning Code, such as matters before the Commission under Section 3305(b). See 58 Pa.C.S. § 3305(b) (orders of the Commission); see also 58 Pa.C.S. §§ 3306-3309.

The citizens argue that the Section 3305(a) process raises a valid separation of powers concern. According to the citizens, the effect of the process employed by Act 13 is to inject the Public Utility Commission into the law-drafting process of zoning ordinances, interfering with the local legislative function. The provision encourages local governments to seek advice from an executive agency in the formulation of zoning ordinances prior to passage by threatening sanctions if, following enactment, the ordinances are found by the Commission or the courts to violate Act 13. See 58 Pa.C.S. §§ 3306-3309. The citizens argue that legislative bodies should not have to and indeed are prohibited from relying on outside entities for guidance during the legislative process because it would “encourage legislative irresponsibility.” Citizens’ Brief (as cross-appellants) at 49 (citing Township of Whitehall v. Oswald, 161 A.2d 348, 349 (Pa. 1960)). The citizens conclude that, as an executive agency, the Public Utility Commission has no authority to render guidance on legislation before its passage. Id. at 40-49.<sup>68</sup>

The Commonwealth responds that, far from providing the coercive process the citizens portray, the provision simply constitutes a resource for municipalities. The General Assembly made basic policy choices and did not delegate to the Public Utility Commission

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<sup>68</sup> The Township of Whitehall decision offers little support to the citizens’ claim. Township of Whitehall turned on whether a township had standing to file a declaratory judgment action to test the constitutionality of its ordinance, and did not implicate any separation of powers claim. 161 A.2d at 349 (“[I]t can not reasonably be said that the plaintiff township’s ‘rights, status, or other legal relations’ have been adversely [sic] affected by its own deliberately intended enactment.”).

any power to make laws, but conferred upon it authority and discretion to execute Act 13, including through the advisory opinion process. Other agencies that exercise quasi-judicial functions are permitted to issue advisory opinions, e.g., the State Ethics Commission, the Office of Open Records, and the Office of the Attorney General. Agencies' Brief (as cross-appellees) at 20-21 (citing 65 Pa.C.S. § 1107(10); 65 P.S. § 67.1310(a)(2); 71 P.S. § 732-204(a)(1)). According to the Commonwealth, while courts may not render advisory opinions, the citizens' "contention that legislative bodies cannot use or otherwise rely on the expertise of executive agencies in enacting legislation is absurd. So long as the executive branch does not tie the hands of the municipality in enacting local zoning ordinances, it does not infringe on the independence of the legislative process." OAG's Brief (as appellee) at 31. Because the Commission simply issues non-binding opinions, the Commonwealth says, the process does not have the coercive effect of which the citizens complain.

The Commonwealth Court sustained the Commonwealth's preliminary objections, holding that Section 3305(a) did not transfer judicial powers to the Public Utility Commission, an executive agency, because the provision did not give the agency any authority over courts to render opinions on constitutional issues. The agency's opinions are non-binding and advisory and, like other advisory opinions, are not appealable. Robinson Twp., 52 A.3d at 489-90.

Initially, we note that the Commonwealth Court's summary reasoning was not responsive to the citizens' actual claim. Moreover, the citizens correctly point out that Section 3305(a) is peculiar in that it imposes obligations upon an executive agency with the goal of facilitating enactment of local legislation (*i.e.*, pre-enactment review of compliance with statutory requirements). Contrary to the Commonwealth's argument, a Public Utility Commission's obligation under Section 3305(a) is not on par, for purposes

of a separation of powers analysis, with actions of the State Ethics Commission, or of the Office of Open Records, or of the Office of the Attorney General, under the relevant respective provisions permitting advisory opinions. For example, under the State Ethics Act, the State Ethics Commission may issue advisory opinions upon the request of a person, or the appointing authority or employer of that person -- including the legislative and judicial branches. 65 Pa.C.S. § 1107(10). The Ethics Commission purports to offer advice to the various branches in their role as employer or appointing authority; the Commission does not appropriate the branches' respective constitutional duties. In fact, this Court's decision in Kremer v. State Ethics Commission, 469 A.2d 593 (Pa. 1983) suggests that, insofar as the roles overlap, the State Ethics Act does not apply to a coordinate branch (the judiciary in that case) on separation of powers grounds. Id. at 595-96 (insofar as they apply to members of judiciary, financial disclosure provisions of Ethics Act infringe upon Supreme Court's power to supervise courts); see also Shaulis v. State Ethics Comm'n, 833 A.2d 123, 132 (Pa. 2003) (provision restricting practice of attorney/former government employee interferes with judiciary's exclusive power to regulate practice of law and violates separation of powers principle).

Similarly, the Right to Know Law provides that the Office of Open Records shall issue advisory opinions to agencies and requesters. The Office of Open Records renders decisions regarding records requests from Commonwealth and local agencies - - agencies within the Executive Department, but not from state legislative or judicial agencies. See 65 P.S. § 67.503 (appeals from Commonwealth and local agencies to Office of Open Records; judicial and legislative agencies to appoint own appeals officers); 65 P.S. § 67.1310(a)(2) (Office of Open Records established, *inter alia*, to decide appeals and issue advisory opinions). Finally, the Office of the Attorney General has the authority to furnish legal advice only to the Executive Department -- "the Governor

or the head of any Commonwealth agency,” under Section 204 of the Commonwealth Attorneys Act. See 71 P.S. § 732-204(a)(1).

In short, the statutes cited by the Commonwealth do not in fact authorize a Commonwealth agency to issue legal advice to a political subdivision acting within its legislative capacity regarding proposed legislation. Nevertheless, for the reasons that follow, we agree ultimately with the Commonwealth Court that Section 3305(a) does not violate the separation of powers doctrine.

The common paradigm implicating the separation of powers principle involves tension between some combination of the General Assembly, the executive branch, and the judiciary. Bd. of Revision of Taxes v. City of Philadelphia, 4 A.3d 610, 627 n.12 (Pa. 2010). While we have recognized that similar tension may also arise in disputes involving the separate branches at a local level, such questions implicate additional levels of complexity because local government derives power to act through the delegation of authority from the General Assembly. 53 P.S. § 10601 (“governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances”); see Bd. of Revision of Taxes, 4 A.3d at 627 n.12 (citing Jefferson County Court Appointed Employees Ass’n v. P.L.R.B., 985 A.2d 697, 701 n.3, 706 (Pa. 2009) (county commissioners’ board, acting in legislative capacity, encroached on judicial authority to hire, fire, and supervise its employees)). The parties here do not explain how, if at all, our analysis of a separation of powers claim is affected by the fact that the primary tension here is not between acts of co-equal branches of government but is further removed, *i.e.*, the tension is between local legislative authority and the state executive branch. We will assume, however, for the purposes of decision, that a separation of powers claim is potentially valid in this scenario.

In Daniels v. W.C.A.B. (Tristate Transport), 828 A.2d 1043 (Pa. 2003), this Court addressed a claim comparable to that of the citizens here. A workers' compensation claimant challenged whether the workers' compensation judge submitted a "reasoned decision" which "adequately explaine[d]" the judge's credibility determination, pursuant to Section 422(a) of the Workers' Compensation Act. The Court observed that a statutory obligation upon administrative officials to provide a reasoned decision to facilitate a judicial function was peculiar and raised separation of powers concerns. Upon further review, the Court dismissed the claim, holding that, because the statutory requirements were "broadly stated and no specific remedy [wa]s set forth for a failure to comply," the determination of what was necessary to provide a basis for effective judicial review remained ultimately with the judiciary, as befitting its constitutional role and, accordingly, there was no valid separation of powers concern. Id. at 1051.

Under the Act 13 construct, local governments retain the power to frame local ordinances as they see fit, within the limitations of their delegated powers. See 53 P.S. § 10601 et seq.; 58 Pa.C.S. § 3302. Any strictures upon the contents of local ordinances derive from the General Assembly -- Act 13 -- rather than from the executive branch. Furthermore, Act 13 does not require the municipality to submit to pre-enactment review by the Public Utility Commission; the decision to seek an advisory opinion regarding compliance with legislative limitations rests entirely with the municipality. When a municipality does request an advisory opinion, the Commission has no power to enforce the opinion, as Act 13 provides no express benefit or remedy for a municipality's failure to comply. While a municipality may have financial incentives to abide by Act 13 requirements as interpreted by the Commission, local government nevertheless retains discretion to enact the reviewed ordinance (albeit risking litigation to enjoin enforcement), to amend the ordinance, or to challenge in court the statutory requirement with which the

ordinance purportedly does not comply. The prerogatives of acting upon policy judgments and enacting local legislation, while limited by the General Assembly's enactment, remain ultimately with local government under the Act 13 scheme. No valid separation of powers concern exists regarding Section 3305(a). See 828 A.2d at 1051. As against this claim, the Commonwealth Court's decision is affirmed, on these different grounds.

## V. Severability

The citizens' requested relief is a declaration that Act 13 is unconstitutional in its entirety, based solely on arguments related to the discrete provisions discussed above. We recognize that certain of the provisions we have held to be unconstitutional represent core aspects of Act 13. But, by the same token, several provisions appear relatively independent of other parts of Act 13. See, e.g., 58 Pa.C.S. § 2302 (unconventional gas well fee); § 2505 (appropriations for Marcellus Legacy Fund). Notably, neither the parties nor Act 13 itself address the potential severability of provisions found unconstitutional. Nevertheless, our holding that Sections 3215(b)(4) and (d), 3303, and 3304 violate the Environmental Rights Amendment does not automatically require finding Act 13 unconstitutional in its entirety. Mockaitis, 834 A.2d at 502. Indeed, the presumption is that "[t]he provisions of every statute shall be severable." 1 Pa.C.S. § 1925 (constitutional construction of statutes).<sup>69</sup> Notably, while not citing to the Section 1925 severability

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<sup>69</sup> Section 1925 of the Statutory Construction Act provides that:

If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision . . . that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the

(continued...)

presumption expressly, the Commonwealth Court obviously recognized that the issue was implicated because, upon finding Section 3304 unconstitutional, the panel was careful to enjoin only those “provisions of Chapter 33 that enforce 58 Pa.C.S. § 3304.” Robinson Twp., 52 A.3d at 485.

Setting aside the question of global severability -- *i.e.*, whether the specific provisions held to be unconstitutional require that the entire Act be enjoined -- there are obvious consequences of certain of our holdings. Thus, we have already recognized that Section 3215(b)(4), which addresses waivers of the general rule requiring setbacks for the protection of certain waters of the Commonwealth, is a key part of the Section 3215(b) scheme. It would appear that the General Assembly did not intend for the setback provision to operate without allowing industry operators to secure waivers from the setbacks. Absent the enjoined Section 3215(b)(4), the remaining parts of Section 3215(b) - - which the citizens do not challenge on appeal -- are incomplete and incapable of execution in accordance with the legislative intent. Having held that Section 3215(b)(4) is unconstitutional, we conclude that the remaining parts of Section 3215(b) are not severable. Accordingly, application of Section 3215(b) is enjoined.

Moreover, insofar as Section 3215(c) and (e) are part of the Section 3215(b) decisional process, these provisions as well are incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215(c) and (e) is, therefore, also enjoined. Finally, Sections 3305 through 3309 are those parts of the statutory scheme that establish a mechanism by which to enforce compliance with the Municipalities Planning

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(...continued)

court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925.

Code and with Chapters 32 and 33 of Act 13, including Sections 3215, 3303, and 3304. To the extent that Sections 3305 through 3309 implement or enforce provisions we hold invalid, these provisions are incapable of execution and are enjoined.

We recognize that, in light of the numerous and diverse nature of the constitutional challenges, the parties were not in an optimal position to present arguments on the severability of the various provisions ultimately held to be unconstitutional. In this Opinion, we decide this issue in part, to the extent that its application is obvious and necessary to provide direction to the parties going forward. Nevertheless, we believe that further inquiry into the continued viability of the entire statute or of discrete provisions, including additional provisions deemed unconstitutional on remand, if any, and guided by additional, targeted briefing from the parties, is salutary and necessary. Accordingly, we remand to the Commonwealth Court for a decision, in the first instance, of whether other parts of Act 13 are properly enjoined upon application of severability principles. See also HHAP, 77 A.3d at 606 (clarifying legal issue but remanding for further factual development and ultimate determination regarding statute's constitutionality).

## **VI. Conclusion and Mandate**

For these reasons, the Commonwealth Court's decision is affirmed in part and reversed in part. We hold that:

A. Brian Coppola; David M. Ball; Maya van Rossum; Robinson Township; Township of Nockamixon; Township of South Fayette; Peters Township; Township of Cecil; Mount Pleasant Township; Borough of Yardley; and the Delaware Riverkeeper Network state justiciable claims. The Commonwealth Court's decision on this question is, therefore, affirmed in part and reversed in part.

B. Dr. Mehernosh Khan also states a justiciable claim. The Commonwealth Court's decision on this issue is reversed, and Dr. Khan's claim is remanded for resolution on the merits.

C. Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment. We do not reach other constitutional issues raised by the parties with respect to these provisions. As a result, the Commonwealth Court's decision is affirmed with respect to Sections 3215(b)(4) and 3304 (on different grounds), and reversed with respect to Sections 3215(d) and 3303. Accordingly, application and enforcement of Sections 3215(b)(4), 3215(d), 3303, and 3304 is hereby enjoined.

D. The remaining parts of Section 3215(b) are not severable from Section 3215(b)(4) and, as a result, the application or enforcement of Section 3215(b) is enjoined in its entirety. Moreover, Sections 3215(c) and (e), and 3305 through 3309 are not severable to the extent that these provisions implement or enforce those Sections of Act 13 which we have found invalid and, in this respect, their application or enforcement is also enjoined.

E. The Commonwealth Court erred in sustaining the Commonwealth's preliminary objections to Counts IV and V of the citizens' petition for review. The lower court's decision in these respects is reversed and the citizens' claims are remanded for decision on the merits.

F. The citizens failed to state a claim in Count VII of the petition for review; in this respect, the Commonwealth Court's decision is affirmed on different grounds.

G. Upon remand, the Commonwealth Court is also directed to address whether any remaining provisions of Act 13, to the extent they are valid, are severable. The Commonwealth Court may request additional briefing from the parties on the issue of severability.

Jurisdiction relinquished.

Former Justice Orié Melvin did not participate in the consideration or decision of this matter.

Madame Justice Todd and Mr. Justice McCaffery join the Opinion. Mr. Justice Baer joins Parts I, II, IV, V, and VI(A), (B), (D)-(G) of the Opinion.

Mr. Justice Baer files a Concurring Opinion.

Mr. Justice Saylor files a Dissenting Opinion in which Mr. Justice Eakin joins.

Mr. Justice Eakin files a Dissenting Opinion.

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Connecting  
Date: Fri Dec 20 2013 19:57:41 EST  
Attachments:

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Hi Mike, Is there a convenient time to connect – perhaps Monday am? I sure hope you are taking some time off over the holidays. Best wishes, Vickie

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Connecting  
Date: Mon Dec 23 2013 08:55:04 EST  
Attachments:

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Vickie, I'm in this morning if you want to call at your convenience.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Friday, December 20, 2013 7:58 PM  
To: Michael J. Myers  
Subject: Connecting

Hi Mike, Is there a convenient time to connect – perhaps Monday am? I sure hope you are taking some time off over the holidays. Best wishes, Vickie

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Mauricio Roma </o=lawnet/ou=first administrative group/cn=recipients/cn=mauricioroma>; Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Cc:  
Bcc:  
Subject: FW: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Dec 30 2013 15:50:24 EST  
Attachments: CO Oil and Gas Proposal.pdf  
image001.jpg  
image002.jpg

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From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Tuesday, November 19, 2013 11:34 PM  
To: Michael J. Myers; Morgan Costello  
Cc: Vickie Patton; Tomas Carbonell  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

Mike, Morgan,

I have attached Colorado's proposed oil and gas air quality revisions. Best wishes,

Peter

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, November 18, 2013 8:10 AM  
To: Peter Zalzal  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

Thanks Peter, good news.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau

New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
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From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 15, 2013 4:36 PM  
To: Michael J. Myers  
Subject: National Journal: Colorado Fracking Rules to Target Methane

## Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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November 15, 2013

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Democratic Gov. John Hickenlooper of Colorado plans to announce a framework targeting methane—a potent greenhouse gas—as part of his state's regulations controlling fracking.

"We are very close now—within the week—to hammering out a specific methane regulatory framework that I think will make sure people's air is much cleaner than what some of their fears would lead them to believe," Hickenlooper said in an interview with National Journal Tuesday. His office confirmed an announcement is expected next week.

In both politics and energy production, Colorado is a bellwether state. So how Hickenlooper moves forward on these issues will be a key indicator of how other states and the country as a whole move forward.

Colorado, which has traditionally ranked in the top 10 of the country's oil and natural-gas producing states, has more than doubled its oil production and increased its gas production by 30 percent since 2005. In that same period, another trend began: Colorado's politics shifted from red, where they were in

the 1990's and early 2000's, to blue. After George W. Bush won the state with 52 percent of the vote in 2004, Barack Obama carried the state comfortably in both 2008 and 2012.

It's already known that Hickenlooper's administration is in the process of writing air-quality rules that are expected to be released early next week. This inclusion of methane, a greenhouse gas whose heat-trapping power is 20 times more potent than carbon dioxide in the short-term—is a new development. Concerns about methane have grown as the country shifts from coal to natural gas, which burns half as many carbon emissions as coal. The methane could cancel out the other climate benefits, some environmentalists and experts worry.

"No one has really broken down methane," Hickenlooper said of states' fracking rules.

The news is coming on the heels of four cities in Colorado—Fort Collins, Boulder, Lafayette, and Broomfield—voting on anti-fracking measures. The first three passed the initiatives by comfortable margins. The measure in Broomfield, the most conservative community, initially failed, but its result was overturned in a recount Thursday. Another recount is now expected.

Meanwhile, the House is expected to vote on legislation next week that bans the Obama administration from regulating fracking, an extraction technique that involves blasting large amounts of sand and water along with chemicals into shale formations to release oil and gas. It's key to developing unconventional fossil resources but controversial for its impact on the environment.

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Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Filename: CO Oil and Gas Proposal.pdf  
Last Modified: Mon Dec 30 15:50:24 EST 2013

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DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION NUMBER 7

CONTROL OF OZONE VIA OZONE PRECURSORS AND CONTROL OF HYDROCARBONS VIA OIL AND GAS EMISSIONS

(EMISSIONS OF VOLATILE ORGANIC COMPOUNDS AND NITROGEN OXIDES)

5 CCR 1001-9

II.B. Exemptions

Emissions of the organic compounds listed as having negligible photochemical reactivity in the common provisions definition of Negligibly Reactive Volatile Organic Compound are exempt from the provisions of this regulation.

(State Only) Notwithstanding the foregoing exemption, hydrocarbon emissions from oil and gas operations, including methane and ethane, are subject to this regulation as set forth in Sections XVII. and XVIII.

>>>>>>>>

**XVII. (State Only, except Section XVII.E.3.a. which was submitted as part of the Regional Haze SIP) Statewide Controls for Oil and Gas Operations and Natural Gas-Fired Reciprocating Internal Combustion Engines**

XVII.A. (State Only) Definitions

XVII.A.1 "Air Pollution Control Equipment," as used in this Section XVII, means a combustion device or vapor recovery unit. Air pollution control equipment also means alternative emissions control equipment and pollution prevention devices and processes intended to reduce uncontrolled actual emissions that comply with the requirements of Section XVII.B.2.e.

~~XVII.A.2. "Atmospheric", when used to modify the term "condensate storage tank", means a type of condensate storage tank that vents, or is designed to vent, to the atmosphere.~~

XVII.A.2. "Approved Instrument Based Monitoring Method" as used in this Section XVII. means an infra-red camera, Method 21, or other Division approved instrument based monitoring device or method. If an owner/operator elects to use a Division approved Continuous Emission Monitoring program, the Division may approve a streamlined inspection and reporting program for such operations. Any instrument based monitoring method approved by the Division under this definition must be at least as effective as Method 21 or an infra-red camera.

XVII.A.3. "Auto-Igniter" means a device which will automatically attempt to relight the pilot flame in the combustion chamber of a control device in order to combust volatile organic compound emissions.

- XVII.A.3. “Condensate Storage Tank” means any production tank or series of production tanks that are manifolded together that store condensate.
- XVII.A.4. “Component” means each pump seal, compressor seal, flange, pressure relief device, connector, open ended line, and valve that contains or contacts a process stream with hydrocarbons. Process streams consisting of glycol, amine, produced water, or methanol are not components for purposes of this Section XVII.
- XVII.A.5. “Connector” means flanged, screwed, or other jointed fittings used to connect two pipes or a pipe and a piece of process equipment or that close an opening in a pipe that could be connected to another pipe. Joined fittings welded completely around the circumference of the interface are not considered connectors.
- XVII.A.6. “Date of First Production” means the date reported to the COGCC as the “first date of production.”
- XVII.A.47. “Glycol Natural Gas Dehydrator” means any device in which a liquid glycol (including ethylene glycol, diethylene glycol, or triethylene glycol) absorbent directly contacts a natural gas stream and absorbs water.
- XVII.A.8. “Multi-Well Site” means a common well pad from which multiple wells may be drilled to various bottomhole locations.
- XVII.A.9. “Natural Gas Compressor Station” means a facility which contains one or more compressors designed to compress natural gas from well pressure to gathering system pressure and recompress natural gas prior to processing.
- XVII.A.10. “Normal Operation” means all periods of operation, excluding malfunction as defined in Section I.G of the Common Provisions regulation. For storage tanks at well production facilities, normal operation includes but is not limited to liquid dumps from the separator.
- XVII.A.11. “Stabilized” when used to refer to crude oil, condensate, intermediate hydrocarbon liquids, or produced water means that the vapor pressure of the liquid is sufficiently low to prevent the production of vapor phase upon transferring the liquid to an atmospheric pressure in a storage tank, and that any emissions that occur are limited to those commonly referred to within the industry as working, breathing, and standing losses.
- XVII.A.12. “Storage Tank” means any fixed roof storage vessel or series of storage vessels that are manifolded together via liquid line. Storage vessel is as defined in 40 CFR Part 60, Subpart OOOO. Storage tanks may be located at a well production facility or other location.
- XVII.A.13. “Unsafe to Monitor” means a component is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of such monitoring.
- XVII.A.14. “Visible Emissions” means observations of smoke for any period or periods of duration greater than or equal to one (1) minute in any fifteen (15) minute period during normal operation. Visible emissions do not include radiant energy or water vapor.
- XVII.A.15. “Well Production Facility” means all equipment at a single stationary source directly associated with one or more oil wells or gas wells. This equipment includes, but is

not limited to, equipment used for storage, separation, treating, dehydration, artificial lift, combustion, compression, pumping, metering, monitoring, and flowline.

#### XVII.B. (State Only) General Provisions

XVII.B.1. General requirements for prevention of emissions and good air pollution control equipment, prevention of leakage, and flares and combustion devices practices for all oil and gas exploration and production operations, well production facilities, natural gas compressor stations, and natural gas processing plants.

XVII.B.1.a.~~XVII.B.1.b.~~ All intermediate hydrocarbon liquid condensate collection, storage, processing, and handling operations, regardless of size, shall be designed, operated, and maintained so as to minimize emission of volatile organic compounds to the atmosphere to the extent reasonably practicable.

XVII.B.1.b. At all times, including periods of start-up and shutdown, the facility and air pollution control equipment shall be maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether or not acceptable operating and maintenance procedures are being used will be based on information available to the Division, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

XVII.B.2. General requirements for air pollution control equipment, flares, and combustion devices used to comply with Section XVII.

XVII.B.2.a.~~XVII.B.1.a.~~ All air pollution control equipment shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file. In addition, all such air pollution control equipment shall be adequately designed and sized to achieve the control efficiency rates required by this Section XVII and to handle reasonably foreseeable fluctuations in emissions of volatile organic compounds and hydrocarbons during normal operations. Fluctuations in emissions that occur when the separator dumps into the tank are reasonably foreseeable.

XVII.B.2.b.~~XVII.B.1.c.~~ If a flare or other combustion device is used to control emissions of hydrocarbons~~volatile organic compounds to comply with Section XVII~~, it shall be enclosed, have no visible emissions during normal operations, and be designed so that an observer can, by means of visual observation from the outside of the enclosed flare or combustion device, or by other convenient means approved by the Division, determine whether it is operating properly.

XVII.B.2.c.~~XVII.B.1.d.~~ Any of the effective dates for installation of controls on condensate storage tanks, dehydrators, and/or internal combustion engines may be extended at the air pollution control-Division's discretion for good cause shown.

XVII.B.2.d. Auto-igniters

All combustion devices used to control emissions of hydrocarbons shall be equipped with and operate an auto-igniter as follows:

XVII.B.2.d.(i) All combustion devices installed on or after May 1, 2014, will be equipped with an operational auto-igniter upon installation of the combustion device.

XVII.B.2.d.(ii) All combustion devices installed before May 1, 2014, will be equipped with an operational auto-igniter by or before May 1, 2016, or after the next combustion device planned shutdown, whichever comes first.

XVII.B.2.e.XVII.B.2. Alternative emissions control equipment shall qualify as air pollution control equipment, and may be used in lieu of, or in combination with, combustion devices and vapor recovery units to achieve the emission reductions required by this Section XVII, if the Division approves the equipment, device or process. As part of the approval process the Division, at its discretion, may specify a different control efficiency than the control efficiencies required by this Section XVII.

XVII.B.3. Oil refineries are not subject to ~~this section of the rule~~Section XVII.

XVII.B.4. ~~Condensate tanks, Glycol natural gas~~ dehydrators and internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard ("NSPS") under 40 CFR Part 60 are not subject to this Section XVII.

XVII.C. (State Only) Emission reduction from ~~condensate~~ storage tanks at oil and gas exploration and production operations, well production facilities, natural gas compressor stations, ~~natural gas drip stations~~ and natural gas processing plants.

XVII.C.1. Control requirements for storage tanks

XVII.C.1.a. Beginning May 1, 2008, owners or operators of all ~~atmospheric condensate~~ storage tanks storing condensate with uncontrolled actual emissions of volatile organic compounds equal to or greater than twenty (20) tons per year based on a rolling twelve-month total ~~shall must~~ operate air pollution control equipment that has an average control efficiency of at least 95% for VOCs ~~on such tanks.~~

XVII.C.1.b. Owners or operators of all storage tanks with uncontrolled actual emissions of volatile organic compounds equal to or greater than six (6) tons per year based on a rolling twelve-month total must operate air pollution control equipment that achieves an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.C.1.b.(i) A storage tank constructed on or after May 1, 2014, must be in compliance by the date that the storage tank commences operation.

XVII.C.1.b.(ii) A storage tank constructed before May 1, 2014, must be in compliance by May 1, 2015.

XVII.C.1.b.(iii) A storage tank not otherwise subject to Sections XVII.C.1.b.(i) or XVII.C.1.b.(ii), above, that increases uncontrolled actual emissions to six tons VOC or more per year on a rolling twelve month basis after May 1,

2014, must be in compliance within sixty days of discovery of the emissions increase.

XVII.C.1.c. Control requirements within 90 days of the date of first production.

XVII.C.1.c.(i) Beginning May 1, 2014, owners or operators of storage tanks at well production facilities shall collect and control emissions by routing emissions to operating air pollution control equipment during the first 90 calendar days after the date of first production. The air pollution control equipment shall achieve an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons. Except that this requirement does not apply to storage tanks that are projected to have emissions less than 1.5 tons of VOC during the first 90 days after the date of first production.

XVII.C.1.c.(ii) The air pollution control equipment and any associated monitoring equipment required pursuant to Section XVII.C.1.c., above may be removed at any time after the first 90 calendar days as long as the source can demonstrate that uncontrolled actual emissions from the storage tank are below the threshold in Section XVII.C.1.b., above.

~~XVII.C.2. For condensate storage tanks with past, uncontrolled actual emissions of volatile organic compounds of less than 20 tons per year based on a rolling twelve-month total that may become subject to Section XVII.C.1. by virtue of the addition of a newly drilled well or the recompletion or stimulation of an existing well, owners or operators of such tanks shall have until 90 days after the date of 1<sup>st</sup> production of the newly drilled, recompleted or stimulated well to install and operate any required air pollution control equipment. If the owner or operator determines that emissions of volatile organic compounds will be below the 20-ton per year threshold, the owner or operator shall notify the Division of this determination in writing and include an explanation of the methodology used to make this determination.~~

XVII.C.2. Capture requirements for storage tanks that are fitted with air pollution control equipment as required by Sections XII.D. or XVII.C.1.

XVII.C.2.a. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall route all hydrocarbon emissions to air pollution control equipment, and shall operate without venting hydrocarbon emissions from the thief hatch (or other access point to the tank) or pressure relief device during normal operation unless venting is reasonably required for maintenance, gauging, or safety of personnel and equipment.

XVII.C.2.b. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall develop, certify, and implement a documented Storage Tank Emission Management System (STEM) plan to identify appropriate strategies to minimize emissions from venting at thief hatches (or other access points to a storage tank) and pressure relief devices during normal operation. As part of STEM, owners and operators shall evaluate and employ appropriate control technologies, monitoring practices, operational practices, and/or other strategies designed to meet the requirements set forth in Section XVII.C.2.a., above, and will update the STEM plan as necessary to achieve or maintain compliance. Owners and operators are not required to develop and implement STEM for storage tanks containing only stabilized liquids. The minimum elements of STEM are listed below.

XVII.C.2.b.(i) STEM must include a monitoring strategy that incorporates the minimum monitoring frequency set forth in Section XVII.F.5.e., procedures for evaluating ongoing storage tank emission capture performance, and, if applicable, the selected strategies.

XVII.C.2.b.(ii) STEM must include a certification by the owner or operator that the selected STEM strategy or strategies are designed to minimize emissions from storage tanks and associated equipment components at the facility or facilities, including thief hatches and pressure relief devices.

### XVII.C.3. Monitoring

~~:- The owner or operator of any condensate storage tank that is required to control volatile organic compound emissions pursuant to this Section XVII.C. shall visually inspect or monitor the Air Pollution Control Equipment to ensure that it is operating at least as often as condensate is loaded out from the tank, unless a more frequent inspection or monitoring schedule is followed. In addition, if a flare or other combustion device is used, the owner or operator shall visually inspect the device for visible emissions at least as often as condensate is loaded out from the tank. The monitoring strategy of each STEM plan must include monitoring in accordance with Approved Instrument Based Monitoring Methods, as specified in Section XVII.F.5.~~

XVII.C.3.a. In addition to any applicable Approved Instrument Based Monitoring Methods, audio, visual, olfactory ("AVO") inspection of the storage tank and any associated equipment (i.e. separator, air pollution control equipment, or other pressure reducing equipment), must be completed as often as liquids are loaded out from the storage tank. However, AVO inspection is required no more frequently than every seven (7) days or less frequently than every thirty (30) days. AVO monitoring is not required for components and tanks that are unsafe to monitor. AVO inspection must include, at a minimum:

XVII.C.3.a.(i) Visual inspection of any thief hatch, pressure relief valve, or other access point to ensure that they are closed and properly sealed;

XVII.C.3.a.(ii) Visual inspection or monitoring of the air pollution control equipment to ensure that it is operating, including that the pilot light is lit on combustion devices used as air pollution control equipment;

XVII.C.3.a.(iii) If a flare or other combustion device is used, visual inspection of the auto-igniter and valves for piping of gas to the pilot light, to ensure they are functioning properly;

XVII.C.3.a.(iv) Visual inspection of the air pollution control equipment to ensure that the valves for the piping from the storage tank to the air pollution control equipment are open; and

XVII.C.3.a.(v) If a flare or other combustion device is used, inspection of the device for the presence or absence of smoke. If smoke is observed, either the equipment will be immediately shut-in to investigate the potential cause for smoke and perform repairs, as necessary, or Method

22 shall be conducted to determine whether visible emissions are present for a period of at least one (1) minute in fifteen (15) minutes.

XVII.C.4. Recordkeeping

The owner or operator of each storage tank subject to XII.D. or XVII.C. must maintain records of STEM as applicable, including the plan, any updates, and the certification, to be made available to the Division upon request. In addition, for a period of two years, the owner or operator must maintain records of any required monitoring and make them available to the Division upon request, including:

- XVII.C.4.a. The AIRS ID for the storage tank.
- XVII.C.4.b. The date and duration of any period where the thief hatch, pressure relief device, or other access point are found to be venting hydrocarbon emissions.
- XVII.C.4.c. The date and duration of any period where the air pollution control equipment is not operating.
- XVII.C.4.d. Where a flare or other combustion device is being used, the date and result of any Method 22 test.
- XVII.C.4.e. The timing of and efforts made to eliminate venting, restore operation of air pollution control equipment, and mitigate visible emissions.

XVII.D. (State Only) Emission reductions from glycol natural gas dehydrators

XVII.D.1. Beginning May 1, 2008, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.2., shall reduce uncontrolled actual emissions of volatile organic compounds by at least 90 percent through the use of a condenser or air pollution control equipment.

XVII.D.2. The control requirement in Section XVII.D.1. shall apply where:

XVII.D.2.a. Actual uncontrolled emissions of volatile organic compounds from the glycol natural gas dehydrator are equal to or greater than two tons per year; and

XVII.D.2.b. The sum of actual uncontrolled emissions of volatile organic compounds from any single glycol natural gas dehydrator or grouping of glycol natural gas dehydrators at a stationary source is equal to or greater than 15 tons per year. To determine if a grouping of dehydrators meets or exceeds the 15 tons per year threshold, sum the total actual uncontrolled emissions of volatile organic compounds from all individual dehydrators at a stationary source, including those with emissions less than two tons per year.

XVII.D.3. Beginning May 1, 2015, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, and drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.4., shall reduce uncontrolled actual emissions of hydrocarbons by at least 95 percent on a rolling twelve-month basis through the use of a condenser or air pollution control equipment. If a

combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.D.4. The control requirement in Section XVII.D.3. shall apply where:

XVII.D.4.a. Actual uncontrolled emissions of volatile organic compounds from a single new glycol natural gas dehydrator are equal to or greater than two tons per year; or

XVII.D.4.b. Actual uncontrolled emissions of volatile organic compounds from a single existing glycol natural gas dehydrator are equal to or greater than six (6) tons per year, or two (2) tons per year if the glycol natural gas dehydrator is located within 1,320 feet of a building unit or designated outside activity area.

XVII.D.4.d. For purposes of Section XVII.D.4:

XVII.D.4.d.(i) Building Unit shall mean a residential building unit, and every five thousand (5,000) square feet of building floor area in commercial facilities or every fifteen thousand (15,000) square feet of building floor area in warehouses that are operating and normally occupied during working hours.

XVII.D.4.d.(ii) A designated outside activity area shall mean an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of public assembly owned or operated by a local government, which the local government seeks to have established as a Designated Outside Activity Area; or an outdoor venue or recreation area where ingress to or egress from could be impeded in the even of an emergency condition at an oil and gas location less than three hundred and fifty (350) feet from the venue due to the configuration of the venue and the number of persons known or expected to simultaneously occupy the venue on a regular basis.

XVII.E. Control of emissions from new, modified, existing, and relocated natural gas fired reciprocating internal combustion engines.

XVII.E.1. (State Only) The requirements of this Section XVII.E. shall not apply to any engine having actual uncontrolled emissions below permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.2. (State Only) New, Modified and Relocated Natural Gas Fired Reciprocating Internal Combustion Engines

XVII.E.2.a. Except as provided in Section XVII.E.2.b. below, the owner or operator on any natural gas fired reciprocating internal combustion engine that is either constructed or relocated to the state of Colorado from another state, on or after the date listed in the table below shall operate and maintain each engine according to the manufacturer's written instructions or procedures to the extent practicable and consistent with technological limitations and good engineering and maintenance practices over the entire life of the engine so that it achieves the emission standards required in Section XVII.E.2.b. Table 1, below.

XVII.E.2.b. Actual emissions from natural gas fired reciprocating internal combustion engines shall not exceed the emission performance standards in Table 1, below as expressed in units of grams per horsepower-hour (G/hp-hr)

TABLE 1				
Maximum Engine Hp	Construction or Relocation Date	Emission Standards is G/hp-hr		
		NOx	CO	VOC
< 100 Hp	Any	NA	NA	NA
≥100 Hp and < 500 Hp	On or after January 1, 2008	2.0	4.0	1.0
	On or after January 1, 2011	1.0	2.0	0.7
≥500 Hp	On or after January 1, 2011	1.0	2.0	0.7
	On or after July 1, 2007	2.0	4.0	1.0
	On or after July 1, 2010	1.0	2.0	0.7
	On or after July 1, 2010	1.0	2.0	0.7

### XVII.E.3. Existing Natural Gas Fired Reciprocating Internal Combustion Engines

#### XVII.E.3.a. (Regional Haze SIP) Rich Burn Reciprocating Internal Combustion Engines

XVII.E.3.a.(i) Except as provided in Sections XVII.3.1.(i)(b) and (c) and XVII.E.3.a.(ii), all rich burn reciprocating internal combustion engines with a manufacturer's name plate design rate greater than 500 horsepower, constructed or modified before February 1, 2009 shall install and operate both a non-selective catalytic reduction system and an air fuel controller by July 1, 2010. A rich burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of less than 2% by volume.

XVII.E.3.a.(i)(a) All control equipment required by this Section XVII.E.3.a. shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file.

XVII.E.3.a.(i)(b) Internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard under 40 CFR Part 60 are not subject to this Section XVII.E.3.a.

XVII.E.3.a.(i)(c) The requirements of this Section XVII.E.3.a. shall not apply to any engine having actual uncontrolled emissions permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.3.a.(ii) Any rich burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of combined volatile organic compound and nitrogen oxides emission reductions (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.a. Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.E.3.b. (State Only) Lean Burn Reciprocating Internal Combustion Engines

XVII.E.3.b.(i) Except as provided in Section XVII.E.3.b.(ii), all lean burn reciprocating internal combustion engines with a manufacturer's nameplate design rate greater than 500 horsepower shall install and operate an oxidation catalyst by July 1, 2010. A lean burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of 2% by volume, or greater.

XVII.E.3.b.(ii) Any lean burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of volatile organic compound emission reduction (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.b.(i). Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.F. [\(State Only\) Leak detection and repair program for well production facilities, storage tanks, and compressor stations](#)

[XVII.F.1. Beginning January 1, 2015, owners and operators of well production facilities and compressor stations will identify and repair leaks from components at these facilities in accordance with the requirements of this Section XVII.F. The following shall apply in lieu of any directed inspection and maintenance program requirements established pursuant to Regulation Number 3, Part B, Section III.D.2.](#)

[XVII.F.2. Owners and operators of well production facilities or natural gas compressor stations that monitor components as part of this Section XVII.F. may opt to estimate emissions from components for the purpose of evaluating the applicability of component fugitive emissions to Regulation Number 3 by utilizing the emission factors defined as less than 10,000 ppmv of Table 2-8 of the 1995 EPA Protocol for Equipment Leak Emission Estimates \(Document EPA-453/R-95-017\).](#)

[XVII.F.3. Owners and operators of well production facilities or natural gas compressor stations shall utilize the Approved Instrument Based Monitoring Method and AVO program as outlined in Section XVII.F. AVO monitoring is not required of components and tanks that are unsafe to monitor or inaccessible to monitor, pursuant to XVII.F.5.g.](#)

XVII.F.4. Inspection schedules for natural gas compressor stations

Beginning January 1, 2015, owners and operators of natural gas compressor stations shall inspect components for leaks using an Approved Instrument Based Monitoring Method, in accordance with the following Table 2, except for components subject to XVII.F.5.g. For purposes of this Section XVII.F.4., fugitive emissions shall be calculated using the emission factors of Table 2-4 of the 1995 EPA Protocol for Equipment Leak Emission Estimates (Document EPA-453/R-95-017), or another Division approved method.

<b>TABLE 2</b>	
<u>Fugitive VOC Emissions (tpy)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 12</u>	<u>Annually</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly</u>
<u>&gt; 50</u>	<u>Monthly</u>

XVII.F.5. Requirements for well production facilities and/or storage tanks

XVII.F.5.a. Beginning August 1, 2014, all new well production facilities shall have a documented pressure test performed on all equipment and piping prior to start up. Documentation of this 90 day testing and monitoring shall be provided in the first annual report to the Division, as required by Section XVII.F.9.

XVII.F.5.b. Beginning January 1, 2015, within 90 days of startup of all new well production facilities and/or storage tanks, owners and/or operators shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method. Such action shall qualify as an inspection pursuant to the inspection frequency schedule in Table 3.

XVII.F.5.c. Consistent with the provisions of XVII.F.5.f., owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks using an Approved Instrument Based Monitoring Method, in accordance with the implementation schedule in XVII.F.5.e. Inspection frequency shall be determined according to Table 3.

XVII.F.5.d. Consistent with the provisions of XVII.F.5.f., owners and operators of new well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method beginning on January 1, 2015. Inspection frequency shall be determined according to Table 3.

XVII.F.5.e. The estimated uncontrolled actual emissions from storage tanks determine the frequency at which inspections must be performed. If no storage tanks are located at a well production facility or multi-well site, operators will rely on the potential to emit of VOC for all of the emissions sources, including emissions from components located at the facility. All components at a well production facility or storage tank must be inspected:

<b>TABLE 3</b>	
<u>Threshold (per XVII.F.5.e.) VOC Emissions (tpy, uncontrolled actual for sites with tanks or PTE for sites without tanks)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 6</u>	<u>One time using Approved Instrument Based Monitoring Method and thereafter using monthly AVO</u>
<u>&gt; 6 and &lt; 12</u>	<u>Annually with monthly AVO</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly with monthly AVO</u>
<u>&gt; 50</u>	<u>Monthly</u>
<u>Multi-well sites without storage tanks after April 15, 2014, that have a PTE &gt; 20 tpy VOC</u>	<u>Monthly</u>

XVII.F.5.f. Phase-in of Approved Instrument Based Monitoring Methods

Owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method, in accordance with the following schedule:

XVII.F.5.f.(i) Beginning January 1, 2015, facilities with uncontrolled actual VOC emissions greater than 50 tpy or multi-well sites.

XVII.F.5.f.(ii) Beginning July 1, 2015, facilities with uncontrolled actual VOC emissions greater than 20 tpy but less than or equal to 50 tpy.

XVII.F.5.f.(iii) Beginning January 1, 2016, facilities with uncontrolled actual VOC emissions greater than 6 tpy but less than or equal to 20 tpy.

XVII.F.5.f.(iv) By July 1, 2016, facilities with uncontrolled actual VOC emissions less than or equal to 6 tpy.

XVII.F.5.g. If a component is difficult, unsafe, or inaccessible to monitor, the owner or operator shall not be required to monitor the component until it becomes feasible to do so.

XVII.F.5.g.(i) Difficult to monitor components are those that cannot be monitored without elevating the monitoring personnel more than two meters above a supported surface or are unable to be reached via a wheeled scissor-lift or hydraulic type scaffold that allows access to components up to 7.6 meters (25 feet) above the ground.

XVII.F.5.g.(ii) Unsafe to monitor components are those that cannot be monitored without exposing monitoring personnel to an immediate danger as a consequence of completing the monitoring.

XVII.F.5.g.(iii) Inaccessible to monitor components are those that are buried, insulated in a manner that prevents access to the components by

a monitor probe, or obstructed by equipment or piping that prevents access to the components by a monitor probe.

XVII.F.6. Leak detection requiring repair

Leaks shall be identified utilizing the methods listed in this Section XVII.F.6.a. through XVII.F.6.d. Only leaks detected pursuant to this Section XVII.F.6. shall require repair under Section XVII.F.

XVII.F.6.a. For Method 21 monitoring at existing facilities, a leak is any concentration of hydrocarbon above 2,000 parts per million (ppm), except for existing well production facilities where leak is defined as any concentration of hydrocarbon above 500 ppm.

XVII.F.6.b. For Method 21 monitoring at facilities constructed after May 1, 2014, a leak is any concentration of hydrocarbon above 500 ppm.

XVII.F.6.c. For infra-red camera and AVO monitoring, a leak is any detectable emissions not associated with normal equipment operation, such as pneumatic device actuation and crank case ventilation.

XVII.F.6.d. For other Division approved monitoring devices or methods, leak identification requiring repair will be established as set forth in the Division's approval.

XVII.F.7. Repair and remonitoring

XVII.F.7.a. First attempt to repair a leak shall be made no later than five (5) working days after discovery, unless parts are unavailable, the equipment requires shutdown to complete repair, or other good cause exists. If parts are unavailable, they shall be ordered promptly and the repair shall be made within fifteen (15) working days of receipt of the parts. If shutdown is required, the leak shall be repaired during the next scheduled shutdown. If delay is attributable to other good cause, repairs shall be completed within fifteen (15) working days after the cause of delay ceases to exist.

XVII.F.7.b. Within fifteen (15) working days of completion of a repair, the leak shall be remonitored to verify the repair was effective.

XVII.F.7.c. Leaks discovered pursuant to the leak detection methods of Section XVII.F. shall not be subject to enforcement by the Division unless the owner or operator fails to perform the required repairs in accordance with Section XVII.F.7.

XVII.F.7.d. For leaks identified using an Approved Instrument Based Monitoring Method, owners and operators have the option of either repairing the leak in accordance with the repair schedule set forth in Section XVII.F.7. or conducting follow-up monitoring using Method 21 within five (5) working days of the leak detected. If the follow-up Method 21 monitoring shows that the leak concentration is less than or equal to 2,000 ppm hydrocarbon for existing facilities (other than existing well production facilities), or 500 ppm for new facilities or existing well production facilities, then the emission shall not be considered a leak for purposes of this Section.

XVII.F.8. Recordkeeping

The owner or operator of each facility subject to the inspection and maintenance requirements in this Section XVII.F. shall maintain the following for a period of two (2) years and make them available to the Division upon request.

XVII.F.8.a. Documentation of the pre-start-up pressure tests for new well production facilities;

XVII.F.8.b. The date and site information for each inspection;

XVII.F.8.c. A list of the leaking components and the monitoring method used to determine the presence of the leak;

XVII.F.8.d. The date of first attempt to repair the leak and, if necessary, any additional attempt to repair the leak;

XVII.F.8.e. The date the leak was repaired;

XVII.F.8.f. The delayed repair list including the basis for placing leaks on the list;

XVII.F.8.g. The date the leak was remonitored to verify the effectiveness of the repair, and the results of the remonitoring; and

XVII.F.8.h. A list of identification numbers for components that are designated as unsafe or inaccessible to monitor, as described in Section XVII.F.5.g., an explanation for each component stating why the component is so designated, and the plan for monitoring such component(s).

XVII.F.9. Reporting

The owner or operator of each facility subject to the inspection and maintenance requirements in Section XVII.F. shall submit a single annual report on or before April 30th of each year summarizing inspection and maintenance activities at all of their subject facilities during the previous calendar year. This report shall contain at a minimum the following information:

XVII.F.9.a. The number of facilities inspected;

XVII.F.9.b. The total number of inspections;

XVII.F.9.c. The total number of leaks identified, broken out by component type;

XVII.F.9.d. The total number of leaks repaired;

XVII.F.9.e. The number of leaks on the delayed repair list as of December 31st; and

XVII.F.9.f. Each report shall be accompanied by a self-certification form. The form shall contain a certification by a responsible official of the truth, accuracy, and completeness of such form, report, or certification stating that, based on information and belief formed after reasonable

inquiry, the statements and information in the document are true, accurate, and complete.

XVII.G. (State Only) Control of emissions from well production facilities.

XVII.G.1. Well Operation and Maintenance.

On or after August 1, 2014, during normal operation gas coming off of a separator produced from any newly constructed, hydraulically fractured, or recompleted oil or gas well must be either routed to a gas gathering line or controlled by air pollution control equipment that achieves an average hydrocarbon control efficiency of 95% from the date of first production. If a combustion device is used, it shall have a design destruction efficiency of at least 98% of hydrocarbons.

XVII.H. (State Only) Venting during downhole well maintenance and unloading events.

XVII.H.1. Well Maintenance.

Beginning May 1, 2014, hydrocarbon emissions from flowing wells must be captured or controlled during downhole well maintenance or servicing activities, unless venting is necessary for safety.

XVII.H.1.a. Operators shall use best management practices to minimize the need for well venting associated with downhole well maintenance and liquids unloading. During liquids unloading events, any means of creating differential pressure will first be used to attempt to unload the liquids from the well without venting. If these methods are not successful in unloading the liquids from the well, the well may be vented to the atmosphere to create the necessary differential pressure to bring the liquids to the surface.

XVII.H.1.b. Venting will be minimized to the extent possible, using best management practices during the well maintenance and liquids unloading events in XVII.H.1.a. The owner and/or operator shall be present on-site during any planned well maintenance and liquids unloading event in XVII.H.1.a. and shall ensure that any venting to the atmosphere is limited to the maximum extent practicable.

XVII.H.1.c. Records of the cause, date, time, and duration of venting events under this Section XVII.H. will be kept and made available to the Division upon request.

XVIII. (State Only) Natural Gas-Actuated Pneumatic Controllers Associated with Oil and Gas Operations ~~in the 8-Hour Ozone Control Area or Any Ozone Nonattainment or Attainment/Maintenance Area~~

XVIII.A. \_\_\_\_\_ Applicability

This section applies to pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations) ~~in the 8-Hour Ozone Control Area or any Ozone Nonattainment or Attainment/Maintenance Area.~~

XVIII.B. \_\_\_\_\_ Definitions

XVIII.B.1. “Affected Operations” shall mean pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations).

XVIII.B.2. “Enhanced Maintenance” is specific to high-bleed devices and shall include but is not limited to cleaning, tuning, and repairing leaking gaskets, tubing fittings, and seals; tuning to operate over a broader range of proportional band; and eliminating unnecessary valve positioners.

XVIII.B.3. “High-Bleed Pneumatic Controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits in excess of 6 standard cubic feet per hour (scfh) of natural gas to the atmosphere.

XVIII.B.4. “Low-Bleed Pneumatic controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits less than or equal to 6 scfh of natural gas to the atmosphere.

XVIII.B.5. “Natural Gas Processing Plant” shall mean any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both.

XVIII.B.6. ~~“No-bleed Pneumatic Controller” shall mean any pneumatic controller that is not using hydrocarbon gas as the valve’s actuating gas.~~

XVIII.B.67. “Pneumatic Controller” shall mean an instrument that is actuated using natural gas pressure and used to control or monitor process parameters such as liquid level, gas level, pressure, valve position, liquid flow, gas flow, and temperature.

XVIII.C. \_\_\_\_\_ Emission Reduction Requirements

The owners and operators of affected operations shall reduce emissions of volatile organic compounds from pneumatic controllers associated with affected operations as follows:

XVIII.C.1. \_\_\_\_\_ In the 8-Hour Ozone Control Area:

[XVIII.C.1.a.](#) All pneumatic controllers placed in service on or after February 1, 2009, shall emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.2.1.b.](#) All high-bleed pneumatic controllers in service prior to February 1, 2009 shall be replaced or retrofit such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, by May 1, 2009, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.31.c.](#) All high-bleed pneumatic controllers that must remain in service -due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.

[XVIII.C.3-a.1.c.\(i\)](#) For high-bleed pneumatic controllers in service prior to February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and /or process purposes by March 1, 2009. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.3-b.1.c.\(ii\)](#) For high-bleed pneumatic controllers placed in service on or after February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to be installed due to safety and /or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.2.](#) [Statewide:](#)

[XVIII.C.2.a.](#) [All pneumatic controllers placed in service on or after May 1, 2014, shall:](#)

[XVIII.C.2.a.\(i\)](#) [Emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.; or](#)

[XVIII.C.2.a.\(ii\)](#) [Utilize no-bleed pneumatic controllers where on-site electrical grid power is being used and is technically and economically feasible.](#)

[XVIII.C.2.b.](#) [All high-bleed pneumatic controllers in service prior to May 1, 2014, shall be replaced or retrofitted by May 1, 2015, such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.](#)

[XVIII.C.2.c.](#) [All high-bleed pneumatic controllers that must remain in service due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.](#)

[XVIII.C.2.c.\(i\)](#) [For high-bleed pneumatic controllers in service prior to May 1, 2014, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and/or process purposes by March 1, 2015. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.](#)

[XVIII.C.2.c.\(ii\)](#) [For high-bleed pneumatic controllers placed in service on or after May 1, 2014, the owner/operator shall submit justification for high-bleed](#)

pneumatic controllers to be installed due to safety and/or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

#### XVIII.D. Monitoring

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

##### XVIII.D.1. In the 8-Hour Ozone Control Area:

XVIII.D.1.a. Effective May 1, 2009, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.1.b. Effective May 1, 2009, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

##### XVIII.D.2. Statewide:

XVIII.D.2.a. Effective May 1, 2015, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.b. Effective May 1, 2015, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

#### XVIII.E. Recordkeeping

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

XVIII.E.1. The owner or operator of affected operations shall maintain a log of the total number of high-bleed pneumatic controllers and their associated controller numbers per facility, the total number of high-bleed pneumatic controllers per company and the associated justification that the high-bleed pneumatic controllers must be used pursuant to SectionSections XVIII.C.31.c. and XVIII.C.2.c. The log shall be updated on a monthly basis.

XVIII.E.2. The owner or operator shall maintain a log of enhanced maintenance which shall include, at a minimum, inspection dates, the date of the maintenance activity, high-bleed pneumatic controller number, description of the maintenance performed, results and date of any corrective action taken, and the printed name and signature of the individual performing the maintenance. The log shall be updated on a monthly basis.

XVIII.E.3. Records of enhanced maintenance of pneumatic controllers shall be maintained for a minimum of three years and readily made available to the ~~division~~Division upon request.

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Reason: It is an unsupported file type

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Mauricio Roma </o=lawnet/ou=first administrative group/cn=recipients/cn=mauricioroma>; Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
Cc:  
Bcc:  
Subject: FW: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Dec 30 2013 15:50:39 EST  
Attachments: CO Oil and Gas Proposal.pdf  
image001.jpg  
image002.jpg

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From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Tuesday, November 19, 2013 6:04 PM  
To: Michael J. Myers  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

FYI

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, November 18, 2013 8:10 AM  
To: Peter Zalzal  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

Thanks Peter, good news.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
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From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 15, 2013 4:36 PM  
To: Michael J. Myers

Subject: National Journal: Colorado Fracking Rules to Target Methane

## Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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November 15, 2013

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Democratic Gov. John Hickenlooper of Colorado plans to announce a framework targeting methane—a potent greenhouse gas—as part of his state's regulations controlling fracking.

"We are very close now—within the week—to hammering out a specific methane regulatory framework that I think will make sure people's air is much cleaner than what some of their fears would lead them to believe," Hickenlooper said in an interview with National Journal Tuesday. His office confirmed an announcement is expected next week.

In both politics and energy production, Colorado is a bellwether state. So how Hickenlooper moves forward on these issues will be a key indicator of how other states and the country as a whole move forward.

Colorado, which has traditionally ranked in the top 10 of the country's oil and natural-gas producing states, has more than doubled its oil production and increased its gas production by 30 percent since 2005. In that same period, another trend began: Colorado's politics shifted from red, where they were in the 1990's and early 2000's, to blue. After George W. Bush won the state with 52 percent of the vote in 2004, Barack Obama carried the state comfortably in both 2008 and 2012.

It's already known that Hickenlooper's administration is in the process of writing air-quality rules that are expected to be released early next week. This inclusion of methane, a greenhouse gas whose heat-trapping power is 20 times more potent than carbon dioxide in the short-term—is a new development. Concerns about methane have grown as the country shifts from coal to natural gas, which burns half as many carbon emissions as coal. The methane could cancel out the other climate benefits, some environmentalists and experts worry.

"No one has really broken down methane," Hickenlooper said of states' fracking rules.

The news is coming on the heels of four cities in Colorado—Fort Collins, Boulder, Lafayette, and Broomfield—voting on anti-fracking measures. The first three passed the initiatives by comfortable margins. The measure in Broomfield, the most conservative community, initially failed, but its result was overturned in a recount Thursday. Another recount is now expected.

Meanwhile, the House is expected to vote on legislation next week that bans the Obama administration from regulating fracking, an extraction technique that involves blasting large amounts of sand and water along with chemicals into shale formations to release oil and gas. It's key to developing unconventional fossil resources but controversial for its impact on the environment.

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DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Air Quality Control Commission

REGULATION NUMBER 7

CONTROL OF OZONE VIA OZONE PRECURSORS AND CONTROL OF HYDROCARBONS VIA OIL AND GAS EMISSIONS

(EMISSIONS OF VOLATILE ORGANIC COMPOUNDS AND NITROGEN OXIDES)

5 CCR 1001-9

II.B. Exemptions

Emissions of the organic compounds listed as having negligible photochemical reactivity in the common provisions definition of Negligibly Reactive Volatile Organic Compound are exempt from the provisions of this regulation.

(State Only) Notwithstanding the foregoing exemption, hydrocarbon emissions from oil and gas operations, including methane and ethane, are subject to this regulation as set forth in Sections XVII. and XVIII.

>>>>>>>>

**XVII. (State Only, except Section XVII.E.3.a. which was submitted as part of the Regional Haze SIP) Statewide Controls for Oil and Gas Operations and Natural Gas-Fired Reciprocating Internal Combustion Engines**

XVII.A. (State Only) Definitions

XVII.A.1 "Air Pollution Control Equipment," as used in this Section XVII, means a combustion device or vapor recovery unit. Air pollution control equipment also means alternative emissions control equipment and pollution prevention devices and processes intended to reduce uncontrolled actual emissions that comply with the requirements of Section XVII.B.2.e.

~~XVII.A.2. "Atmospheric", when used to modify the term "condensate storage tank", means a type of condensate storage tank that vents, or is designed to vent, to the atmosphere.~~

XVII.A.2. "Approved Instrument Based Monitoring Method" as used in this Section XVII. means an infra-red camera, Method 21, or other Division approved instrument based monitoring device or method. If an owner/operator elects to use a Division approved Continuous Emission Monitoring program, the Division may approve a streamlined inspection and reporting program for such operations. Any instrument based monitoring method approved by the Division under this definition must be at least as effective as Method 21 or an infra-red camera.

XVII.A.3. "Auto-Igniter" means a device which will automatically attempt to relight the pilot flame in the combustion chamber of a control device in order to combust volatile organic compound emissions.

- XVII.A.3. “Condensate Storage Tank” means any production tank or series of production tanks that are manifolded together that store condensate.
- XVII.A.4. “Component” means each pump seal, compressor seal, flange, pressure relief device, connector, open ended line, and valve that contains or contacts a process stream with hydrocarbons. Process streams consisting of glycol, amine, produced water, or methanol are not components for purposes of this Section XVII.
- XVII.A.5. “Connector” means flanged, screwed, or other jointed fittings used to connect two pipes or a pipe and a piece of process equipment or that close an opening in a pipe that could be connected to another pipe. Joined fittings welded completely around the circumference of the interface are not considered connectors.
- XVII.A.6. “Date of First Production” means the date reported to the COGCC as the “first date of production.”
- XVII.A.47. “Glycol Natural Gas Dehydrator” means any device in which a liquid glycol (including ethylene glycol, diethylene glycol, or triethylene glycol) absorbent directly contacts a natural gas stream and absorbs water.
- XVII.A.8. “Multi-Well Site” means a common well pad from which multiple wells may be drilled to various bottomhole locations.
- XVII.A.9. “Natural Gas Compressor Station” means a facility which contains one or more compressors designed to compress natural gas from well pressure to gathering system pressure and recompress natural gas prior to processing.
- XVII.A.10. “Normal Operation” means all periods of operation, excluding malfunction as defined in Section I.G of the Common Provisions regulation. For storage tanks at well production facilities, normal operation includes but is not limited to liquid dumps from the separator.
- XVII.A.11. “Stabilized” when used to refer to crude oil, condensate, intermediate hydrocarbon liquids, or produced water means that the vapor pressure of the liquid is sufficiently low to prevent the production of vapor phase upon transferring the liquid to an atmospheric pressure in a storage tank, and that any emissions that occur are limited to those commonly referred to within the industry as working, breathing, and standing losses.
- XVII.A.12. “Storage Tank” means any fixed roof storage vessel or series of storage vessels that are manifolded together via liquid line. Storage vessel is as defined in 40 CFR Part 60, Subpart OOOO. Storage tanks may be located at a well production facility or other location.
- XVII.A.13. “Unsafe to Monitor” means a component is unsafe to inspect because inspecting personnel would be exposed to an imminent or potential danger as a consequence of such monitoring.
- XVII.A.14. “Visible Emissions” means observations of smoke for any period or periods of duration greater than or equal to one (1) minute in any fifteen (15) minute period during normal operation. Visible emissions do not include radiant energy or water vapor.
- XVII.A.15. “Well Production Facility” means all equipment at a single stationary source directly associated with one or more oil wells or gas wells. This equipment includes, but is

not limited to, equipment used for storage, separation, treating, dehydration, artificial lift, combustion, compression, pumping, metering, monitoring, and flowline.

#### XVII.B. (State Only) General Provisions

XVII.B.1. General requirements for prevention of emissions and good air pollution control equipment, prevention of leakage, and flares and combustion devices practices for all oil and gas exploration and production operations, well production facilities, natural gas compressor stations, and natural gas processing plants.

XVII.B.1.a.~~XVII.B.1.b.~~ All intermediate hydrocarbon liquid condensate collection, storage, processing, and handling operations, regardless of size, shall be designed, operated, and maintained so as to minimize emission of volatile organic compounds to the atmosphere to the extent reasonably practicable.

XVII.B.1.b. At all times, including periods of start-up and shutdown, the facility and air pollution control equipment shall be maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether or not acceptable operating and maintenance procedures are being used will be based on information available to the Division, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

XVII.B.2. General requirements for air pollution control equipment, flares, and combustion devices used to comply with Section XVII.

XVII.B.2.a.~~XVII.B.1.a.~~ All air pollution control equipment shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file. In addition, all such air pollution control equipment shall be adequately designed and sized to achieve the control efficiency rates required by this Section XVII and to handle reasonably foreseeable fluctuations in emissions of volatile organic compounds and hydrocarbons during normal operations. Fluctuations in emissions that occur when the separator dumps into the tank are reasonably foreseeable.

XVII.B.2.b.~~XVII.B.1.c.~~ If a flare or other combustion device is used to control emissions of hydrocarbons~~volatile organic compounds to comply with Section XVII~~, it shall be enclosed, have no visible emissions during normal operations, and be designed so that an observer can, by means of visual observation from the outside of the enclosed flare or combustion device, or by other convenient means approved by the Division, determine whether it is operating properly.

XVII.B.2.c.~~XVII.B.1.d.~~ Any of the effective dates for installation of controls on condensate storage tanks, dehydrators, and/or internal combustion engines may be extended at the air pollution control-Division's discretion for good cause shown.

XVII.B.2.d. Auto-igniters

All combustion devices used to control emissions of hydrocarbons shall be equipped with and operate an auto-igniter as follows:

XVII.B.2.d.(i) All combustion devices installed on or after May 1, 2014, will be equipped with an operational auto-igniter upon installation of the combustion device.

XVII.B.2.d.(ii) All combustion devices installed before May 1, 2014, will be equipped with an operational auto-igniter by or before May 1, 2016, or after the next combustion device planned shutdown, whichever comes first.

XVII.B.2.e.XVII.B.2. Alternative emissions control equipment shall qualify as air pollution control equipment, and may be used in lieu of, or in combination with, combustion devices and vapor recovery units to achieve the emission reductions required by this Section XVII, if the Division approves the equipment, device or process. As part of the approval process the Division, at its discretion, may specify a different control efficiency than the control efficiencies required by this Section XVII.

XVII.B.3. Oil refineries are not subject to ~~this section of the rule~~Section XVII.

XVII.B.4. ~~Condensate tanks, Glycol natural gas~~ dehydrators and internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard ("NSPS") under 40 CFR Part 60 are not subject to this Section XVII.

XVII.C. (State Only) Emission reduction from ~~condensate~~ storage tanks at oil and gas exploration and production operations, well production facilities, natural gas compressor stations, ~~natural gas drip stations~~ and natural gas processing plants.

XVII.C.1. Control requirements for storage tanks

XVII.C.1.a. Beginning May 1, 2008, owners or operators of all ~~atmospheric condensate~~ storage tanks storing condensate with uncontrolled actual emissions of volatile organic compounds equal to or greater than twenty (20) tons per year based on a rolling twelve-month total ~~shall must~~ operate air pollution control equipment that has an average control efficiency of at least 95% for VOCs ~~on such tanks.~~

XVII.C.1.b. Owners or operators of all storage tanks with uncontrolled actual emissions of volatile organic compounds equal to or greater than six (6) tons per year based on a rolling twelve-month total must operate air pollution control equipment that achieves an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.C.1.b.(i) A storage tank constructed on or after May 1, 2014, must be in compliance by the date that the storage tank commences operation.

XVII.C.1.b.(ii) A storage tank constructed before May 1, 2014, must be in compliance by May 1, 2015.

XVII.C.1.b.(iii) A storage tank not otherwise subject to Sections XVII.C.1.b.(i) or XVII.C.1.b.(ii), above, that increases uncontrolled actual emissions to six tons VOC or more per year on a rolling twelve month basis after May 1,

2014, must be in compliance within sixty days of discovery of the emissions increase.

XVII.C.1.c. Control requirements within 90 days of the date of first production.

XVII.C.1.c.(i) Beginning May 1, 2014, owners or operators of storage tanks at well production facilities shall collect and control emissions by routing emissions to operating air pollution control equipment during the first 90 calendar days after the date of first production. The air pollution control equipment shall achieve an average hydrocarbon control efficiency of 95%. If a combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons. Except that this requirement does not apply to storage tanks that are projected to have emissions less than 1.5 tons of VOC during the first 90 days after the date of first production.

XVII.C.1.c.(ii) The air pollution control equipment and any associated monitoring equipment required pursuant to Section XVII.C.1.c., above may be removed at any time after the first 90 calendar days as long as the source can demonstrate that uncontrolled actual emissions from the storage tank are below the threshold in Section XVII.C.1.b., above.

~~XVII.C.2. For condensate storage tanks with past, uncontrolled actual emissions of volatile organic compounds of less than 20 tons per year based on a rolling twelve-month total that may become subject to Section XVII.C.1. by virtue of the addition of a newly drilled well or the recompletion or stimulation of an existing well, owners or operators of such tanks shall have until 90 days after the date of 1<sup>st</sup> production of the newly drilled, recompleted or stimulated well to install and operate any required air pollution control equipment. If the owner or operator determines that emissions of volatile organic compounds will be below the 20-ton per year threshold, the owner or operator shall notify the Division of this determination in writing and include an explanation of the methodology used to make this determination.~~

XVII.C.2. Capture requirements for storage tanks that are fitted with air pollution control equipment as required by Sections XII.D. or XVII.C.1.

XVII.C.2.a. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall route all hydrocarbon emissions to air pollution control equipment, and shall operate without venting hydrocarbon emissions from the thief hatch (or other access point to the tank) or pressure relief device during normal operation unless venting is reasonably required for maintenance, gauging, or safety of personnel and equipment.

XVII.C.2.b. Beginning on the applicable compliance date specified in Section XVII.C.1.b., owners and operators of storage tanks shall develop, certify, and implement a documented Storage Tank Emission Management System (STEM) plan to identify appropriate strategies to minimize emissions from venting at thief hatches (or other access points to a storage tank) and pressure relief devices during normal operation. As part of STEM, owners and operators shall evaluate and employ appropriate control technologies, monitoring practices, operational practices, and/or other strategies designed to meet the requirements set forth in Section XVII.C.2.a., above, and will update the STEM plan as necessary to achieve or maintain compliance. Owners and operators are not required to develop and implement STEM for storage tanks containing only stabilized liquids. The minimum elements of STEM are listed below.

XVII.C.2.b.(i) STEM must include a monitoring strategy that incorporates the minimum monitoring frequency set forth in Section XVII.F.5.e., procedures for evaluating ongoing storage tank emission capture performance, and, if applicable, the selected strategies.

XVII.C.2.b.(ii) STEM must include a certification by the owner or operator that the selected STEM strategy or strategies are designed to minimize emissions from storage tanks and associated equipment components at the facility or facilities, including thief hatches and pressure relief devices.

### XVII.C.3. Monitoring

~~:- The owner or operator of any condensate storage tank that is required to control volatile organic compound emissions pursuant to this Section XVII.C. shall visually inspect or monitor the Air Pollution Control Equipment to ensure that it is operating at least as often as condensate is loaded out from the tank, unless a more frequent inspection or monitoring schedule is followed. In addition, if a flare or other combustion device is used, the owner or operator shall visually inspect the device for visible emissions at least as often as condensate is loaded out from the tank. The monitoring strategy of each STEM plan must include monitoring in accordance with Approved Instrument Based Monitoring Methods, as specified in Section XVII.F.5.~~

XVII.C.3.a. In addition to any applicable Approved Instrument Based Monitoring Methods, audio, visual, olfactory ("AVO") inspection of the storage tank and any associated equipment (i.e. separator, air pollution control equipment, or other pressure reducing equipment), must be completed as often as liquids are loaded out from the storage tank. However, AVO inspection is required no more frequently than every seven (7) days or less frequently than every thirty (30) days. AVO monitoring is not required for components and tanks that are unsafe to monitor. AVO inspection must include, at a minimum:

XVII.C.3.a.(i) Visual inspection of any thief hatch, pressure relief valve, or other access point to ensure that they are closed and properly sealed;

XVII.C.3.a.(ii) Visual inspection or monitoring of the air pollution control equipment to ensure that it is operating, including that the pilot light is lit on combustion devices used as air pollution control equipment;

XVII.C.3.a.(iii) If a flare or other combustion device is used, visual inspection of the auto-igniter and valves for piping of gas to the pilot light, to ensure they are functioning properly;

XVII.C.3.a.(iv) Visual inspection of the air pollution control equipment to ensure that the valves for the piping from the storage tank to the air pollution control equipment are open; and

XVII.C.3.a.(v) If a flare or other combustion device is used, inspection of the device for the presence or absence of smoke. If smoke is observed, either the equipment will be immediately shut-in to investigate the potential cause for smoke and perform repairs, as necessary, or Method

22 shall be conducted to determine whether visible emissions are present for a period of at least one (1) minute in fifteen (15) minutes.

XVII.C.4. Recordkeeping

The owner or operator of each storage tank subject to XII.D. or XVII.C. must maintain records of STEM as applicable, including the plan, any updates, and the certification, to be made available to the Division upon request. In addition, for a period of two years, the owner or operator must maintain records of any required monitoring and make them available to the Division upon request, including:

- XVII.C.4.a. The AIRS ID for the storage tank.
- XVII.C.4.b. The date and duration of any period where the thief hatch, pressure relief device, or other access point are found to be venting hydrocarbon emissions.
- XVII.C.4.c. The date and duration of any period where the air pollution control equipment is not operating.
- XVII.C.4.d. Where a flare or other combustion device is being used, the date and result of any Method 22 test.
- XVII.C.4.e. The timing of and efforts made to eliminate venting, restore operation of air pollution control equipment, and mitigate visible emissions.

XVII.D. (State Only) Emission reductions from glycol natural gas dehydrators

XVII.D.1. Beginning May 1, 2008, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.2., shall reduce uncontrolled actual emissions of volatile organic compounds by at least 90 percent through the use of a condenser or air pollution control equipment.

XVII.D.2. The control requirement in Section XVII.D.1. shall apply where:

XVII.D.2.a. Actual uncontrolled emissions of volatile organic compounds from the glycol natural gas dehydrator are equal to or greater than two tons per year; and

XVII.D.2.b. The sum of actual uncontrolled emissions of volatile organic compounds from any single glycol natural gas dehydrator or grouping of glycol natural gas dehydrators at a stationary source is equal to or greater than 15 tons per year. To determine if a grouping of dehydrators meets or exceeds the 15 tons per year threshold, sum the total actual uncontrolled emissions of volatile organic compounds from all individual dehydrators at a stationary source, including those with emissions less than two tons per year.

XVII.D.3. Beginning May 1, 2015, still vents and vents from any flash separator or flash tank on a glycol natural gas dehydrator located at an oil and gas exploration and production operation, natural gas compressor station, and drip station or gas-processing plant subject to control requirements pursuant to Section XVII.D.4., shall reduce uncontrolled actual emissions of hydrocarbons by at least 95 percent on a rolling twelve-month basis through the use of a condenser or air pollution control equipment. If a

combustion device is used, it shall have a design destruction efficiency of at least 98% for hydrocarbons.

XVII.D.4. The control requirement in Section XVII.D.3. shall apply where:

XVII.D.4.a. Actual uncontrolled emissions of volatile organic compounds from a single new glycol natural gas dehydrator are equal to or greater than two tons per year; or

XVII.D.4.b. Actual uncontrolled emissions of volatile organic compounds from a single existing glycol natural gas dehydrator are equal to or greater than six (6) tons per year, or two (2) tons per year if the glycol natural gas dehydrator is located within 1,320 feet of a building unit or designated outside activity area.

XVII.D.4.d. For purposes of Section XVII.D.4:

XVII.D.4.d.(i) Building Unit shall mean a residential building unit, and every five thousand (5,000) square feet of building floor area in commercial facilities or every fifteen thousand (15,000) square feet of building floor area in warehouses that are operating and normally occupied during working hours.

XVII.D.4.d.(ii) A designated outside activity area shall mean an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of public assembly owned or operated by a local government, which the local government seeks to have established as a Designated Outside Activity Area; or an outdoor venue or recreation area where ingress to or egress from could be impeded in the even of an emergency condition at an oil and gas location less than three hundred and fifty (350) feet from the venue due to the configuration of the venue and the number of persons known or expected to simultaneously occupy the venue on a regular basis.

XVII.E. Control of emissions from new, modified, existing, and relocated natural gas fired reciprocating internal combustion engines.

XVII.E.1. (State Only) The requirements of this Section XVII.E. shall not apply to any engine having actual uncontrolled emissions below permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.2. (State Only) New, Modified and Relocated Natural Gas Fired Reciprocating Internal Combustion Engines

XVII.E.2.a. Except as provided in Section XVII.E.2.b. below, the owner or operator on any natural gas fired reciprocating internal combustion engine that is either constructed or relocated to the state of Colorado from another state, on or after the date listed in the table below shall operate and maintain each engine according to the manufacturer's written instructions or procedures to the extent practicable and consistent with technological limitations and good engineering and maintenance practices over the entire life of the engine so that it achieves the emission standards required in Section XVII.E.2.b. Table 1, below.

XVII.E.2.b. Actual emissions from natural gas fired reciprocating internal combustion engines shall not exceed the emission performance standards in Table 1, below as expressed in units of grams per horsepower-hour (G/hp-hr)

TABLE 1				
Maximum Engine Hp	Construction or Relocation Date	Emission Standards is G/hp-hr		
		NOx	CO	VOC
< 100 Hp	Any	NA	NA	NA
≥100 Hp and < 500 Hp	On or after January 1, 2008	2.0	4.0	1.0
	On or after January 1, 2011	1.0	2.0	0.7
≥500 Hp	On or after January 1, 2011	1.0	2.0	0.7
	On or after July 1, 2007	2.0	4.0	1.0
	On or after July 1, 2010	1.0	2.0	0.7
	On or after July 1, 2010	1.0	2.0	0.7

### XVII.E.3. Existing Natural Gas Fired Reciprocating Internal Combustion Engines

#### XVII.E.3.a. (Regional Haze SIP) Rich Burn Reciprocating Internal Combustion Engines

XVII.E.3.a.(i) Except as provided in Sections XVII.3.1.(i)(b) and (c) and XVII.E.3.a.(ii), all rich burn reciprocating internal combustion engines with a manufacturer's name plate design rate greater than 500 horsepower, constructed or modified before February 1, 2009 shall install and operate both a non-selective catalytic reduction system and an air fuel controller by July 1, 2010. A rich burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of less than 2% by volume.

XVII.E.3.a.(i)(a) All control equipment required by this Section XVII.E.3.a. shall be operated and maintained pursuant to manufacturer specifications or equivalent to the extent practicable, and consistent with technological limitations and good engineering and maintenance practices. The owner or operator shall keep manufacturer specifications or equivalent on file.

XVII.E.3.a.(i)(b) Internal combustion engines that are subject to an emissions control requirement in a federal maximum achievable control technology ("MACT") standard under 40 CFR Part 63, a Best Available Control Technology ("BACT") limit, or a New Source Performance Standard under 40 CFR Part 60 are not subject to this Section XVII.E.3.a.

XVII.E.3.a.(i)(c) The requirements of this Section XVII.E.3.a. shall not apply to any engine having actual uncontrolled emissions permitting thresholds listed in Regulation Number 3, Part B.

XVII.E.3.a.(ii) Any rich burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of combined volatile organic compound and nitrogen oxides emission reductions (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.a. Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.E.3.b. (State Only) Lean Burn Reciprocating Internal Combustion Engines

XVII.E.3.b.(i) Except as provided in Section XVII.E.3.b.(ii), all lean burn reciprocating internal combustion engines with a manufacturer's nameplate design rate greater than 500 horsepower shall install and operate an oxidation catalyst by July 1, 2010. A lean burn reciprocating internal combustion engine is one with a normal exhaust oxygen concentration of 2% by volume, or greater.

XVII.E.3.b.(ii) Any lean burn reciprocating internal combustion engine constructed or modified before February 1, 2009, for which the owner or operator demonstrates to the Division that retrofit technology cannot be installed at a cost of less than \$ 5,000 per ton of volatile organic compound emission reduction (this value shall be adjusted for future applications according to the current day consumer price index) is exempt complying with Section XVII.E.3.b.(i). Installation costs and the best information available for determining control efficiency shall be considered in determining such costs. In order to qualify for such exemption, the owner or operator must submit an application making such a demonstration, together with all supporting documents, to the Division by August 1, 2009.

XVII.F. [\(State Only\) Leak detection and repair program for well production facilities, storage tanks, and compressor stations](#)

[XVII.F.1. Beginning January 1, 2015, owners and operators of well production facilities and compressor stations will identify and repair leaks from components at these facilities in accordance with the requirements of this Section XVII.F. The following shall apply in lieu of any directed inspection and maintenance program requirements established pursuant to Regulation Number 3, Part B, Section III.D.2.](#)

[XVII.F.2. Owners and operators of well production facilities or natural gas compressor stations that monitor components as part of this Section XVII.F. may opt to estimate emissions from components for the purpose of evaluating the applicability of component fugitive emissions to Regulation Number 3 by utilizing the emission factors defined as less than 10,000 ppmv of Table 2-8 of the 1995 EPA Protocol for Equipment Leak Emission Estimates \(Document EPA-453/R-95-017\).](#)

[XVII.F.3. Owners and operators of well production facilities or natural gas compressor stations shall utilize the Approved Instrument Based Monitoring Method and AVO program as outlined in Section XVII.F. AVO monitoring is not required of components and tanks that are unsafe to monitor or inaccessible to monitor, pursuant to XVII.F.5.g.](#)

XVII.F.4. Inspection schedules for natural gas compressor stations

Beginning January 1, 2015, owners and operators of natural gas compressor stations shall inspect components for leaks using an Approved Instrument Based Monitoring Method, in accordance with the following Table 2, except for components subject to XVII.F.5.g. For purposes of this Section XVII.F.4., fugitive emissions shall be calculated using the emission factors of Table 2-4 of the 1995 EPA Protocol for Equipment Leak Emission Estimates (Document EPA-453/R-95-017), or another Division approved method.

<b>TABLE 2</b>	
<u>Fugitive VOC Emissions (tpy)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 12</u>	<u>Annually</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly</u>
<u>&gt; 50</u>	<u>Monthly</u>

XVII.F.5. Requirements for well production facilities and/or storage tanks

XVII.F.5.a. Beginning August 1, 2014, all new well production facilities shall have a documented pressure test performed on all equipment and piping prior to start up. Documentation of this 90 day testing and monitoring shall be provided in the first annual report to the Division, as required by Section XVII.F.9.

XVII.F.5.b. Beginning January 1, 2015, within 90 days of startup of all new well production facilities and/or storage tanks, owners and/or operators shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method. Such action shall qualify as an inspection pursuant to the inspection frequency schedule in Table 3.

XVII.F.5.c. Consistent with the provisions of XVII.F.5.f., owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks using an Approved Instrument Based Monitoring Method, in accordance with the implementation schedule in XVII.F.5.e. Inspection frequency shall be determined according to Table 3.

XVII.F.5.d. Consistent with the provisions of XVII.F.5.f., owners and operators of new well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method beginning on January 1, 2015. Inspection frequency shall be determined according to Table 3.

XVII.F.5.e. The estimated uncontrolled actual emissions from storage tanks determine the frequency at which inspections must be performed. If no storage tanks are located at a well production facility or multi-well site, operators will rely on the potential to emit of VOC for all of the emissions sources, including emissions from components located at the facility. All components at a well production facility or storage tank must be inspected:

<b>TABLE 3</b>	
<u>Threshold (per XVII.F.5.e.) VOC Emissions (tpy, uncontrolled actual for sites with tanks or PTE for sites without tanks)</u>	<u>Inspection Frequency</u>
<u>&gt; 0 and &lt; 6</u>	<u>One time using Approved Instrument Based Monitoring Method and thereafter using monthly AVO</u>
<u>&gt; 6 and &lt; 12</u>	<u>Annually with monthly AVO</u>
<u>&gt; 12 and &lt; 50</u>	<u>Quarterly with monthly AVO</u>
<u>&gt; 50</u>	<u>Monthly</u>
<u>Multi-well sites without storage tanks after April 15, 2014, that have a PTE &gt; 20 tpy VOC</u>	<u>Monthly</u>

XVII.F.5.f. Phase-in of Approved Instrument Based Monitoring Methods

Owners and operators of existing well production facilities and/or storage tanks shall identify and repair leaks from components using an Approved Instrument Based Monitoring Method, in accordance with the following schedule:

XVII.F.5.f.(i) Beginning January 1, 2015, facilities with uncontrolled actual VOC emissions greater than 50 tpy or multi-well sites.

XVII.F.5.f.(ii) Beginning July 1, 2015, facilities with uncontrolled actual VOC emissions greater than 20 tpy but less than or equal to 50 tpy.

XVII.F.5.f.(iii) Beginning January 1, 2016, facilities with uncontrolled actual VOC emissions greater than 6 tpy but less than or equal to 20 tpy.

XVII.F.5.f.(iv) By July 1, 2016, facilities with uncontrolled actual VOC emissions less than or equal to 6 tpy.

XVII.F.5.g. If a component is difficult, unsafe, or inaccessible to monitor, the owner or operator shall not be required to monitor the component until it becomes feasible to do so.

XVII.F.5.g.(i) Difficult to monitor components are those that cannot be monitored without elevating the monitoring personnel more than two meters above a supported surface or are unable to be reached via a wheeled scissor-lift or hydraulic type scaffold that allows access to components up to 7.6 meters (25 feet) above the ground.

XVII.F.5.g.(ii) Unsafe to monitor components are those that cannot be monitored without exposing monitoring personnel to an immediate danger as a consequence of completing the monitoring.

XVII.F.5.g.(iii) Inaccessible to monitor components are those that are buried, insulated in a manner that prevents access to the components by

a monitor probe, or obstructed by equipment or piping that prevents access to the components by a monitor probe.

XVII.F.6. Leak detection requiring repair

Leaks shall be identified utilizing the methods listed in this Section XVII.F.6.a. through XVII.F.6.d. Only leaks detected pursuant to this Section XVII.F.6. shall require repair under Section XVII.F.

XVII.F.6.a. For Method 21 monitoring at existing facilities, a leak is any concentration of hydrocarbon above 2,000 parts per million (ppm), except for existing well production facilities where leak is defined as any concentration of hydrocarbon above 500 ppm.

XVII.F.6.b. For Method 21 monitoring at facilities constructed after May 1, 2014, a leak is any concentration of hydrocarbon above 500 ppm.

XVII.F.6.c. For infra-red camera and AVO monitoring, a leak is any detectable emissions not associated with normal equipment operation, such as pneumatic device actuation and crank case ventilation.

XVII.F.6.d. For other Division approved monitoring devices or methods, leak identification requiring repair will be established as set forth in the Division's approval.

XVII.F.7. Repair and remonitoring

XVII.F.7.a. First attempt to repair a leak shall be made no later than five (5) working days after discovery, unless parts are unavailable, the equipment requires shutdown to complete repair, or other good cause exists. If parts are unavailable, they shall be ordered promptly and the repair shall be made within fifteen (15) working days of receipt of the parts. If shutdown is required, the leak shall be repaired during the next scheduled shutdown. If delay is attributable to other good cause, repairs shall be completed within fifteen (15) working days after the cause of delay ceases to exist.

XVII.F.7.b. Within fifteen (15) working days of completion of a repair, the leak shall be remonitored to verify the repair was effective.

XVII.F.7.c. Leaks discovered pursuant to the leak detection methods of Section XVII.F. shall not be subject to enforcement by the Division unless the owner or operator fails to perform the required repairs in accordance with Section XVII.F.7.

XVII.F.7.d. For leaks identified using an Approved Instrument Based Monitoring Method, owners and operators have the option of either repairing the leak in accordance with the repair schedule set forth in Section XVII.F.7. or conducting follow-up monitoring using Method 21 within five (5) working days of the leak detected. If the follow-up Method 21 monitoring shows that the leak concentration is less than or equal to 2,000 ppm hydrocarbon for existing facilities (other than existing well production facilities), or 500 ppm for new facilities or existing well production facilities, then the emission shall not be considered a leak for purposes of this Section.

XVII.F.8. Recordkeeping

The owner or operator of each facility subject to the inspection and maintenance requirements in this Section XVII.F. shall maintain the following for a period of two (2) years and make them available to the Division upon request.

XVII.F.8.a. Documentation of the pre-start-up pressure tests for new well production facilities;

XVII.F.8.b. The date and site information for each inspection;

XVII.F.8.c. A list of the leaking components and the monitoring method used to determine the presence of the leak;

XVII.F.8.d. The date of first attempt to repair the leak and, if necessary, any additional attempt to repair the leak;

XVII.F.8.e. The date the leak was repaired;

XVII.F.8.f. The delayed repair list including the basis for placing leaks on the list;

XVII.F.8.g. The date the leak was remonitored to verify the effectiveness of the repair, and the results of the remonitoring; and

XVII.F.8.h. A list of identification numbers for components that are designated as unsafe or inaccessible to monitor, as described in Section XVII.F.5.g., an explanation for each component stating why the component is so designated, and the plan for monitoring such component(s).

XVII.F.9. Reporting

The owner or operator of each facility subject to the inspection and maintenance requirements in Section XVII.F. shall submit a single annual report on or before April 30th of each year summarizing inspection and maintenance activities at all of their subject facilities during the previous calendar year. This report shall contain at a minimum the following information:

XVII.F.9.a. The number of facilities inspected;

XVII.F.9.b. The total number of inspections;

XVII.F.9.c. The total number of leaks identified, broken out by component type;

XVII.F.9.d. The total number of leaks repaired;

XVII.F.9.e. The number of leaks on the delayed repair list as of December 31st; and

XVII.F.9.f. Each report shall be accompanied by a self-certification form. The form shall contain a certification by a responsible official of the truth, accuracy, and completeness of such form, report, or certification stating that, based on information and belief formed after reasonable

inquiry, the statements and information in the document are true, accurate, and complete.

XVII.G. (State Only) Control of emissions from well production facilities.

XVII.G.1. Well Operation and Maintenance.

On or after August 1, 2014, during normal operation gas coming off of a separator produced from any newly constructed, hydraulically fractured, or recompleted oil or gas well must be either routed to a gas gathering line or controlled by air pollution control equipment that achieves an average hydrocarbon control efficiency of 95% from the date of first production. If a combustion device is used, it shall have a design destruction efficiency of at least 98% of hydrocarbons.

XVII.H. (State Only) Venting during downhole well maintenance and unloading events.

XVII.H.1. Well Maintenance.

Beginning May 1, 2014, hydrocarbon emissions from flowing wells must be captured or controlled during downhole well maintenance or servicing activities, unless venting is necessary for safety.

XVII.H.1.a. Operators shall use best management practices to minimize the need for well venting associated with downhole well maintenance and liquids unloading. During liquids unloading events, any means of creating differential pressure will first be used to attempt to unload the liquids from the well without venting. If these methods are not successful in unloading the liquids from the well, the well may be vented to the atmosphere to create the necessary differential pressure to bring the liquids to the surface.

XVII.H.1.b. Venting will be minimized to the extent possible, using best management practices during the well maintenance and liquids unloading events in XVII.H.1.a. The owner and/or operator shall be present on-site during any planned well maintenance and liquids unloading event in XVII.H.1.a. and shall ensure that any venting to the atmosphere is limited to the maximum extent practicable.

XVII.H.1.c. Records of the cause, date, time, and duration of venting events under this Section XVII.H. will be kept and made available to the Division upon request.

XVIII. (State Only) Natural Gas-Actuated Pneumatic Controllers Associated with Oil and Gas Operations ~~in the 8-Hour Ozone Control Area or Any Ozone Nonattainment or Attainment/Maintenance Area~~

XVIII.A. \_\_\_\_\_ Applicability

This section applies to pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations) ~~in the 8-Hour Ozone Control Area or any Ozone Nonattainment or Attainment/Maintenance Area.~~

XVIII.B. \_\_\_\_\_ Definitions

XVIII.B.1. “Affected Operations” shall mean pneumatic controllers that are actuated by natural gas, and located at, or upstream of natural gas processing plants (upstream activities include: oil and gas exploration and production operations, natural gas compressor stations, and/or natural gas drip stations).

XVIII.B.2. “Enhanced Maintenance” is specific to high-bleed devices and shall include but is not limited to cleaning, tuning, and repairing leaking gaskets, tubing fittings, and seals; tuning to operate over a broader range of proportional band; and eliminating unnecessary valve positioners.

XVIII.B.3. “High-Bleed Pneumatic Controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits in excess of 6 standard cubic feet per hour (scfh) of natural gas to the atmosphere.

XVIII.B.4. “Low-Bleed Pneumatic controller” shall mean a pneumatic controller that is designed to have a constant bleed rate that emits less than or equal to 6 scfh of natural gas to the atmosphere.

XVIII.B.5. “Natural Gas Processing Plant” shall mean any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both.

XVIII.B.6. “No-bleed Pneumatic Controller” shall mean any pneumatic controller that is not using hydrocarbon gas as the valve’s actuating gas.

XVIII.B.67. “Pneumatic Controller” shall mean an instrument that is actuated using natural gas pressure and used to control or monitor process parameters such as liquid level, gas level, pressure, valve position, liquid flow, gas flow, and temperature.

XVIII.C. \_\_\_\_\_ Emission Reduction Requirements

The owners and operators of affected operations shall reduce emissions of volatile organic compounds from pneumatic controllers associated with affected operations as follows:

XVIII.C.1. \_\_\_\_\_ In the 8-Hour Ozone Control Area:

[XVIII.C.1.a.](#) All pneumatic controllers placed in service on or after February 1, 2009, shall emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.2.1.b.](#) All high-bleed pneumatic controllers in service prior to February 1, 2009 shall be replaced or retrofit such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, by May 1, 2009, unless allowed pursuant to Section XVIII.C.[31.c.](#)

[XVIII.C.31.c.](#) All high-bleed pneumatic controllers that must remain in service -due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.

[XVIII.C.3-a.1.c.\(i\)](#) For high-bleed pneumatic controllers in service prior to February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and /or process purposes by March 1, 2009. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.3-b.1.c.\(ii\)](#) For high-bleed pneumatic controllers placed in service on or after February 1, 2009, the owner/operator shall submit justification for high-bleed pneumatic controllers to be installed due to safety and /or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

[XVIII.C.2.](#) [Statewide:](#)

[XVIII.C.2.a.](#) [All pneumatic controllers placed in service on or after May 1, 2014, shall:](#)

[XVIII.C.2.a.\(i\)](#) [Emit VOCs in an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.; or](#)

[XVIII.C.2.a.\(ii\)](#) [Utilize no-bleed pneumatic controllers where on-site electrical grid power is being used and is technically and economically feasible.](#)

[XVIII.C.2.b.](#) [All high-bleed pneumatic controllers in service prior to May 1, 2014, shall be replaced or retrofitted by May 1, 2015, such that VOC emissions are reduced to an amount equal to or less than a low-bleed pneumatic controller, unless allowed pursuant to Section XVIII.C.2.c.](#)

[XVIII.C.2.c.](#) [All high-bleed pneumatic controllers that must remain in service due to safety and/or process purposes must have Division approval and comply with Sections XVIII.D. and XVIII.E.](#)

[XVIII.C.2.c.\(i\)](#) [For high-bleed pneumatic controllers in service prior to May 1, 2014, the owner/operator shall submit justification for high-bleed pneumatic controllers to remain in service due to safety and/or process purposes by March 1, 2015. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.](#)

[XVIII.C.2.c.\(ii\)](#) [For high-bleed pneumatic controllers placed in service on or after May 1, 2014, the owner/operator shall submit justification for high-bleed](#)

pneumatic controllers to be installed due to safety and/or process purposes prior to installation. The Division shall be deemed to have approved the justification if it does not object to the owner/operator within 30-days upon receipt.

#### XVIII.D. Monitoring

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

##### XVIII.D.1. In the 8-Hour Ozone Control Area:

XVIII.D.1.a. Effective May 1, 2009, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.1.b. Effective May 1, 2009, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

##### XVIII.D.2. Statewide:

XVIII.D.2.a. Effective May 1, 2015, each high-bleed pneumatic controller shall be physically tagged by the owner/operator identifying it with a unique high-bleed pneumatic controller number that is assigned and maintained by the owner/operator.

XVIII.D.2.b. Effective May 1, 2015, each high-bleed pneumatic controller shall be inspected on a monthly basis, perform necessary enhanced maintenance as defined in Section XVIII.B.2 , and maintain the device according to manufacturer specifications to ensure that the controller's VOC emissions are minimized.

#### XVIII.E. Recordkeeping

This section applies only to high-bleed pneumatic controllers identified in SectionSections XVIII.C.31.c. and XVIII.C.2.c.

XVIII.E.1. The owner or operator of affected operations shall maintain a log of the total number of high-bleed pneumatic controllers and their associated controller numbers per facility, the total number of high-bleed pneumatic controllers per company and the associated justification that the high-bleed pneumatic controllers must be used pursuant to SectionSections XVIII.C.31.c. and XVIII.C.2.c. The log shall be updated on a monthly basis.

XVIII.E.2. The owner or operator shall maintain a log of enhanced maintenance which shall include, at a minimum, inspection dates, the date of the maintenance activity, high-bleed pneumatic controller number, description of the maintenance performed, results and date of any corrective action taken, and the printed name and signature of the individual performing the maintenance. The log shall be updated on a monthly basis.

XVIII.E.3. Records of enhanced maintenance of pneumatic controllers shall be maintained for a minimum of three years and readily made available to the ~~division~~Division upon request.

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Filename: image001.jpg

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Owner: Michael J. Myers </o=lawnet/ou=first administrative  
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Reason: It is an unsupported file type

From: Mauricio Roma </o=lawnet/ou=first  
administrative group/cn=recipients/cn=mauricioroma>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane  
Date: Mon Dec 30 2013 16:02:14 EST  
Attachments: image001.jpg  
image002.jpg

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Thank you Mike.

From: Michael J. Myers  
Sent: Monday, December 30, 2013 3:51 PM  
To: Mauricio Roma; Alan Belenz  
Subject: FW: National Journal: Colorado Fracking Rules to Target Methane

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Tuesday, November 19, 2013 6:04 PM  
To: Michael J. Myers  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

FYI

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, November 18, 2013 8:10 AM  
To: Peter Zalzal  
Subject: RE: National Journal: Colorado Fracking Rules to Target Methane

Thanks Peter, good news.

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General

The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Peter Zalzal [mailto:pzalzal@edf.org]  
Sent: Friday, November 15, 2013 4:36 PM  
To: Michael J. Myers  
Subject: National Journal: Colorado Fracking Rules to Target Methane

## Colorado Fracking Rules to Target Methane

Ninety percent of wells in Colorado are fracked.(Amy Harder)

By Amy Harder

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November 15, 2013

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Democratic Gov. John Hickenlooper of Colorado plans to announce a framework targeting methane—a potent greenhouse gas—as part of his state's regulations controlling fracking.

"We are very close now—within the week—to hammering out a specific methane regulatory framework that I think will make sure people's air is much cleaner than what some of their fears would lead them to believe," Hickenlooper said in an interview with National Journal Tuesday. His office confirmed an announcement is expected next week.

In both politics and energy production, Colorado is a bellwether state. So how Hickenlooper moves forward on these issues will be a key indicator of how other states and the country as a whole move forward.

Colorado, which has traditionally ranked in the top 10 of the country's oil and natural-gas producing states, has more than doubled its oil production and increased its gas production by 30 percent since 2005. In that same period, another trend began: Colorado's politics shifted from red, where they were in the 1990's and early 2000's, to blue. After George W. Bush won the state with 52 percent of the vote in

2004, Barack Obama carried the state comfortably in both 2008 and 2012.

It's already known that Hickenlooper's administration is in the process of writing air-quality rules that are expected to be released early next week. This inclusion of methane, a greenhouse gas whose heat-trapping power is 20 times more potent than carbon dioxide in the short-term—is a new development. Concerns about methane have grown as the country shifts from coal to natural gas, which burns half as many carbon emissions as coal. The methane could cancel out the other climate benefits, some environmentalists and experts worry.

"No one has really broken down methane," Hickenlooper said of states' fracking rules.

The news is coming on the heels of four cities in Colorado—Fort Collins, Boulder, Lafayette, and Broomfield—voting on anti-fracking measures. The first three passed the initiatives by comfortable margins. The measure in Broomfield, the most conservative community, initially failed, but its result was overturned in a recount Thursday. Another recount is now expected.

Meanwhile, the House is expected to vote on legislation next week that bans the Obama administration from regulating fracking, an extraction technique that involves blasting large amounts of sand and water along with chemicals into shale formations to release oil and gas. It's key to developing unconventional fossil resources but controversial for its impact on the environment.

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group/cn=recipients/cn=mauricioroma>

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Owner: Mauricio Roma </o=lawnet/ou=first administrative  
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Filename: image002.jpg

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Reason: It is an unsupported file type

From: Jordan, Scott <jordan.scott@epa.gov>  
To: tballo@earthjustice.org  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
tcarbonell@edf.org <tcarbonell@edf.org>; dchung@crowell.com  
<dchung@crowell.com>; gschultz@riag.ri.gov  
<gschultz@riag.ri.gov>; abrown@riag.ri.gov  
<abrown@riag.ri.gov>; tschwartz@atg.state.vt.us  
<tschwartz@atg.state.vt.us>; mary.raivel@maryland.gov  
<mary.raivel@maryland.gov>; kellen.mwangi@maryland.gov  
<kellen.mwangi@maryland.gov>; paul.garrahan@doj.state.or.us  
<paul.garrahan@doj.state.or.us>; scott.koschwitz@ct.gov  
<scott.koschwitz@ct.gov>  
Cc: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
Bcc:  
Subject: Wood Heaters NSPS Proposed Rule  
Date: Tue Dec 31 2013 12:33:41 EST  
Attachments:

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Counsel -

I have just learned that EPA may sign the Wood Heaters NSPS proposed rule later this week. (Eileen is out of the office until January 6, so I am contacting you directly. In fact, I am on leave until January 6, but EPA folks were able to reach me about this.)

In addition, Acting AA Janet McCabe may be making courtesy calls to interested parties that have contacted her about this rule.

Scott

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Jordan.Scott@epa.gov  
<jordan.scott@epa.gov>  
Cc:  
Bcc:  
Subject: Re: Wood Heaters NSPS Proposed Rule  
Date: Tue Dec 31 2013 15:06:25 EST  
Attachments:

---

Thanks for the heads up, Scott Happy new year.

Message sent from a Blackberry device

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]  
Sent: Tuesday, December 31, 2013 12:33 PM  
To: tballo@earthjustice.org <tballo@earthjustice.org>; Michael J. Myers; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; tcarbonell@edf.org <tcarbonell@edf.org>; dchung@crowell.com <dchung@crowell.com>; gschultz@riag.ri.gov <gschultz@riag.ri.gov>; abrown@riag.ri.gov <abrown@riag.ri.gov>; tschwartz@atg.state.vt.us <tschwartz@atg.state.vt.us>; mary.raivel@maryland.gov <mary.raivel@maryland.gov>; kellen.mwangi@maryland.gov <kellen.mwangi@maryland.gov>; paul.garrahan@doj.state.or.us <paul.garrahan@doj.state.or.us>; scott.koschwitz@ct.gov <scott.koschwitz@ct.gov>  
Cc: McDonough, Eileen (ENRD) <Eileen.McDonough@usdoj.gov>  
Subject: Wood Heaters NSPS Proposed Rule

Counsel -

I have just learned that EPA may sign the Wood Heaters NSPS proposed rule later this week. (Eileen is out of the office until January 6, so I am contacting you directly. In fact, I am on leave until January 6, but EPA folks were able to reach me about this.)

In addition, Acting AA Janet McCabe may be making courtesy calls to interested parties that have contacted her about this rule.

Scott

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Energy Secretary Fracking Won't Cook the Planet - NationalJournal.com.htm  
Date: Tue Dec 31 2013 16:31:11 EST  
Attachments: image001.gif  
image002.gif  
image003.gif

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Mike, As noted.....

Energy Secretary: Fracking Won't Cook the Planet

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National Journal

Energy

By Ben Geman

December 22, 2013

Energy Secretary Ernest Moniz is ending the year with a reminder: Carbon dioxide is the biggest enemy

in the fight against climate change.

Moniz, in a new interview, offers a quick tour of recent studies on methane emissions from natural-gas development—a topic that's plenty controversial amid the U.S. fracking boom.

"We need more data," he tells the news service Platts. But, he adds, methane is far from public enemy No. 1. That's carbon dioxide.

"We do have, after all, measurements of the methane concentrations in the atmosphere and what they tell us is that the carbon dioxide concentrations remain by far the biggest forcer of climate change," he said in an interview that aired Sunday.

"So CO<sub>2</sub> remains the dominant concern for us," Moniz said on Platts' Energy Week TV.

The comments are the latest sign that Moniz does not see methane leaks undercutting the climate advantages that natural gas holds over coal.

Natural gas, which has been eating into coal's market share in power generation, emits just half as much carbon dioxide when burned to create electricity.

It's one of the major reasons U.S. carbon emissions are falling, and Moniz sees gas as an ally in the fight against global warming—at least for a while, although he believes that eventually much steeper carbon cuts will be needed.

But leaks of methane from gas wells and elsewhere on the supply chain, critics say, threaten to erode a big part of that carbon advantage over coal (or all of it, according to a Cornell University professor's controversial and contrarian analysis).

Moniz is not dismissive of the threat from methane—a gas that's pound-for-pound about 20 times more heat-trapping than carbon dioxide, but emitted in much lower volumes and doesn't stick around nearly as long.

His department is part of an interagency group crafting a methane strategy under President Obama's second-term climate plan.

And Moniz is keeping up on his reading. In the interview, he cited the recent University of Texas study, a product of work with the Environmental Defense Fund that had industry funding, which found low methane emissions from gas wells surveyed.

Moniz, in noting that more data is needed, also cited more troubling research: A recent Harvard University study that found overall U.S. methane emissions are far above EPA estimates. That study looked at a wider array of sources, including gas distribution infrastructure.

But Moniz, a former Massachusetts Institute of Technology physics professor, offers a quick lesson.

"Carbon dioxide has a very, very long residence time in the atmosphere. We are talking centuries. If we emit CO<sub>2</sub> now, we are living with that, our children are living with it, our grandchildren are living with it," Moniz said.

"Methane, you are talking more the order of a decade. If we can clamp down, measure . . . reduce those methane emissions, a lot of that will, in fact, go away in a one or two decades time scale," he said.

Elsewhere in the interview, Moniz reiterated his view that it's time to revisit laws and policies that effectively ban U.S. crude oil exports.

Check out the full interview [here](#).

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Document ID: 0.7.691.541215-000001

Owner: Vickie Patton <vpatton@edf.org>

Filename: image001.gif

Last Modified: Tue Dec 31 16:31:11 EST 2013

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Document ID: 0.7.691.541215-000001

Attachment Name: image001.gif

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Reason: It is an unsupported file type

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Owner: Vickie Patton <vpatton@edf.org>

Filename: image002.gif

Last Modified: Tue Dec 31 16:31:11 EST 2013

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Document ID: 0.7.691.541215-000002

Attachment Name: image002.gif

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Owner: Vickie Patton <vpatton@edf.org>

Filename: image003.gif

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Document ID: 0.7.691.541215-000003

Attachment Name: image003.gif

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:07005e2cd90b60e5aca84208bbfd17cf0fe2db1fc7b3a272f0a2856566d983c83fe2

Reason: It is an unsupported file type

From: Timothy Ballo <tballo@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>  
Cc: Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>  
Bcc:  
Subject: FW: Wood Heaters NSPS Proposed Rule  
Date: Fri Jan 03 2014 12:26:22 EST  
Attachments:

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Mike and Fred,

FYI, EPA has issued the proposed rule. See links below.

-Tim

From: Janice Nolen [mailto:Janice.Nolen@lung.org]  
Sent: Friday, January 03, 2014 12:15 PM  
To: Timothy Ballo; nancy.alderman@ehhi.org; cperkins@cleanair.org; Augusta Wilson  
(awilson@cleanair.org)  
Cc: Tomas Carbonell (tcarbonell@edf.org); Paul Billings  
Subject: RE: Wood Heaters NSPS Proposed Rule  
Importance: High

Everyone,

EPA just announced the proposed rule. Their release is live now. The proposal with added information is at <http://www2.epa.gov/residential-wood-heaters>. "EPA expects to issue a final rule in 2015."

Attached is our statement.

Happy new year,

Janice

Janice E. Nolen

American Lung Association

Janice.Nolen@Lung.org

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: fred.augenstern@state.ma.us  
<fred.augenstern@state.ma.us>; dchung@crowell.com  
<dchung@crowell.com>; tballo@earthjustice.org  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
gschultz@riag.ri.gov <gschultz@riag.ri.gov>; abrown@riag.ri.gov  
<abrown@riag.ri.gov>; tschwartz@atg.state.vt.us  
<tschwartz@atg.state.vt.us>; mary.raivel@maryland.gov  
<mary.raivel@maryland.gov>; kellen.mwangi@maryland.gov  
<kellen.mwangi@maryland.gov>; paul.garrahan@doj.state.or.us  
<paul.garrahan@doj.state.or.us>; scott.koschwitz@ct.gov  
<scott.koschwitz@ct.gov>; Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: Wood heaters  
Date: Mon Jan 06 2014 11:33:30 EST  
Attachments:

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The EPA Administrator signed the proposed rule for the Wood Heaters NSPS on Friday, Jan 3. The pre-publication notice and related materials are available online at <http://www2.epa.gov/residential-wood-heaters/proposed-new-source-performance-standards-residential-wood-heaters>. We do not yet know exactly when it will be published in the Fed. Reg.

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: Vickie Patton <vpatton@edf.org>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress  
Date: Mon Jan 06 2014 14:56:28 EST  
Attachments:

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<http://blogs.edf.org/climate411/2014/01/06/new-study-web-of-entities-invests-heavily-in-obstructing-climate-and-clean-energy-progress/>

## New Study — Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

By Vickie Patton | Bio | Published: January 6, 2014|Edit

A few days ago, the Wall Street Journal reported that Peabody Coal Company is one of the top five worst performing stocks of 2013.

In a year when the S&P 500 was up 29 percent and the Dow rose by 26 percent, Peabody Coal's stock plummeted by 28 percent.

While most investors recognize the serious environmental and financial risks associated with coal and its pollution, not all do.

Drexel University Professor Robert Brulle reviewed IRS data from 2003 to 2010 and found a web of entities investing over \$900 million annually in organizations dedicated to obstructing climate progress and fighting the deployment of safe, clean energy in America.

If you take a closer look at those specific organizations identified in Brulle's study, you'll find that several of them are involved – now – in extensive efforts to obstruct climate and clean energy progress under the nation's clean air laws and leading state programs.

Take a look at these examples:

The Landmark Legal Foundation, Competitive Enterprise Institute and FreedomWorks all just filed briefs before the U.S. Supreme Court challenging the Clean Air Act's requirement that, at the time of their design and construction, large industrial sources deploy cost-effective modern pollution control technologies to mitigate their climate pollution.

In its challenge to clean air measures for climate pollution, the Competitive Enterprise Institute and FreedomWorks brief (filed along with Southeastern Legal Foundation) relies extensively — and chillingly — on the tobacco industry case *FDA v. Brown & Williamson Tobacco Corp.* and the legal attacks on our nation's efforts to eliminate the scourge of youth tobacco addiction:

“The Court's approach to FDA's assertion of regulatory authority over tobacco products has direct relevance in the present case and should control the outcome here.”

(That's from page 7 of their brief. The Supreme Court has already considered – and rejected – this misguided legal attack in the context of EPA's authority to regulate climate pollution.)

Earlier this year, the Landmark Legal Foundation unsuccessfully asked the U.S. Supreme Court to review EPA's science-based determination that six greenhouse gases endanger the health and welfare of current and future generations. They tried to challenge EPA's determination, anchored in extensive science reflecting decades of research, by ridiculously questioning whether this finding is a "scientific judgment." (see page 11 of their brief)

The Competitive Enterprise Institute also litigated to overturn New York Republican Governor George Pataki's leading efforts to cap and reduce the climate pollution from fossil fuel power plants in New York and to participate in a broader regional pollution control program, the Regional Greenhouse Gas Initiative.

On December 5th, New York's appellate court affirmed the decision of the state's trial court firmly rejecting these legal attacks.

In his study, Brulle also chronicles the "evidence of a trend toward concealing the sources of [climate obstructionism] funding through the use of donor directed philanthropies" such as the Donors Trust.

A closer look at funding by the Donors Trust through its most recent IRS Form 990 (2011) indicates \$1,189,730 in grant funding provided to an organization called the Committee for a Constructive Tomorrow (CFACT). CFACT is a major outlet for climate denialism.

CFACT, too, just filed a brief with the U.S. Supreme Court in which it asserts that the overwhelming scientific consensus on human-induced climate change is "tenuous, biased, inaccurate, incomplete, unsupported by actual observations, and lacking in scientific integrity."

The recent scientific findings of the world's leading scientists set out in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change found that climate change is unequivocal and its impacts are unprecedented and profound.

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The microwave standards will lead to less energy use, consumer cost savings and pollution reductions.

Landmark Legal Foundation and the Cato Institute objected to DOE's consideration of the societal benefits of mitigating carbon pollution. Patrick Michaels, a well-known climate denialist, co-authored the Cato comments. Landmark asked DOE to immediately halt implementation and rescind the Rule.

DOE has denied the request to upend these common sense energy conservation standards for our nation.

And it is not surprising that Peabody Coal Company, too, has just filed a brief in the U.S. Supreme Court objecting to the Clean Air Act requirement that our nation's largest industrial emitters use modern pollution controls to mitigate climate pollution.

Peabody's brief begins by asserting that "[w]hether and how to regulate GHGs [greenhouse gases] remains a highly debated, contentious issue in Congress, agencies and the courts." (Page 2 of their brief)

But Brulle's research elucidates how Peabody's assertion is a tautology. Through massive funding of groups dedicated to climate obstructionism, Brulle documents how climate change remains contentious because there is a vast climate change counter-movement dedicated to making it so:

"[A] number of conservative think tanks, trade associations, and advocacy organizations are the key organizational components of a well-organized climate change counter-movement (CCCM) that has not only played a major role in confounding public understanding of climate science, but also successfully delayed meaningful government policy actions to address the issue."

Climate change is happening. The toll exacted from extreme weather — fueled in part by climate change — on human life and our economy is profound, and reaches from the ravages wrought on New York and New Jersey by Hurricane Sandy to the tragic flooding in the Rockies.

However, the solutions are at hand.

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And even more recently, in November 2013, 100 percent — ALL — of the new electrical power in America came from renewable energy.

While Peabody's stock falls and its rhetoric rises, and while the forces of obstructionism fight clean energy, the winds of change are blowing briskly.

Brulle's study is a clarion call for moms, dads, grandparents, aunts, and uncles to resolve that in 2014 we will work together to fight for clean air and clean energy for our children — and for all children.

In spite of a well-funded group of obstructionists, we can prevail.

We can secure climate progress and clean energy for our nation, for our communities and for our future.

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From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Timothy Ballo  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Tomas  
Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
dchung@crowell.com <dchung@crowell.com>; Menotti, David  
<dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: Wood heaters  
Date: Mon Jan 06 2014 15:28:40 EST  
Attachments:

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I would like to schedule a call next week to discuss plaintiffs' response to EPA's settlement proposal. Because the industry association has been granted intervention, it is appropriate that they should be included. Of course, I am not sure if plaintiffs have completed their discussions with their clients, which would have to happen before we talk further. To keep everything moving, I would like to set a time for us to talk next week. I propose Jan. 14 (Tues) or 16 (Thurs) between 10:00 and 2:00. Please let me know if you are available. I will send out a call-in number once we settle on a time. Thank you.

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress  
Date: Mon Jan 06 2014 15:29:13 EST  
Attachments:

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Thanks Vickie. When you have a minute or two to fill me in on Fred's meeting with the WH today, that would be appreciated. Thanks.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Monday, January 06, 2014 2:56 PM  
To: Vickie Patton  
Subject: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

<http://blogs.edf.org/climate411/2014/01/06/new-study-web-of-entities-invests-heavily-in-obstructing-climate-and-clean-energy-progress/>

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
Cc:  
Bcc:  
Subject: RE: Wood heaters  
Date: Mon Jan 06 2014 15:32:59 EST  
Attachments:

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Eileen—Tues. the 14th I'm available 11-130 and Thurs. the 16th I'm free 10-2. Thanks.

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Monday, January 06, 2014 3:29 PM  
To: Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.  
ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: Wood heaters

I would like to schedule a call next week to discuss plaintiffs' response to EPA's settlement proposal. Because the industry association has been granted intervention, it is appropriate that they should be included. Of course, I am not sure if plaintiffs have completed their discussions with their clients, which would have to happen before we talk further. To keep everything moving, I would like to set a time for us to talk next week. I propose Jan. 14 (Tues) or 16 (Thurs) between 10:00 and 2:00. Please let me know if you are available. I will send out a call-in number once we settle on a time. Thank you.

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: Timothy Ballo <tballo@earthjustice.org>  
To: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
dchung@crowell.com <dchung@crowell.com>; Menotti, David  
<dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Mon Jan 06 2014 15:35:48 EST  
Attachments:

---

I'm unavailable Tuesday, but free Thursday. Thanks for organizing this.

-Tim

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Monday, January 06, 2014 3:29 PM  
To: Timothy Ballo; 'Michael J. Myers'; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
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</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
dchung@crowell.com <dchung@crowell.com>; Menotti, David  
<dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Mon Jan 06 2014 16:01:42 EST  
Attachments:

---

Thursday also works better for me. Thanks,

Tomás

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Monday, January 06, 2014 3:36 PM  
To: 'McDonough, Eileen (ENRD)'; 'Michael J. Myers'; Tomas Carbonell; fred.augenstern@state.ma.us;  
dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters

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From: Chung, David <dchung@crowell.com>  
To: Tomas Carbonell <tcarbonell@edf.org>;  
Timothy Ballo <tballo@earthjustice.org>; McDonough, Eileen  
(ENRD) <eileen.mcdonough@usdoj.gov>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Menotti, David <dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Mon Jan 06 2014 17:20:36 EST  
Attachments:

---

Thursday at those times works for David Menotti and me. Thanks.

From: Tomas Carbonell [mailto:tcarbonell@edf.org]  
Sent: Monday, January 06, 2014 4:02 PM  
To: Timothy Ballo; 'McDonough, Eileen (ENRD)'; 'Michael J. Myers'; fred.augenstern@state.ma.us;  
Chung, David; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters

Thursday also works better for me. Thanks,

Tomás

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Monday, January 06, 2014 3:36 PM  
To: 'McDonough, Eileen (ENRD)'; 'Michael J. Myers'; Tomas Carbonell; fred.augenstern@state.ma.us;  
dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters

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From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Tomas Carbonell <tcarbonell@edf.org>;  
Timothy Ballo <tballo@earthjustice.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Menotti, David <dmenotti@crowell.com>; dchung@crowell.com  
<dchung@crowell.com>; Jordan, Scott <jordan.scott@epa.gov>  
Cc:  
Bcc:  
Subject: Wood Heaters call  
Date: Mon Jan 06 2014 17:27:51 EST  
Attachments:

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When: Thursday, January 16, 2014 11:00 AM-11:30 AM (GMT-05:00) Eastern Time (US & Canada).  
Where: Call-in number 866-410-9426 Code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

Please let me know if this time does not work for you. Thank you.

From: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>  
To: Tomas Carbonell <tcarbonell@edf.org>; Timothy Ballo <tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; Menotti, David <dmenotti@crowell.com>; dchung@crowell.com <dchung@crowell.com>; Jordan, Scott <jordan.scott@epa.gov>; McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>  
Cc:  
Bcc:  
Subject: Copy: Wood Heaters call  
Date: Mon Jan 06 2014 17:28:02 EST  
Attachments:

StartTime: Thu Jan 16 11:00:00 Eastern Standard Time 2014  
EndTime: Thu Jan 16 11:30:00 Eastern Standard Time 2014  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Mon Jan 06 17:28:00 Eastern Standard Time 2014

When: Thursday, January 16, 2014 11:00 AM-11:30 AM (GMT-05:00) Eastern Time (US & Canada).  
Where: Call-in number 866-410-9426 Code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

Please let me know if this time does not work for you. Thank you.

From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Delaware RGGI suit  
Date: Tue Jan 07 2014 11:59:49 EST  
Attachments: Stevenson v. Delaware DNR.pdf

---

Hi Mike and Morgan, Hope you had a good holiday. I learned yesterday of a challenge in Delaware to that state's adoption of the new RGGI cap levels. Do you by any chance know who at the Delaware AG's office is likely to handle this? Complaint attached for your possible interest. Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW

Washington, DC 20005

Tel 202-513-6256

Fax 202-289-1060

Admitted in New York and the District of Columbia.

Document ID: 0.7.691.178930-000001

Owner: Longstreth, Ben <blongstreth@nrdc.org>

Filename: Stevenson v. Delaware DNR.pdf

Last Modified: Tue Jan 07 11:59:49 EST 2014

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**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR SUSSEX COUNTY**

DAVID T. STEVENSON, :  
R. CHRISTIAN HUDSON, :  
JOHN W. MOORE, and :  
JACK PETERMAN, :

Plaintiffs, :

C.A. No. S13C-12- :  
:

DELAWARE DEPARTMENT :  
OF NATURAL RESOURCES AND :  
ENVIRONMENTAL CONTROL, an :  
agency of the State, and COLIN O'MARA, :  
in his capacity as Secretary of the :  
Department of Natural Resources and :  
Environmental Control, :

Defendants. :

**COMPLAINT**

Plaintiffs David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman bring this action for Declaratory Relief regarding illegal state regulations pursuant to the Administrative Procedures Act, based upon the following:

**THE PARTIES**

1. Plaintiff David T. Stevenson ("Stevenson") is a Sussex County, Delaware resident, currently residing at 37524 Golden Eagle Boulevard in Lewes, Delaware. Stevenson is an electric power customer of Delaware Electric Cooperative, Inc.

2. Plaintiff R. Christian Hudson ("Hudson") is a Sussex County, Delaware resident, with offices at 30045 Eagle Crest Road in Milton, Delaware, with businesses known as Sam Yoder And Son, LLC and Hudson Management. Hudson is an electric power customer of Delmarva Power and one of his businesses is a customer of Delaware Electric Cooperative, Inc.

3. Plaintiff John W. Moore (“Moore”) is a New Castle County, Delaware resident. Moore is an electric power customer of Delmarva Power.

4. Plaintiff Jack Peterman (“Peterman”) is a Kent County, Delaware resident, currently living at 595 Log Cabin Road in Milford, Delaware, and currently serves as a member of the Delaware State House of Representatives, representing the 33<sup>rd</sup> District. Peterman is an electric power customer of Delaware Electric Cooperative, Inc.

5. Defendant Delaware Department of Natural Resources And Environmental Control (“DNREC”) is an agency of the State of Delaware, created and empowered pursuant to the provisions of 29 *Del. C.* Ch. 80 and Title 7 of the Delaware Code.

6. Defendant Colin O’Mara is the Secretary of DNREC (the “Secretary”), and is named solely in his official capacity.

### **JURISDICTION**

7. This Court has jurisdiction over this action pursuant to provisions of 10 *Del. C.* § 541, Article IV, § 7 of the Delaware Constitution, and 29 *Del. C.* § 10141.

### **THE FACTS**

8. In December of 2005, the State of Delaware entered into a Memorandum of Understanding with six (6) other states located in the northeast section of the United States regarding a Regional Greenhouse Gas Initiative (the “MOU”). The MOU was executed by the then Governor of Delaware, and was ultimately approved by six (6) other states: Connecticut; Maine; New Hampshire; New Jersey; New York; and Vermont. New Jersey subsequently withdrew from the MOU, and Massachusetts and Rhode Island joined in.

9. Under the MOU, the seven (7) states committed to propose for legislative and/or regulatory approval a program reflected in the MOU's "Model Rule," with a launch date for the program of January 1, 2009.

10. The MOU proposed to establish a Carbon Dioxide (CO<sub>2</sub>) trading program (the "Program") for, *inter alia*, Electric Generation facilities. It also set regional and individual State Carbon Dioxide emission caps, which were to remain constant through 2014 and be reduced by 2.5% per year in the years 2015 through 2018.

11. The MOU also provided that each State would: 1) allocate "allowances" to emit Carbon Dioxide which would not exceed the individual State cap amounts; and 2) conduct a comprehensive review of the Program in the year 2012, in order to evaluate success, impacts, further reductions, and status of sales of CO<sub>2</sub> emission allowances. But in no event were cap amounts to be reduced prior to 2018.

12. In furtherance of the commitments made by the State of Delaware in the MOU, the Delaware General Assembly enacted the Regional Greenhouse Gas Initiative Act as 7 *Del. C.* §§ 6043-6047 in 2008 (the "RGGI Act").

13. The RGGI Act: 1) declared Carbon Dioxide to constitute an "air contaminant" subject to state regulation; 2) established a "cap and trade" allowance program to control CO<sub>2</sub> emissions; and 3) provided that Delaware Electric Generation facilities would be required to hold sufficient government-issued "CO<sub>2</sub> allowances" to cover their respective annual CO<sub>2</sub> emission levels.

14. In turn, 7 *Del. C.* §§ 6001(2)-(3) and 6003 subject "air contaminant" generators to the permitting and regulatory authority of DNREC and the Secretary.

15. The RGGI Act establishes mandatory requirements that Electric Generation facilities purchase “CO<sub>2</sub> allowances” in order to emit Carbon Dioxide. Delmarva Power and Delaware Electric Cooperative, Inc. both purchase electricity to distribute to customers from Delaware Electric Generation facilities that must purchase “CO<sub>2</sub> allowances.”

16. DNREC has sold CO<sub>2</sub> allowances for monetary consideration in order to enable Electric Generation companies to continue functioning and providing electricity as their business purposes require. CO<sub>2</sub> allowances are only good for a short number of years, after which new ones must be purchased.

17. No Electric Generation facility in Delaware may legally operate unless it purchases the mandatory CO<sub>2</sub> allowances from DNREC in return for a required monetary payment, which DNREC sets the minimum price for. Thus, a CO<sub>2</sub> allowance effectively constitutes a “permit” (the “CO<sub>2</sub> Permit”).

18. After adoption of the RGGI Act, the Secretary of DNREC adopted regulations consistent with the MOU.

19. On November 19, 2013, DNREC issued Secretary’s Order No. 2013-A-0054, approving final amendments to 7 DE Admin. Co. 1147: Carbon Dioxide (CO<sub>2</sub>) Budget Trading Program – Regional Greenhouse Gas Initiative, which had an effective date of December 11, 2013 (the “New RGGI Regulations”). The New RGGI Regulations were published in the Delaware Register of Regulations on December 1, 2013.

20. The New RGGI Regulations include changes in: 1) the size and structure of the CO<sub>2</sub> allowance cap; and 2) the effective price of a CO<sub>2</sub> Permit.

21. Pursuant to 7 *Del. C.* §§ 6043 and 6044, the Secretary of DNREC is authorized to participate in the Regional Greenhouse Gas Initiative and to promulgate regulations to

implement the RGGI cap and trade program consistent with the MOU. Thus, the Secretary's delegated powers are expressly limited by and subject to the MOU terms.

22. The New RGGI Regulations illegally decreased the CO<sub>2</sub> cap for Delaware below the levels provided for in the MOU. Based on principles of supply and demand, the lower CO<sub>2</sub> cap provisions in the New RGGI Regulations will directly and proximately increase the cost of CO<sub>2</sub> Permits, which will concomitantly increase electric power rates charged to customers.

23. The New RGGI Regulations also illegally establish a higher price floor and a new method for the trade of CO<sub>2</sub> allowances, which will cause the price of CO<sub>2</sub> Permits for Electric Generating facilities to increase. But the General Assembly never approved an increase in such permit rates by the required three-fifths (3/5<sup>ths</sup>) vote.

24. The Plaintiffs are aggrieved *per se* by the New RGGI Regulations' violation of Article VIII, § 10 of the Delaware State Constitution. And they are also aggrieved since their electric power rates will rise as a result of increased costs to the Electric Generation facilities stemming from higher CO<sub>2</sub> Permit rates driven by the RGGI Regulations.

**COUNT I – DECLARATORY JUDGMENT –  
STATE CONSTITUTIONAL ILLEGALITY**

25. The contents of paragraphs 1. through 24. are hereby restated as if fully set forth herein.

26. Pursuant to the Delaware Administrative Procedures Act, 29 *Del. C.* § 10141, persons claiming the unlawfulness of a regulation may bring a complaint for declaratory relief in this Court.

27. Additionally, this Court has the authority to declare the actions of government agents such as DNREC and O'Mara to be invalid under the Delaware Code pursuant to the Declaratory Judgment Act, 10 *Del. C.* Ch. 65.

28. As adopted, the New RGGI Regulations would permit DNREC and O'Mara to administratively increase CO<sub>2</sub> Permit rates.

29. The New RGGI Regulations are unconstitutional in contravention of Article VIII, § 10 of the Delaware Constitution since the CO<sub>2</sub> Permit fees that result therefrom were not expressly approved by a three-fifths (3/5<sup>ths</sup>) vote of the Delaware General Assembly.

**COUNT II – DECLARATORY JUDGMENT –  
RGGI ACT AND DELEGATION DOCTRINE ILLEGALITY**

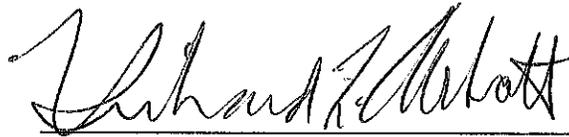
30. The contents of paragraphs 1. through 29. are hereby restated as if fully set forth herein.

31. The New RGGI Regulations also run afoul of the RGGI Act since the new, lower CO<sub>2</sub> emissions cap provisions are not consistent with the MOU. The MOU is expressly required to be followed pursuant to the RGGI Act.

32. Under the principles of legislative delegation, DNREC and the Secretary are required to act in strict conformance with the conditions of their delegated authority in the RGGI Act. Since the New RGGI Regulations stray from the emissions cap provisions of the MOU contrary to the express terms of the legislative delegation in the RGGI Act, such regulatory action is illegal.

WHEREFORE, the Plaintiffs David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman respectfully request that this Court enter a Judgment in their favor and against Defendants DNREC and O'Mara pursuant to the Administrative Procedures Act by declaring that the New RGGI Regulations are invalid based upon their contravention of the Delaware Constitution and the RGGI Act.

ABBOTT LAW FIRM

A handwritten signature in cursive script, appearing to read "Richard L. Abbott", is written over a horizontal line.

Richard L. Abbott, Esquire (I.D. #2712)  
724 Yorklyn Road, Suite 240  
Hockessin, DE 19707  
(302) 489-2529

Attorneys for Plaintiffs

Dated: December 30, 2013

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Timothy Ballo <tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Tue Jan 07 2014 12:41:31 EST  
Attachments:

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Eileen, we have a response to your proposal, and would propose to have a call this week in advance of the call with industry next week. We're available Thurs. from 230-on and Friday from 9-11, 2-3, or 4-5, if one of those slots works for Scott and you. Figure on about 30-45 min. With respect to next week's call, did you intend that we'd take up the "meet and confer" items in Rule 16, or that we'd schedule a separate call to discuss those? Per the court's scheduling order, we have until Jan. 29 to submit the meet and confer statement. Thanks.—Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

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From: Rebecca Bar, Ceres <bar@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Investors File Carbon Asset Risk Resolutions with World's Largest Fossil Fuel Companies  
Date: Tue Jan 07 2014 13:38:05 EST  
Attachments:

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To view this email as a web page, go here.

INCR a project of Ceres  
INCR Bulletin-  
January 7, 2014

#### In the News

INCR Members Say "2014 the Year for a Smart Carbon Tax"

Joe Keefe, INCR member and President and CEO of Pax World Mgmt, and Pax World Funds, writes in The Green Money Journal that a credible alliance between sustainable investors and the fossil fuel industry might help fashion climate change solutions, especially through a Smart Carbon Tax.

[Read more...](#)

#### Tools & Materials

#### Follow INCR and Expert Ceres Staff on Twitter

Are you or your organization on Twitter? Do you want to share your most recent research, reports and events with other INCR members? Follow us and stay connected on climate related news, INCR initiatives, member stories and Ceres projects.

Twitter handle: @INCRnews

#### Events

Shareholder Initiative on Climate and Sustainability (SICS) Working Group Call

Wednesday, January 8  
2:00 - 3:00 pm ET

The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change- related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge, Director, Investor Programs.

INCR Policy Working Group Call

Tuesday, January 21

1:00 - 2:00 pm ET

Join this month's INCR Policy working group call to hear from guest speakers, Ceres staff and investor peers. The discussion will focus on upcoming engagements, investor opportunities and new regulations. To register and learn more, contact Brandon Smithwood, Senior Manager, Policy Program.

#### INCR Sustainable Stock Exchanges Working Group Call

Thursday, January 30  
12:00 - 1:00 pm ET

INCR Sustainable Stock Exchanges Working Group Call - The SSE Working Group will meet to discuss the upcoming launch of the Listing Standards Comment Period by global stock exchanges, among other items. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Programs.

#### Investors File Carbon Asset Risk Resolutions with World's Largest Fossil Fuel Companies

Coal Power Plant 1In September 2013, INCR members and other global investors managing over \$3 trillion of collective assets sent letters to 45 of the world's largest fossil fuel companies urging them to report on how they will mitigate the risk of stranded assets in a low carbon future. Now, a subset of these investors is following up by filing shareholder resolutions with 11 fossil fuel companies. Filers include: Arjuna Capital, As You Sow, Connecticut Office of the State Treasurer, First Affirmative Financial Network, NY State Common Retirement Fund, Trillium Asset Management and the Unitarian Universalist Association.

Exxon Mobil, Peabody Energy Corporation, Alpha Natural Resources, and The Southern Company are among the fossil fuel producers and fossil fuel-consuming utilities that received resolutions. Resolution text can be found on the Ceres online Resolution Database.

The Office of the New York State Comptroller filed resolutions with FirstEnergy Corp, an electric utility, and Devon Energy Corp, an oil and gas producer. Citing a HSBC report that found that "the equity valuation of oil producers could drop below 40 to 60% under a low emissions scenario," the Devon resolution states, "without additional disclosure, it is difficult for shareholders to determine whether Devon is adequately managing these risks or seizing related opportunities."

"We believe that oil and coal companies in our portfolios need to go back to the drawing board to determine the long-term financial risks that climate change poses to their business plans," wrote Thomas DiNapoli, the New York State Comptroller, and Anne Stausboll, the CEO of CalSTRS in a recent Huffington Post Op-Ed.

The letters and resolutions are part of the Carbon Asset Risk Initiative through which investors are addressing the growing concern that, "No more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 °C goal," as stated by the International Energy Agency.

View a current list of 2014 filings, including Carbon Asset Risk and other climate and sustainability resolutions filed by INCR members and partners.

For more information on the initiative or the resolutions, contact Ryan Salmon.

#### INCR Member-Communications Merge to Weekly Mailing

The INCR Bulletin and associated Events Calendar, regularly sent every Friday and Monday, will now be combined into one streamlined mailing to be circulated to members every Monday morning.

This weekly email will follow the same format of the INCR Bulletin and feature stories and information about INCR, its members, and sustainable investing. Focusing on one INCR email a week will allow us to provide members with relevant information in a concise and timely manner.

INCR Communication Tools Include:

- \*INCR Bulletin / Events Calendar (Now Merged)
- \*INCR Members-Only Listserv ([incr@ceres.org](mailto:incr@ceres.org))
- \*INCR Twitter- @INCRnews
- \*Monthly/Quarterly INCR Working Group Calls
- \*INCR webinars
- \*INCR meetings

INCR members are encouraged to op-into the INCR listserv forum – a members only email platform that allows investors to connect with their peers, share news stories, events and their successes. Interested investors should contact Tracey Rembert, Senior Manager of Investor Programs, to be added to the listserv.

For questions or to learn more about INCR communications, please contact Rebecca Bar, Coordinator, Investor Programs.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

Donate now Ceres

99 Chauncy Street, 6th Floor

Boston, MA 02111

[www.ceres.org](http://www.ceres.org)

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

This email was sent by:

Ceres

99 Chauncy Street

Boston, MA 02111

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[Manage Subscriptions](#) | [Update Profile](#) | [One-Click Unsubscribe](#)

From: Driskell, Kristen@Energy  
<kristen.driskell@energy.ca.gov>  
To: Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Cc: Kennedy, Kit (kkennedy@nrdc.org)  
<kkennedy@nrdc.org>; Longstreth, Ben <blongstreth@nrdc.org>  
Bcc:  
Subject: Amicus Curiae brief in APGA v. DOE (D.C. Cir. Case No. 11-1485)  
Date: Tue Jan 07 2014 14:00:21 EST  
Attachments: Court Order re Briefing Schedule (12-9-13).pdf

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Happy New Year!

I hope everyone is doing well at the start of the new year! I was just browsing PACER, and came across this court order regarding the briefing schedule. I assume we will discuss the scope of our brief after January 28, 2014 (when the Intervenors in support of Petitioner submit their joint brief), but I just wanted to check in with all of you to find out if there is another plan.

Best,

Kristen

Kristen M. Driskell

Attorney

California Energy Commission

1516 9th Street, MS-14

Sacramento, CA 95814

Ph: (916) 654-3957

E-mail: Kristen.Driskell@energy.ca.gov

Document ID: 0.7.691.544675-000001

Owner: Driskell, Kristen@Energy <kristen.driskell@energy.ca.gov>

Filename: Court Order re Briefing Schedule (12-9-13).pdf

Last Modified: Tue Jan 07 14:00:21 EST 2014

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**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 11-1485**

**September Term, 2013**

Joint Brief of Amici Curiae  
in Support of Respondent  
(not to exceed 7,000 words)

March 14, 2014

Petitioner’s Reply Brief  
(not to exceed 8,500 words)

March 31, 2014

Joint Reply Brief of Intervenors  
in Support of Petitioner  
(not to exceed 5,125 words)

April 15, 2014

The briefs will cite to the previously-filed appendix.

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

In 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. . . . When the appellant’s or petitioner’s standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk’s office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

**Per Curiam**

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>; Timothy Ballo  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Tomas  
Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
dchung@crowell.com <dchung@crowell.com>; Menotti, David  
<dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Tue Jan 07 2014 14:03:09 EST  
Attachments:

---

The plaintiffs have told me that they are ready now to discuss their response to EPA's settlement proposal and would like to have the call quickly so that we can keep this moving.

Could we talk at 4:00 on Thurs. at 4:00 or on Monday? I am open all day on Mon. Would 11:00 work?  
Thanks

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Timothy Ballo <tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; dchung@crowell.com <dchung@crowell.com>; Menotti, David <dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Tue Jan 07 2014 14:07:53 EST  
Attachments:

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Thurs. at 4 works for the state plaintiffs (and I believe the NGOs as well). I'm also free on Monday.

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Tuesday, January 07, 2014 2:03 PM  
To: McDonough, Eileen (ENRD); Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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From: Timothy Ballo <tballo@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; dchung@crowell.com <dchung@crowell.com>; Menotti, David <dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Tue Jan 07 2014 14:08:20 EST  
Attachments:

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Either time works for me, I'm also free all day Monday. Thank you.

-Tim

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'McDonough, Eileen (ENRD)'; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Tuesday, January 07, 2014 2:03 PM  
To: McDonough, Eileen (ENRD); Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
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From: Chung, David <dchung@crowell.com>  
To: Timothy Ballo  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; McDonough,  
Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Menotti, David <dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Tue Jan 07 2014 14:13:16 EST  
Attachments:

---

David Menotti and I would prefer Thurs at 4 pm, but either of those times would work.

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'Michael J. Myers'; 'McDonough, Eileen (ENRD)'; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.  
augenstern@state.ma.us; Chung, David; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

Either time works for me, I'm also free all day Monday. Thank you.

-Tim

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'McDonough, Eileen (ENRD)'; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.  
augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Tuesday, January 07, 2014 2:03 PM  
To: McDonough, Eileen (ENRD); Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.  
org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David

Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Chung, David <dchung@crowell.com>;  
Timothy Ballo <tballo@earthjustice.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Menotti, David <dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Tue Jan 07 2014 14:22:37 EST  
Attachments:

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We have closure! Thurs. Jan. 9 at 4:00. The call-in number is 866-410-9426 Code is 2025143126.  
Thank you for the flexibility. It will be helpful to all of us to keep this moving.

Eileen T. McDonough

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From: Chung, David [mailto:DChung@crowell.com]  
Sent: Tuesday, January 07, 2014 2:13 PM  
To: Timothy Ballo; 'Michael J. Myers'; McDonough, Eileen (ENRD); 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'Michael J. Myers'; 'McDonough, Eileen (ENRD)'; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; Chung, David; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'McDonough, Eileen (ENRD)'; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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Sent: Tuesday, January 07, 2014 2:03 PM  
To: McDonough, Eileen (ENRD); Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

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Eileen T. McDonough

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Longstreth, Ben <blongstreth@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Delaware RGGI suit  
Date: Tue Jan 07 2014 14:51:44 EST  
Attachments:

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Thanks Ben. Valerie Edge (formerly Satterfield) is handling this. Dick Durstein is her supervisor. I emailed her the court decisions in our most recent case (Thrun) and our brief in the first case. Her contact info is below if you want to reach out to her.

Valerie Satterfield Edge

Deputy Attorney General

Delaware Department of Justice

102 West Water Street, 3rd Floor

Dover, Delaware 19904

Phone: (302) 739-4636

After Hrs: (302) 257-3219

Fax: (302) 739-4624

email: [valerie.edge@state.de.us](mailto:valerie.edge@state.de.us)

From: Longstreth, Ben [<mailto:blongstreth@nrdc.org>]  
Sent: Tuesday, January 07, 2014 12:00 PM  
To: Morgan Costello; Michael J. Myers  
Subject: Delaware RGGI suit

Hi Mike and Morgan, Hope you had a good holiday. I learned yesterday of a challenge in Delaware to that state's adoption of the new RGGI cap levels. Do you by any chance know who at the Delaware AG's office is likely to handle this? Complaint attached for your possible interest. Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW  
Washington, DC 20005  
Tel 202-513-6256  
Fax 202-289-1060

Admitted in New York and the District of Columbia.

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress  
Date: Tue Jan 07 2014 20:26:55 EST  
Attachments:

---

Hi Mike, Is there a convenient time to call tomorrow am? Best wishes, Vickie

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, January 06, 2014 1:29 PM  
To: Vickie Patton  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

Thanks Vickie. When you have a minute or two to fill me in on Fred's meeting with the WH today, that would be appreciated. Thanks.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Monday, January 06, 2014 2:56 PM  
To: Vickie Patton  
Subject: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

<http://blogs.edf.org/climate411/2014/01/06/new-study-web-of-entities-invests-heavily-in-obstructing-climate-and-clean-energy-progress/>

New Study — Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

By Vickie Patton | Bio | Published: January 6, 2014|Edit

A few days ago, the Wall Street Journal reported that Peabody Coal Company is one of the top five worst performing stocks of 2013.

In a year when the S&P 500 was up 29 percent and the Dow rose by 26 percent, Peabody Coal's stock plummeted by 28 percent.

While most investors recognize the serious environmental and financial risks associated with coal and its pollution, not all do.

Drexel University Professor Robert Brulle reviewed IRS data from 2003 to 2010 and found a web of entities investing over \$900 million annually in organizations dedicated to obstructing climate progress and fighting the deployment of safe, clean energy in America.

If you take a closer look at those specific organizations identified in Brulle's study, you'll find that several of them are involved – now – in extensive efforts to obstruct climate and clean energy progress under the nation's clean air laws and leading state programs.

Take a look at these examples:

The Landmark Legal Foundation, Competitive Enterprise Institute and FreedomWorks all just filed briefs before the U.S. Supreme Court challenging the Clean Air Act's requirement that, at the time of their design and construction, large industrial sources deploy cost-effective modern pollution control technologies to mitigate their climate pollution.

In its challenge to clean air measures for climate pollution, the Competitive Enterprise Institute and FreedomWorks brief (filed along with Southeastern Legal Foundation) relies extensively — and chillingly — on the tobacco industry case *FDA v. Brown & Williamson Tobacco Corp.* and the legal attacks on our nation's efforts to eliminate the scourge of youth tobacco addiction:

“The Court's approach to FDA's assertion of regulatory authority over tobacco products has direct relevance in the present case and should control the outcome here.”

(That's from page 7 of their brief. The Supreme Court has already considered – and rejected – this misguided legal attack in the context of EPA's authority to regulate climate pollution.)

Earlier this year, the Landmark Legal Foundation unsuccessfully asked the U.S. Supreme Court to review EPA's science-based determination that six greenhouse gases endanger the health and welfare of current and future generations. They tried to challenge EPA's determination, anchored in extensive science reflecting decades of research, by ridiculously questioning whether this finding is a “scientific judgment.” (see page 11 of their brief)

The Competitive Enterprise Institute also litigated to overturn New York Republican Governor George Pataki's leading efforts to cap and reduce the climate pollution from fossil fuel power plants in New York and to participate in a broader regional pollution control program, the Regional Greenhouse Gas Initiative.

On December 5th, New York's appellate court affirmed the decision of the state's trial court firmly rejecting these legal attacks.

In his study, Brulle also chronicles the “evidence of a trend toward concealing the sources of [climate obstructionism] funding through the use of donor directed philanthropies” such as the Donors Trust.

A closer look at funding by the Donors Trust through its most recent IRS Form 990 (2011) indicates \$1,189,730 in grant funding provided to an organization called the Committee for a Constructive Tomorrow (CFACT). CFACT is a major outlet for climate denialism.

CFACT, too, just filed a brief with the U.S. Supreme Court in which it asserts that the overwhelming scientific consensus on human-induced climate change is “tenuous, biased, inaccurate, incomplete, unsupported by actual observations, and lacking in scientific integrity.”

The recent scientific findings of the world’s leading scientists set out in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change found that climate change is unequivocal and its impacts are unprecedented and profound.

Another organization that has received support from the Donors Trust according to the Trust’s IRS Form 990 (2011) is the Judicial Education Project.

They also just filed a brief with the U.S. Supreme Court challenging the federal government’s authority to regulate greenhouse gas emissions from the nation’s largest sources of such pollution. The brief alleges that the Environmental Protection Agency exceeded its authority under the U.S. Supreme Court’s 2007 landmark case, *Massachusetts v. EPA*, in which the Court stated that the “harms associated with climate change are serious and well recognized.”

Earlier this year, the Mercatus Center — another group identified by Brulle’s research — submitted adverse comments on proposed clean air standards for cars and gasoline by calling into question the extensive body of peer reviewed science linking particulate pollution and mortality.

It is well documented that these clean air standards for cars and gasoline will provide healthier, longer lives. They have also won the support of diverse interests, including the American Lung Association and the U.S. auto industry, because of the dual benefits of reducing health-harming pollutants and enabling more efficient clean car technologies.

Recently, the Landmark Legal Foundation joined by the Cato Institute — both groups identified in Brulle’s research — challenged the Department of Energy’s adoption of improved appliance efficiency standards for microwaves.

The microwave standards will lead to less energy use, consumer cost savings and pollution reductions. Landmark Legal Foundation and the Cato Institute objected to DOE’s consideration of the societal benefits of mitigating carbon pollution. Patrick Michaels, a well-known climate denialist, co-authored the Cato comments. Landmark asked DOE to immediately halt implementation and rescind the Rule.

DOE has denied the request to upend these common sense energy conservation standards for our nation.

And it is not surprising that Peabody Coal Company, too, has just filed a brief in the U.S. Supreme Court objecting to the Clean Air Act requirement that our nation’s largest industrial emitters use modern pollution controls to mitigate climate pollution.

Peabody’s brief begins by asserting that “[w]hether and how to regulate GHGs [greenhouse gases] remains a highly debated, contentious issue in Congress, agencies and the courts.” (Page 2 of their brief)

But Brulle’s research elucidates how Peabody’s assertion is a tautology. Through massive funding of groups dedicated to climate obstructionism, Brulle documents how climate change remains contentious because there is a vast climate change counter-movement dedicated to making it so:

“[A] number of conservative think tanks, trade associations, and advocacy organizations are the key organizational components of a well-organized climate change counter-movement (CCCM) that has not

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In spite of a well-funded group of obstructionists, we can prevail.

We can secure climate progress and clean energy for our nation, for our communities and for our future.

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From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: Delaware RGGI suit  
Date: Tue Jan 07 2014 21:04:49 EST  
Attachments:

---

Many thanks Mike.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, January 07, 2014 2:52 PM  
To: Longstreth, Ben  
Cc: Morgan Costello  
Subject: RE: Delaware RGGI suit

Thanks Ben. Valerie Edge (formerly Satterfield) is handling this. Dick Durstein is her supervisor. I emailed her the court decisions in our most recent case (Thrun) and our brief in the first case. Her contact info is below if you want to reach out to her.

Valerie Satterfield Edge

Deputy Attorney General

Delaware Department of Justice

102 West Water Street, 3rd Floor

Dover, Delaware 19904

Phone: (302) 739-4636

After Hrs: (302) 257-3219

Fax: (302) 739-4624

email: valerie.edge@state.de.us

From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Tuesday, January 07, 2014 12:00 PM  
To: Morgan Costello; Michael J. Myers  
Subject: Delaware RGGI suit

Hi Mike and Morgan, Hope you had a good holiday. I learned yesterday of a challenge in Delaware to that state's adoption of the new RGGI cap levels. Do you by any chance know who at the Delaware AG's office is likely to handle this? Complaint attached for your possible interest. Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW

Washington, DC 20005

Tel 202-513-6256

Fax 202-289-1060

Admitted in New York and the District of Columbia.

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress  
Date: Tue Jan 07 2014 22:07:11 EST  
Attachments:

---

My morning's wide open so whatever works for you. Thanks.

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Tuesday, January 07, 2014 8:27 PM  
To: Michael J. Myers  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

Hi Mike, Is there a convenient time to call tomorrow am? Best wishes, Vickie

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, January 06, 2014 1:29 PM  
To: Vickie Patton  
Subject: RE: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

Thanks Vickie. When you have a minute or two to fill me in on Fred's meeting with the WH today, that would be appreciated. Thanks.--Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Monday, January 06, 2014 2:56 PM  
To: Vickie Patton  
Subject: Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

<http://blogs.edf.org/climate411/2014/01/06/new-study-web-of-entities-invests-heavily-in-obstructing-climate-and-clean-energy-progress/>

## New Study — Web of Entities Invests Heavily in Obstructing Climate and Clean Energy Progress

By Vickie Patton | Bio | Published: January 6, 2014|Edit

A few days ago, the Wall Street Journal reported that Peabody Coal Company is one of the top five worst performing stocks of 2013.

In a year when the S&P 500 was up 29 percent and the Dow rose by 26 percent, Peabody Coal's stock plummeted by 28 percent.

While most investors recognize the serious environmental and financial risks associated with coal and its pollution, not all do.

Drexel University Professor Robert Brulle reviewed IRS data from 2003 to 2010 and found a web of entities investing over \$900 million annually in organizations dedicated to obstructing climate progress and fighting the deployment of safe, clean energy in America.

If you take a closer look at those specific organizations identified in Brulle's study, you'll find that several of them are involved – now – in extensive efforts to obstruct climate and clean energy progress under the nation's clean air laws and leading state programs.

Take a look at these examples:

The Landmark Legal Foundation, Competitive Enterprise Institute and FreedomWorks all just filed briefs before the U.S. Supreme Court challenging the Clean Air Act's requirement that, at the time of their design and construction, large industrial sources deploy cost-effective modern pollution control technologies to mitigate their climate pollution.

In its challenge to clean air measures for climate pollution, the Competitive Enterprise Institute and FreedomWorks brief (filed along with Southeastern Legal Foundation) relies extensively — and chillingly — on the tobacco industry case *FDA v. Brown & Williamson Tobacco Corp.* and the legal attacks on our nation's efforts to eliminate the scourge of youth tobacco addiction:

“The Court's approach to FDA's assertion of regulatory authority over tobacco products has direct relevance in the present case and should control the outcome here.”

(That's from page 7 of their brief. The Supreme Court has already considered – and rejected – this misguided legal attack in the context of EPA's authority to regulate climate pollution.)

Earlier this year, the Landmark Legal Foundation unsuccessfully asked the U.S. Supreme Court to review EPA's science-based determination that six greenhouse gases endanger the health and welfare of current and future generations. They tried to challenge EPA's determination, anchored in extensive science reflecting decades of research, by ridiculously questioning whether this finding is a “scientific judgment.” (see page 11 of their brief)

The Competitive Enterprise Institute also litigated to overturn New York Republican Governor George Pataki's leading efforts to cap and reduce the climate pollution from fossil fuel power plants in New York and to participate in a broader regional pollution control program, the Regional Greenhouse Gas Initiative.

On December 5th, New York's appellate court affirmed the decision of the state's trial court firmly rejecting these legal attacks.

In his study, Brulle also chronicles the "evidence of a trend toward concealing the sources of [climate obstructionism] funding through the use of donor directed philanthropies" such as the Donors Trust.

A closer look at funding by the Donors Trust through its most recent IRS Form 990 (2011) indicates \$1,189,730 in grant funding provided to an organization called the Committee for a Constructive Tomorrow (CFACT). CFACT is a major outlet for climate denialism.

CFACT, too, just filed a brief with the U.S. Supreme Court in which it asserts that the overwhelming scientific consensus on human-induced climate change is "tenuous, biased, inaccurate, incomplete, unsupported by actual observations, and lacking in scientific integrity."

The recent scientific findings of the world's leading scientists set out in the Fifth Assessment Report of the Intergovernmental Panel on Climate Change found that climate change is unequivocal and its impacts are unprecedented and profound.

Another organization that has received support from the Donors Trust according to the Trust's IRS Form 990 (2011) is the Judicial Education Project.

They also just filed a brief with the U.S. Supreme Court challenging the federal government's authority to regulate greenhouse gas emissions from the nation's largest sources of such pollution. The brief alleges that the Environmental Protection Agency exceeded its authority under the U.S. Supreme Court's 2007 landmark case, *Massachusetts v. EPA*, in which the Court stated that the "harms associated with climate change are serious and well recognized."

Earlier this year, the Mercatus Center — another group identified by Brulle's research — submitted adverse comments on proposed clean air standards for cars and gasoline by calling into question the extensive body of peer reviewed science linking particulate pollution and mortality.

It is well documented that these clean air standards for cars and gasoline will provide healthier, longer lives. They have also won the support of diverse interests, including the American Lung Association and the U.S. auto industry, because of the dual benefits of reducing health-harming pollutants and enabling more efficient clean car technologies.

Recently, the Landmark Legal Foundation joined by the Cato Institute — both groups identified in Brulle's research — challenged the Department of Energy's adoption of improved appliance efficiency standards for microwaves.

The microwave standards will lead to less energy use, consumer cost savings and pollution reductions. Landmark Legal Foundation and the Cato Institute objected to DOE's consideration of the societal benefits of mitigating carbon pollution. Patrick Michaels, a well-known climate denialist, co-authored the Cato comments. Landmark asked DOE to immediately halt implementation and rescind the Rule.

DOE has denied the request to upend these common sense energy conservation standards for our nation.

And it is not surprising that Peabody Coal Company, too, has just filed a brief in the U.S. Supreme Court objecting to the Clean Air Act requirement that our nation's largest industrial emitters use modern pollution controls to mitigate climate pollution.

Peabody's brief begins by asserting that "[w]hether and how to regulate GHGs [greenhouse gases] remains a highly debated, contentious issue in Congress, agencies and the courts." (Page 2 of their brief)

But Brulle's research elucidates how Peabody's assertion is a tautology. Through massive funding of groups dedicated to climate obstructionism, Brulle documents how climate change remains contentious because there is a vast climate change counter-movement dedicated to making it so:

"[A] number of conservative think tanks, trade associations, and advocacy organizations are the key organizational components of a well-organized climate change counter-movement (CCCM) that has not only played a major role in confounding public understanding of climate science, but also successfully delayed meaningful government policy actions to address the issue."

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From: Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>  
To: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>; Chung, David  
<dchung@crowell.com>; Timothy Ballo <tballo@earthjustice.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>; Menotti, David  
<dmenotti@crowell.com>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters: Changing call  
Date: Wed Jan 08 2014 11:54:52 EST  
Attachments:

---

Works for me. Thanks, Eileen.

Fred Augenstern  
Assistant Attorney General  
Environmental Protection Division  
Office of the Attorney General  
1 Ashburton Place, 18th Floor  
Boston, Massachusetts 02108  
Ph: 617-963-2427 (direct)  
(or 617-727-2200 x.2427)  
Fax: 617-727-9665  
E-mail: fred.augenstern@state.ma.us

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Tuesday, January 07, 2014 2:23 PM  
To: Chung, David; Timothy Ballo; 'Michael J. Myers'; 'Tomas Carbonell (tcarbonell@edf.org)';  
Augenstern, Fred (AGO); Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

We have closure! Thurs. Jan. 9 at 4:00. The call-in number is 866-410-9426 Code is 2025143126.  
Thank you for the flexibility. It will be helpful to all of us to keep this moving.

Eileen T. McDonough  
Environmental Defense Section  
U.S. Dept. of Justice  
202-514-3126

THIS IS A CONFIDENTIAL COMMUNICATION INTENDED ONLY FOR THE ABOVE-NAMED RECIPIENT. THE MESSAGE, OR ATTACHMENTS, MAY CONTAIN ATTORNEY-CLIENT INFORMATION, INCLUDING PRIVILEGED AND CONFIDENTIAL MATTER. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE DELETE THE MESSAGE AND NOTIFY THE SENDER IMMEDIATELY.

From: Chung, David [mailto:DChung@crowell.com]  
Sent: Tuesday, January 07, 2014 2:13 PM  
To: Timothy Ballo; 'Michael J. Myers'; McDonough, Eileen (ENRD); 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

David Menotti and I would prefer Thurs at 4 pm, but either of those times would work.

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'Michael J. Myers'; 'McDonough, Eileen (ENRD)'; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; Chung, David; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

Either time works for me, I'm also free all day Monday. Thank you.

-Tim

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, January 07, 2014 2:08 PM  
To: 'McDonough, Eileen (ENRD)'; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.

augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

Thurs. at 4 works for the state plaintiffs (and I believe the NGOs as well). I'm also free on Monday.

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Tuesday, January 07, 2014 2:03 PM  
To: McDonough, Eileen (ENRD); Timothy Ballo; Michael J. Myers; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us; dchung@crowell.com; Menotti, David  
Cc: Jordan, Scott  
Subject: RE: Wood heaters: Changing call

The plaintiffs have told me that they are ready now to discuss their response to EPA's settlement proposal and would like to have the call quickly so that we can keep this moving.

Could we talk at 4:00 on Thurs. at 4:00 or on Monday? I am open all day on Mon. Would 11:00 work?  
Thanks

Eileen T. McDonough  
Environmental Defense Section  
U.S. Dept. of Justice  
202-514-3126

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From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Cc:  
Bcc:  
Subject: State brief in CAMR  
Date: Thu Jan 09 2014 10:03:32 EST  
Attachments:

---

Hi Mike and Morgan, do you by any chance have ready access to the State petitioners brief in the CAMR (NJ v. EPA, 517 F.3d 574 (D.C. Cir. 2008)) litigation? In case it's helpful the DC Circuit lead case number was 05-1097). Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW

Washington, DC 20005

Tel 202-513-6256

Fax 202-289-1060

Admitted in New York and the District of Columbia.

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Longstreth, Ben <blongstreth@nrdc.org>  
Cc: Morgan Costello </o=lawnet/ou=first  
administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: State brief in CAMR  
Date: Thu Jan 09 2014 10:14:32 EST  
Attachments: NJ et al v EPA - States Initial Brief FINAL (wsig).PDF  
Reply Brief of Government Petitioners 06.14.07.pdf

---

Ben, here you go.

From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Thursday, January 09, 2014 10:04 AM  
To: Michael J. Myers; Morgan Costello  
Subject: State brief in CAMR

Hi Mike and Morgan, do you by any chance have ready access to the State petitioners brief in the CAMR (NJ v. EPA, 517 F.3d 574 (D.C. Cir. 2008)) litigation? In case it's helpful the DC Circuit lead case number was 05-1097). Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW

Washington, DC 20005

Tel 202-513-6256

Fax 202-289-1060

Admitted in New York and the District of Columbia.

Document ID: 0.7.691.180218-000001

Owner: Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>

Filename: NJ et al v EPA - States Initial Brief FINAL (wsig).PDF

Last Modified: Thu Jan 09 10:14:32 EST 2014

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ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 05-1097, and consolidated
	)	cases
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	<b>Complex</b>
	)	
Respondent.	)	
	)	

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

**OPENING BRIEF OF GOVERNMENT PETITIONERS**

**The States of New Jersey, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan Department of Environmental Quality, Minnesota, New Hampshire, New Mexico, New York, Pennsylvania Department of Environmental Protection, Rhode Island, Vermont, and Wisconsin, and the City of Baltimore**

STUART RABNER  
Attorney General of New Jersey

CHRISTOPHER D. BALL, JUNG KIM,  
RUTH CARTER  
Deputy Attorneys General  
R.J. Hughes Justice Complex  
25 Market Street, PO 093  
Trenton, New Jersey 08625-0093

(Additional counsel for Government Petitioners listed in signature pages)

Dated: January 11, 2006

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

### A. PARTIES AND AMICI

#### 1. Parties to the Challenges to the EPA Delisting Rule: 70 Fed. Reg. 15994 (March 29, 2005)

##### Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 05-1097, filed March 29, 2005, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, State of Vermont.

In case no. 05-1104, filed April 1, 2005, the Commonwealth of Pennsylvania, Department of Environmental Protection.

In case no. 05-1116, filed April 11, 2005, the State of Delaware.

In case no. 05-1118, filed April 8, 2005, the State of Wisconsin.

In case no. 05-1158, filed May 18, 2005, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Waterkeeper Alliance.

In case no. 05-1159, filed May 18, 2005, Environmental Defense, National Wildlife Federation and Sierra Club.

In case no. 05-1160, filed May 18, 2005, Natural Resources Council of Maine, Ohio Environmental Council and U.S. Public Interest Research Group.

In case no. 05-1163, filed May 18, 2005, Natural Resources Defense Council.

In case no. 05-1174, filed May 27, 2005, State of Illinois.

In case no. 05-1176, filed May 27, 2005, the State of Minnesota.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases for Respondent: Utility Air Regulatory Group, Cinergy Corp., PPL Corp., PSEG Fossil LLC, NRG Energy, Inc., Florida Power & Light Company, State of Alabama, State of Indiana, State of Kansas, State of Nebraska, State of North Dakota, State of South Dakota.

The following parties have intervened in these consolidated cases for Petitioners: Physicians for Social Responsibility, American Nurses Association, The American Public Health Association, American Academy of Pediatrics, Adirondack Mountain Club, Aroostook Band of Micmac Indians, Houlton Band of Maliseet Indians, Penobscot Indian Nation, The Passamaquoddy Tribe at Pleasant Point (Sipayik), The Passamaquoddy Tribe at Indian Township, The City of Baltimore.

Amici

The following parties appear as amici in these consolidated cases:

In support of respondent EPA: Washington Legal Foundation

- 2. Parties to the Challenges to the EPA Clean Air Mercury Rule: 70 Fed. Reg. 28606 (May 18, 2005)**

Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 05-1162, filed May 18, 2005, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, Commonwealth of Pennsylvania, State of Vermont, State of Wisconsin.

In case 05-1164, filed May 19, 2005, Ohio Environmental Council, Natural Resources Council of Maine, U.S. Public Interest Research Group.

In case 05-1167, filed May 19, 2005, Natural Resources Defense Council.

In case 05-1175, filed May 27, 2005, State of Minnesota.

In case 05-1183, filed May 31, 2005, State of Delaware.

In case 05-1189, filed May 27, 2005, State of Illinois.

In case 05-1263, filed July 12, 2005, Mayor and City Council of Baltimore.

In case 05-1264, filed July 13, 2005, Southern Montana Electric Generation & Transmission Cooperative, Inc.

In case 05-1267, filed July 14, 2005, Chesapeake Bay Foundation, Inc., Environmental Defense, National Wildlife Federation, Sierra Club, Waterkeeper Alliance.

In case 05-1270, filed July 15, 2005, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators & Associates, Inc., Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, West Virginia Coal Association.

In case 05-1271, filed July 15, 2005, ARIPPA.

In case 05-1275, filed July 18, 2005, Utility Air Regulatory Group.

In case 05-1277, filed July 18, 2005, United Mine Workers of America, AFL-CIO.

In case 05-1280, filed July 18, 2005, Producers for Electric Reliability.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases for Respondent:

Utility Air Regulatory Group, Edison Electric Institute, State of Alabama, State of Kansas, State of Nebraska, State of South Dakota, State of North Dakota, Producers for Electric Reliability.

The following party has intervened in these consolidated cases for Petitioners: Michigan Department of Environmental Quality.

Amici

No parties appear as amici in these consolidated cases:

3. **Parties to the Challenges to EPA's Final Action on Reconsideration: 71 Fed. Reg. 33388 (June 9, 2006)**

Petitioners

The following parties appear in these consolidated cases as petitioners:

In case no. 06-1211, filed June 19, 2006, the State of New Jersey, State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Minnesota, State of New Hampshire, State of New Mexico, State of New York, State of Rhode Island, State of Vermont, State of Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, and the Michigan Department of Environmental Quality.

In case no. 06-1220, filed June 23, 2006, National Congress of American Indians, Little River Band of Ottawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe, Swinomish Indian Tribe Community.

In case no. 06-1231, filed June 26, 2006, American Nurses Association, The American Public Health Association, American Academy of Pediatrics, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Environmental Defense, National Wildlife Federation, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, U.S. Public Interest Research Group, Water Keeper Alliance.

In case no. 06-1287, filed July 26, 2006, Mayor & City Council of Baltimore.

In case no. 06-1291, filed August 8, 2006, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators and Associates of Kentucky, Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, West Virginia Coal Association.

In case no. 06-1293, filed August 8, 2006, ARIPPA.

In case no. 06-1294, filed August 8, 2006, Alaska Industrial Development and Export Authority.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

No parties appear as intervenors in these consolidated cases.

Amici

No parties appear as amici in these consolidated cases.

B. RULINGS UNDER REVIEW

Petitioners State of New Jersey et al, in these consolidated cases seek review of final actions by EPA:

1. A rule entitled “Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List,” 70 Fed. Reg. 15,994 (March 29, 2005).

2. A rule entitled “Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units,” 70 Fed. Reg. 28,606 (May 18, 2005).

3. A rule entitled “Revision of December 2000 Clean Air Act Section 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration, Final Rule” published at 71 Fed. Reg. 33,388 (June 9, 2006).

C. RELATED CASES

The matter on review has not been previously heard in this or any other court. There are no related cases pending before the Court.

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## GLOSSARY

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

<b>112(c) List</b>	List of Sources Subject to Regulation Pursuant to 42 U.S.C. § 7412
<b>Act/CAA</b>	Clean Air Act, 42 U.S.C. §§ 7401 et seq.
<b>CAIR</b>	Clean Air Interstate Rule, 70 Fed. Reg. 72,268 (Nov. 22, 2005)
<b>CAMR</b>	Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 18, 2005)
<b>Delisting Action/Rule</b>	70 Fed. Reg. 15,994 (March 29, 2005)
<b>EGUs</b>	Electric utility steam generating units
<b>EPA</b>	United States Environmental Protection Agency
<b>Government Petitioners</b>	State and municipal petitioners
<b>HAPs</b>	Hazardous air pollutants, 42 U.S.C. §§ 7412(a)(6); 7412(b)
<b>ICR</b>	Information collection request
<b>MACT</b>	Maximum achievable control technology, 42 U.S.C. § 7412(d)
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>NO<sub>x</sub></b>	Nitrogen oxides
<b>NSPS</b>	New source performance standards
<b>RTC</b>	EPA Utility Report to Congress, 65 Fed. Reg. 79,825 (Dec. 20, 2000)
<b>SO<sub>2</sub></b>	Sulfur dioxide
<b>Title IV program</b>	42 U.S.C. §§ 7651-7651

## JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction to review any “nationally applicable regulations promulgated, or any final action taken” by EPA under the Act. 42 U.S.C. § 7607(b). In these consolidated cases, Government Petitioners challenge EPA’s nationally applicable regulations at 70 Fed. Reg. 15,994 (Mar. 29, 2005), and 70 Fed. Reg. 28,606 (May 18, 2005), and its final action on reconsideration of these regulations at 71 Fed. Reg. 33,389 (June 9, 2006). As set forth in the Certificate as to Parties, supra, Government Petitioners filed petitions for review of these regulatory actions within the sixty-day period provided in 42 U.S.C. § 7607(b).

## STANDING

Government Petitioners suffer injuries due to EPA’s mercury rules sufficient to confer standing. First, the rules impose a regulatory and economic burden on the states to either participate in a cap-and-trade program promulgated under section 111 of the Act, or obtain reductions in mercury emissions through other mechanisms. States have incurred economic costs in either promulgating state plans or joining the cap-and-trade program, and will continue to incur costs through the lifetime of the regulations. See Aff. of William O’Sullivan (“O’Sullivan Aff.”) ¶ 4; 71 Fed. Reg. 75,117 (Dec. 14, 2006). Second, the rules will make it more difficult for states to comply with water quality standards required under the Clean Water Act. See O’Sullivan Aff. ¶ 7; 33 U.S.C. § 1313(d); West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (Injury sufficient to confer standing found where an EPA rule made the state task of devising an adequate state implementation plan more difficult). Finally, the rules injure the interests of Government Petitioners by allowing continued high levels of mercury emissions from power plants. These emissions play a significant contributory role in ongoing impacts to the

natural resources of, and economic burden on, Government Petitioners. See Idaho v. ICC, 35 F.3d 585, 591 (D.C. Cir. 1994) (State standing established based on pollution damage to its natural resources)’ O’Sullivan Aff. ¶¶ 8-9; Decl. of Ray Vaughan (“Vaughan Decl”) ¶¶ 3, 6-13; Comments of Hubbard Brook Research Foundation (“Hubbard Brook Comments”) at 7-9, OAR-2002-0056-2038 [JA\_]. These injuries can be redressed by a ruling from this Court vacating EPA’s mercury rules and requiring the agency to establish source-specific emissions standards for all power plants as required under section 112 of the Act. See O’Sullivan Aff. ¶¶ 8-9; Vaughan Decl. ¶¶ 14-17; Hubbard Brook Comments at 13; 42 U.S.C. § 7412(d).

### STATEMENT OF ISSUES

1. In December 2000, EPA added EGUs to the list of sources subject to regulation under section 112 of the CAA, 42 U.S.C. § 7412, but has now removed EGUs from that list without satisfying the removal criteria in section 112(c)(9). Did EPA exceed its statutory authority, fail to observe procedure required by law, or otherwise act arbitrarily or capriciously?

2. In the Delisting Action, EPA rescinded its December 2000 conclusion that EGUs should be regulated pursuant to CAA section 112. Was EPA’s decision to rescind the December 2000 conclusion in excess of statutory authority, arbitrary, capricious, or an abuse of discretion?

3. Through CAMR, EPA uses CAA section 111 to establish a cap-and-trade system for the regulation of a hazardous air pollutant, mercury. Did EPA exceed its statutory authority under CAA section 111(d) which prohibits the use of section 111 to regulate hazardous air pollutants and/or act arbitrarily and capriciously in light of the requirements for a “standard of performance” under section 111?

## STATUTES AND REGULATIONS

The relevant provisions of the Act are 42 U.S.C. §§ 7411 (Standards of performance for new stationary sources), and 7412 (Hazardous air pollutants). The rules were promulgated at 40 C.F.R. Parts 60, 63, 72, and 75. The rules, together with relevant portions of statutory and regulatory provisions and legislative history, are contained in the Addendum.

## STATEMENT OF THE CASE

State and municipal petitioners (“Government Petitioners”) seek review of two rules promulgated by the Environmental Protection Agency (“EPA”) relating to the emission of hazardous air pollutants (“HAPs”) from electric utility steam generating units (“EGUs” or “power plants”). In 2000, EPA concluded that such emissions, including mercury, warranted regulation pursuant to section 112 of the Clean Air Act (“Act”) and added power plants to a list of sources subject to such regulation (the “112(c) List”). 65 Fed. Reg. 79,825, 79,830-31 (Dec. 20, 2000). Having taken that action, EPA was required to establish plant-specific limits on power plant emissions reflecting the maximum degree of reduction in HAP emissions achievable for similar sources. See 42 U.S.C. § 7412(d)(3). EPA was further prohibited from removing power plants from the 112(c) List unless certain criteria were met. See 42 U.S.C. § 7412(c)(9).

EPA failed to meet its statutory duties and instead published two rules that seek to exempt power plants - emitters of more than 150,000 tons of HAPs annually, including over 30% of the nation’s mercury emissions, U.S. EPA, Mercury Study Report to Congress, EPA-452/R-97-005 (Dec. 1997) (“RTC”), at ES-5, 14-1 [JA\_] - from the stringent regulatory framework of section 112. In the first rule, the “De-Listing Action,” EPA removed EGUs from the 112(c) List without attempting to satisfy the statutory removal criteria. 70 Fed. Reg. at 16,002-16,008. EPA

then promulgated in the second rule, the “Clean Air Mercury Rule” (“CAMR”), regulations under section 111 that govern power plant mercury emissions through a cap-and-trade scheme, not the statutorily-required plant-specific approach. 70 Fed. Reg. at 28,624-30. Petitioners ask this Court to correct EPA’s legal errors, vacate the rules, and direct the agency to promulgate emission standards for the hazardous air pollutants emitted by power plants under section 112 as required by the Act. By orders dated December 8, 2005, and August 21, 2006, this Court consolidated these petitions and designated New Jersey v. EPA (No. 05-1097) as the lead case.

### STATEMENT OF FACTS

#### A. Hazardous Air Pollutant Regulation Under the Clean Air Act

The 1970 Amendments added section 112 to the Act, which specified that the EPA Administrator must list each “hazardous air pollutant for which he intends to establish an emission standard.” Pub.L. 91-604, § 4(a), 84 Stat. 1685. After a pollutant was listed, the Act required EPA to propose emission standards set at a level that “provides an ample margin of safety to protect the public health” from the pollutant. Id.

Between 1970 and 1990 when the Act was again amended, EPA established standards under section 112 for only seven hazardous air pollutants. Nat’l Mining Ass’n v. EPA, 59 F.3d 1351, 1353 and n.1 (D.C. Cir. 1995) (citing S. Rep. No. 228, 101<sup>st</sup> Cong., at 131 (1989)). Of these seven, mercury, along with asbestos and beryllium, were the first pollutants listed as hazardous. See 36 Fed. Reg. 5,991 (Mar. 31, 1971). For even these listed pollutants, EPA established emission standards for only a small subset of their sources. Nat’l Mining Ass’n, 59 F.3d at 1353 and n.1 (citing S. Rep. No. 228, 101<sup>st</sup> Cong., at 128 (1989) and H.R. Rep. No. 490(I), 101<sup>st</sup> Cong., at 322 (1990)).

To address the slow pace of EPA's regulatory action, the 1990 Amendments to the Act completely restructured the regulation of HAPs under section 112. Id. These amendments continued the Act's distinct treatment of HAPs<sup>1</sup>, and required EPA to set the "most stringent standards achievable" for sources of HAPs which are standards "based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology" ("MACT Standards").<sup>2</sup> Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 857 (D.C. Cir. 2001). The new amendments established a list of 188 HAPs, 42 U.S.C. § 7412(b)(1), set a mandatory schedule for issuing emissions standards for the major sources of these pollutants, 42 U.S.C. §§ 7412(c) and (e), and established a "non-discretionary duty" on EPA to promulgate technology-based emission standards for all categories of major emitting sources of listed HAPs. See S. Rep. 101-228, at 3385, 3518, 3541, reprinted in 1991 U.S.C.C.A.N.; 42 U.S.C. § 7412(b),(c), and (e). The only exception to the mandatory standards applies to source categories either: a) listed for regulation because of a single HAP which was later removed from the list of HAPs under section 112; or b) for which EPA makes a formal determination that the emissions of no source in the category exceeds risk thresholds set by Congress. See 42 U.S.C. § 7412(c)(9)(B).

The 1990 Amendments imposed an additional requirement on EPA before regulating EGUs under section 112. Section 112(n) required EPA to perform by 1993 a study of the health

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<sup>1</sup> See H.R. Rep. No. 101-490, at 3339 (May 21, 1990) ("The Clean Air Act distinguishes between two categories of pollutants: hazardous air pollutants and criteria or conventional air pollutants.")

<sup>2</sup> For existing major sources of HAPs, MACT standards must be no less stringent than the "average emission limitation achieved by the best performing 12 percent of the existing sources." 42 U.S.C. § 7412(d)(3)(A).

hazards posed by toxic substances emitted from EGUs and determine whether it is “appropriate and necessary” to regulate such emissions as HAPs under section 112. 42 U.S.C. § 7412(n). Once such a determination was made and EGUs were placed on the source category list, Congress required that EPA “shall” regulate EGUs under section 112 through the promulgation of MACT standards. *Id.*

**B. EGU Study and Appropriate and Necessary Determination**

EPA undertook the study of hazards to public health reasonably expected to be caused by power plant emissions and in February 1998, five years after the statutory deadline, the agency released its utility report to Congress and the public. 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA concluded that “mercury from coal-utilities is the HAP of greatest potential concern,” RTC, at ES-26, [JA\_ ], and estimated that approximately sixty percent of the total mercury deposited in the United States comes from “U.S. anthropogenic air emission sources; the percentage is estimated to be even higher in certain regions (e.g., northeast U.S.).” 65 Fed. Reg. at 79,827.

On December 20, 2000, after years of peer-reviewed scientific and technical study including a National Academy of Sciences report, numerous public hearings, and extensive public comment, EPA published its regulatory finding on the emissions of HAPs from EGUs. 65 Fed. Reg. 79,825. In this action, EPA added EGUs to the section 112 List of source categories after concluding that the “regulation of HAP emissions from [EGUs] under section 112 of the [Act] is appropriate and necessary.” *Id.* at 79,826 (“[T]his notice adds coal- and oil-fired [EGUs] to the list of source categories under section 112(c) of the CAA.”). EPA determined that: “[m]ercury is highly toxic, persistent, and bioaccumulates in food chains”; “[m]ost of the U.S. population consumes fish and is exposed to methylmercury as a result”; and “[m]ost of the

mercury currently entering U.S. water bodies and contaminating fish is the result of air emissions.” Id. at 79,829-30. The agency further found that EGUs:

are the largest source of mercury emissions in the U.S., estimated to emit about 30 percent of current anthropogenic emissions. There is a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric steam generating units) and methylmercury in fish. Therefore, mercury emissions from [EGUs] are considered a threat to public health and the environment.<sup>3</sup>

Id. at 79,827. In 2002, EPA formally revised the section 112(c) List to reflect the addition of EGUs pursuant to the December 20, 2000 notice. 67 Fed. Reg. 6,521 (Feb. 12, 2002).

### **C. 2004 Proposed Rulemaking**

On January 30, 2004, EPA proposed two regulatory alternatives to control mercury emissions from EGUs. 69 Fed. Reg. 4,652 (Jan. 30, 2004). The first alternative maintained EPA’s December 2000 listing of EGUs and “appropriate and necessary” determination and sought to regulate EGU emissions under section 112 either through MACT standards, or a cap-and-trade plan under section 112. Id. at 4,659-83. Under the second regulatory alternative, EPA proposed to remove EGUs from the section 112(c) List by revising its December 2000 “appropriate and necessary” determination, id. at 4,683-89, and instead use section 111 of the Act to set standards and a cap-and-trade program for mercury emissions from coal-fired EGUs and nickel emissions from oil-fired EGUs, id. at 4,689-4,706.

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<sup>3</sup> Mercury converts to methylmercury, a toxic compound, after mercury is “precipitated from the air and deposited into water bodies or land.” 70 Fed. Reg. at 16,011. For the sake of simplicity, this brief will refer to mercury concentrations in waterbodies and fish tissue, while recognizing that the actual compound at issue is frequently methylmercury.

#### D. The Final Rules

In the final Delisting Rule, EPA followed the second regulatory alternative of the proposed rule and removed EGUs from the 112(c) List. See 70 Fed. Reg. 15,994. This delisting did not follow the removal requirements of section 112(c)(9), but was instead based solely on the agency's rescission of the December 2000 "appropriate and necessary" determination. Id. at 16,002. As support, EPA "newly interpreted" section 112(n)(1)(A) to require EGU regulation under section 112 only if no other authorities under the Act, "if implemented," would eliminate the public health threat posed by EGU emissions. Id. at 15,997-99. EPA concluded that mercury reductions from two rules yet to be finalized - the Clean Air Interstate Rule ("CAIR") and CAMR - addressed mercury from EGUs sufficiently so that their regulation under section 112 was neither appropriate nor necessary. Id. at 15,997-16,002.<sup>4</sup>

CAIR was published on May 12, 2005, 70 Fed. Reg. 25,162 (May 12, 2005), and CAMR followed six days later. CAMR regulates mercury emissions from EGUs under section 111 of the Act, entitled "Standards of performance for new stationary sources." 42 U.S.C. § 7411. The rule establishes performance standards for new sources under section 111(b) and a cap-and-trade system for mercury from existing power plants under section 111(d). 70 Fed. Reg. at 28,624-30. This system caps nationwide mercury emissions from coal-fired EGUs at thirty-eight tons beginning in 2010 and fifteen tons beginning in 2018, reductions of 21% and 69% respectively from the approximately forty-eight tons currently emitted from EGUs. 69 Fed. Reg. at 4,691; 71

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<sup>4</sup> CAIR establishes budgets for emissions of nitrogen oxides ("NO<sub>x</sub>") and sulfur dioxide ("SO<sub>2</sub>") for the twenty-eight states in the eastern United States. 70 Fed. Reg. at 28,618. CAIR does not regulate EGUs directly and contains no mercury reduction requirements. See id.; 70 Fed. Reg. at 25,209.

Fed. Reg. at 33,395. Regulated power plants can either reduce their mercury emissions under the plan or buy credits for such reductions from other plants. 70 Fed. Reg. at 28,632. Credits can also be “banked” to meet future compliance requirements, potentially substantially delaying full implementation of the plan.<sup>5</sup> *Id.* at 28,629. EPA predicts that as of 2020 — two years after mercury emissions are supposed to be capped at fifteen tons per year — actual mercury emissions will still be at least twenty-four tons per year. *Id.* at 28,619.

Several parties petitioned for reconsideration of the rules, and on October 28, 2005, EPA granted reconsideration on several issues. 70 Fed. Reg. 62,200. On June 9, 2006, EPA issued its decision on reconsideration to continue with the final Delisting Rule. The agency made only two changes to CAMR relating to state mercury allocations under the cap-and-trade plan and the standards of performance for certain new sources. 71 Fed. Reg. 33,389.

### SUMMARY OF ARGUMENT

Both the plain language and purpose of the Act dictate a ruling in petitioners’ favor as EPA’s mercury rules violate the Act in at least three ways, each warranting that the rules be vacated.

EPA’s first error is to disregard the plain language of section 112. The Delisting Rule, which removed EGUs from the list of regulated sources under section 112, is based solely on EPA’s rescission of its December 2000 regulatory determination under section 112(n). Section 112(n), however, grants EPA no authority to make such a rescission, and the agency has thus

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<sup>5</sup>See Congressional Research Service, Mercury Emissions from Electric Power Plants: An Analysis of EPA’s Cap-and-Trade Regulations, The Library of Congress (Apr. 15, 2005), OAR-2002-0056-5686 [JA\_\_] (reporting that EPA officials do not expect full compliance with the 2018 cap until 2025 or beyond).

exceeded its statutory authority with the rule. Moreover, a rescission of the December 2000 determination provides no basis to remove EGUs from the section 112(c) List. Section 112(c)(9) alone establishes the requirements necessary to remove “any” source from the list of regulated sources and applies unambiguously to all such sources. EPA admits that it has not met those requirements in the Delisting Rule but contends that section 112(n) somehow exempts power plants from the requirements of section 112(c)(9) and allows the agency to arbitrarily reverse course regarding their regulation. The plain language of the Act, however, belies EPA’s claims as section 112(n) evinces a clear congressional desire that EPA “shall regulate [EGUs] under this section” following an appropriate and necessary determination.

EPA’s second legal error is its “new interpretation” of a discrete portion of section 112(n) to support a “revised” determination that regulation of EGUs under section 112 is no longer appropriate and necessary. EPA’s legal interpretation of section 112(n) contravenes the Act and cannot be squared with Congress’s clear desire that all major sources of HAPs be regulated in an expeditious manner through the implementation of plant-specific technology-based standards to address the unique public health threat that HAPs pose. Neither CAIR nor CAMR provide any basis on which EPA may “revise” its determination.

EPA’s third error is to disregard the scope of, and requirements for, regulation under section 111 of the Act. CAMR establishes mercury emissions standards through a cap-and-trade system under section 111. Subsection (d) of section 111, however, explicitly limits the scope of that section to those air pollutants that are not “emitted from a source category which is regulated under section 7412 of this title.” Mercury is a listed HAP under section 112, emitted from a number of source categories currently regulated by section 112, and therefore not subject to

regulation by section 111. Even if EPA can regulate mercury under section 111, CAMR fails to meet the requirement that standards of performance under that section reflect the “best system of emission reduction . . . adequately demonstrated.” 42 U.S.C. § 7411(a). CAMR fails to meet this standard as the rule: a) will allow many power plants to increase their mercury emissions for years; b) sets emission reduction standards that are already significantly exceeded by numerous existing power plants; c) is expected to take at least two decades to reach full implementation; and d) fails to address public health impacts of mercury “hot-spots” near power plants.

### STANDARD OF REVIEW

The Court should reverse an agency action if it is arbitrary, in excess of statutory authority, or without observance of procedure required by law. 42 U.S.C. § 7607(d)(9). An agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the record, or is so implausible that it could not be the product of agency expertise. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

In evaluating EPA’s interpretation of the statute, the Court must first “determine whether, based on the Act’s language, legislative history, structure and purpose, ‘Congress has directly spoken to the precise question at issue.’ If so, EPA must obey.” New York v. EPA, 413 F.3d 3, 18 (D.C. Cir. 2005) (quoting Chevron v. NRDC, 467 U.S. 837, 842 (1984)). If that evaluation is inconclusive, EPA’s interpretation must nevertheless be rejected under Chevron if “it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” Chevron, 467 U.S. at 845.

## ARGUMENT

### POINT I

#### **EPA EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED THE CLEAN AIR ACT BY REMOVING EGUS FROM THE SECTION 112 LIST WITHOUT COMPLYING WITH THE MANDATED PROCEDURE**

EPA acted without statutory authority and contravened the clear expression of Congress's intent when the agency removed EGUs from the list of source categories without following the procedure laid out in section 112(c)(9). An agency is bound by the limits of the authority delegated to it, and where the language is clear, as here, the agency simply has no discretion to deviate from the statute's mandate. See Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006).

#### **A. EPA exceeded its statutory authority in revising the 112(n) determination**

EPA's delisting action is based solely on the agency's revision of its six-year-old determination pursuant to section 112(n) of the Act that EGUs should be regulated under section 112. 70 Fed. Reg. at 16,002. The plain language of section 112(n), however, clearly indicates that Congress gave EPA only limited authority to make a single regulatory determination. See 42 U.S.C. § 7412(n). EPA's action was thus unlawful and must be vacated.

Section 112(n) requires EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by EGUs," report the results of that study to Congress by 1993, and requires that the agency "shall regulate [EGUs] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. § 7412(n)(1)(A). Nothing in this language authorizes EPA to revisit the appropriate and necessary determination once made. If the initial listing was in error, the

regulatory avenue Congress provided EPA to delist EGUs is section 112(c)(9). See 42 U.S.C. § 7412(c)(9) (“Deletions from the list”). Indeed, if Congress had wanted to authorize EPA to periodically revisit its determination - as EPA asserts - Congress would have done so, as it did in other subsections of the Act. See, e.g., 42 U.S.C. § 7412(b) (EPA shall “periodically review the list established by [112(b)]. . . and, where appropriate, revise such list by rule”); 42 U.S.C. § 7409(d)(1) (EPA to perform periodic review of national air quality standards). No such provision is present in section 112(n), however, and “it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” City of Chicago v. Envtl. Def. Fund, 511 U.S. 318, 338 (1994).

EPA attempts to avoid the plain language of the Act by asserting an “implied” authority based solely on the lack of a deadline in section 112(n)(1)(A) by which EPA must make its appropriate and necessary determination. See 70 Fed. Reg. at 16,001-16,002. From this, EPA claims “sufficient discretion under section 112(n)(1)(A) - in terms of both the substance and the timing of the appropriate and necessary finding - that nothing precludes us from revising our. . . finding.” Id. (emphasis added). The tenets of statutory construction, however, do not require Congress to employ superfluous language to proscribe the bounds of agency authority. See Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act . . . unless and until Congress confers power upon it”); New York v. EPA, 443 F.3d at 880, 887 (D.C. Cir. 2006) (“Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use.”).

Moreover, the context of the 1990 amendments to the Act, see infra at I.B., indicate that Congress - far from providing implied authority and discretion to EPA - moved to limit the

agency's discretion to promote rapid regulation of HAPs. See S. Coast Air Quality Mgmt. District, No. 04-1200, slip op. at 20 (D.C. Cir. 2006) ("EPA's interpretation of the Act in a manner to maximize its own discretion is unreasonable because the clear intent of Congress in enacting the 1990 Amendments was to the contrary."). Indeed, because of Congress' concern for the prompt and effective regulation of HAP emissions, section 112 does not allow judicial review of the listing until emissions standards are promulgated. See 42 U.S.C. § 7412(e)(4); 65 Fed. Reg. at 79,831; S. Rep. No. 101-228, at 3559 ("The Administrator's determination of priorities is given insulation from court challenge because of the complexity of the balancing involved and the extended nature of the litigation that might ensue if all of the schedule were open to challenge in court."). The provision for judicial review at such time does not render the listing any less final. As "[a]n agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority," EPA's Delisting Rule, based on a faulty claim of implied authority, must fail. Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174 (D.C. Cir. 2003).

**B. EPA's Delisting Rule Contravenes the Plain Language of Section 112(c)(9)**

Even if EPA has authority to revise its appropriate and necessary determination, EPA still may not remove EGUs from the section 112(c) List without following the mandated procedure. Once a source is listed – as EGUs were with the December 20, 2000 Notice of Regulatory Finding, 65 Fed. Reg. 79,825 – EPA is authorized to remove that source from the list under only two circumstances, neither of which is the case here. See 42 U.S.C. § 7412(c)(9).

First, under 112(c)(9)(A), EPA shall delete a source if "the sole reason" that the source was included on the list is the emission of a unique chemical substance and EPA determines 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.” 42 U.S.C. §§ 7412(c)(9)(A); 7412(b)(3)(9)(C). Here, EPA acknowledges, and the scientific literature and the Act itself are clear, that mercury causes significant adverse impacts to both human health and the environment. See, e.g., 42 U.S.C. § 7412(b); 70 Fed. Reg. at 16,011-12; 69 Fed. Reg. at 4,657; RTC, at 7-13 to -18 [JA\_].

Second, under section 112(c)(9)(B), EPA “may delete any source category from the list under this subsection . . . whenever the Administrator makes the [applicable] determination.” 42 U.S.C. § 7412(c)(9)(B). For non-cancerous pollutants such as mercury, section 112(c)(9) requires “a determination that emissions from no source in the category or subcategory concerned . . . 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.” 42 U.S.C. § 7412(c)(9)(B)(ii).

Here, EPA failed to make the determination that is a mandatory prerequisite to removing EGUs from the list of regulated sources under section 112. Indeed, EPA has plainly acknowledged that the agency used section 112(n) itself as the basis for delisting EGUs. See 70 Fed. Reg. at 15,994 (“The EPA is revising the regulatory finding that it issued in December 2000 pursuant to section 112(n)(1)(A) of the [Act], and based on that revision, removing coal- and oil-fired [EGUs] from the CAA section 112(c) source category list.”) (emphasis added)).

EPA offers no justification for its action sufficient to depart from the literal interpretation of the Act. The agency’s argument rests on its claim that section 112(n)(1)(A) “occupies the

field in section 112 with regard to Utility Units,” and therefore EGUs are not subject to the section 112(c)(9) delisting requirements. 70 Fed. Reg. at 16,032-33. However, “[f]or EPA to avoid a literal interpretation . . . it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” Friends of the Earth v. EPA, 446 F.3d 140, 146 (D.C. Cir. 2006) (quoting Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 2006)). The language of section 112(n)(1)(a) itself provides that EPA “shall” regulate EGUs under section 112 if the “appropriate and necessary” determination is made. 42 U.S.C. § 7412(n)(1)(A). Section 112(n), in other words, plays a threshold role, not a preemptive one. The presence of an express exemption for EGUs from section 112(c)(6), where no such exemption exists in section 112(c)(9) further supports the conclusion that Congress did not mean to preempt the regulatory scheme of section 112 through section 112(n)(1)(A). Compare 42 U.S.C. § 7412(c)(6) with 42 U.S.C. § 7412(c)(9); see Russello v. United States, 464 U.S. 16, 23 (1983) (“where Congress includes language in one section of a statute, but omits it in another . . . it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion”).

The legislative framework and history of the 1990 Amendments supports the Act’s plain language. First, Congress created a strict framework for effective and expeditious regulation of HAPs, “precisely because it believed EPA had failed to regulate enough HAPs under previous air toxics provisions.” Nat’l Lime Ass’n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000). Because “very little has been done since the passage of the 1970 Act to identify and control hazardous air pollutants” Congress greatly restricted EPA’s discretion. See S. Rep. No. 101-228, at 3, 1990 U.S.C.C.A.N. at 3389. It is only logical, then, that Congress intended section 112(c)(9) to apply

to EGUs once listed as the delisting requirements complement the legislature's desire to limit EPA's discretion and promote regulation of all major sources of HAPs.

Second, section 112(n) was the product of a congressional compromise and introduced only to "determine the nature of utility boiler emissions and whether their control is warranted enacted as part of the 1990 amendments to the Act." S. Rep. 101-228, at 414, 1990 U.S.C.C.A.N. at 3794. EPA's broad claims of discretion to avoid the requirements of section 112(c)(9) must fail as the agency may not interpret the Act "in a way that completely nullifies textually applicable provisions meant to limit its discretion." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001).

## POINT II

### **EPA'S ACTION VIOLATES THE CAA BY EXEMPTING EGUS FROM SECTION 112 BASED ON AN ERRONEOUS "NEW INTERPRETATION" OF SECTION 112(n) AND CAMR AND CAIR**

EPA ignored section 112(c)(9) and removed power plants from the 112(c) List based solely on its rescission of its December 2000 appropriate and necessary determination. 70 Fed. Reg. at 16,002. Even assuming EPA had the authority to take such action, EPA's Delisting Rule must still be vacated because EPA's rescission of the December 2000 determination relies on a "new" interpretation of section 112(n) that is contrary to the language and purpose of the Act. The agency's regulatory conclusion – that CAMR and CAIR obviate the need for EGU regulation – is similarly contrary to clear congressional intent and lacks support in the record.

**A. EPA's Interpretation Ignores the Purpose, Structure and Context of Section 112(n).**

EPA's Delisting Rule rescinds the agency's listing of EGUs as a source regulated under section 112 based on a new legal interpretation of section 112(n). See 70 Fed. Reg. 15,997-99. According to EPA's new interpretation, two threshold questions must be answered affirmatively before EPA can conclude that regulation of EGUs is appropriate and necessary. The first question is: Are the power plant mercury emissions that remain after the CAA's other requirements have been implemented (the "Remaining Emissions") – standing alone – responsible for causing hazards to human health? See 70 Fed. Reg. at 15,997-16,002 (explaining EPA's new understanding of 42 U.S.C. § 7412(n)(1)(A)); 70 Fed. Reg. at 16,022-25 (concluding that the Remaining Emissions do not result in hazards to human health); 70 Fed. Reg. at 16,028 (insisting that EPA cannot consider the effects of power plant emissions in combination with emissions from other sources). If the answer is "no," EPA concludes that it is not "appropriate" to regulate power plant emissions under section 112 and the inquiry ends. See 70 Fed. Reg. at 16,000.

EPA also concludes that even if regulation of power plant emissions under section 112 is "appropriate," it may not be "necessary." According to EPA, such regulation is "necessary" "only if there are no other authorities available under the CAA that would, if implemented, effectively address the remaining HAP emissions from Utility Units." 70 Fed. Reg. at 16,001 (emphases added).

EPA's approach based on EPA's new legal interpretation contravenes the Act. First, section 112(n) does not limit EPA to consider public health impacts arising solely from EGU

emissions. Rather, the section requires EPA to assess the “hazards to public health reasonably anticipated to occur as a result of emissions from [EGUs].” 42 U.S.C. § 7412(n)(1)(A) (emphasis added). EPA’s interpretation therefore inserts a new requirement into the act as it reads “as a result of” to mean “solely as a result of.” If Congress had intended EPA to focus on hazards resulting solely as a result of EGU emissions, it would have used the word “solely,” as it has numerous times even within section 112. See 42 U.S.C. §§ 7412 (b)(2); 7412(b)(3)(A); 7412(r)(4)(B). Cf. New York v. EPA, 443 F.3d 880, 887 (D.C. Cir. 2006) (rejecting EPA’s expansive interpretation as “the court must presume that Congress acted ‘intentionally and purposely’” when Congress expressly includes a limitation). This statutory context reinforces the plain meaning of “as a result of” to include results that are caused by EGU emissions acting in concert with other sources of mercury. Cf. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (the phrase “based upon” does not mean based “solely” upon).

Second, the Act requires EPA to study the hazards posed by EGU emissions after imposition of the “requirements” of the Act, not those emissions projected to be remaining after “authorities” not yet enacted take effect. See 42 U.S.C. § 7412(n)(1)(A). The plain meaning of “requirement” as something “necessary” or “an essential condition” indicates that Congress wanted EPA to look at existing requirements actually imposed on EGUs by the 1990 Amendments such as the Title IV program for SO<sub>2</sub>, not authorities that may be implemented as EPA asserts. See New Webster’s Dictionary 815 (1984). Here, EPA identifies CAIR and CAMR as available authorities and then looks to the year 2020 to determine if any EGU emissions then remaining pose a threat. Nothing in section 112(n) suggests that the legislature, in 1990, intended that EPA look ahead thirty years and consider the effects of regulatory programs that

would not be promulgated for fifteen years to determine whether regulating EGUs under section 112 was appropriate and necessary. On the contrary, Congress gave EPA until 1993 to study the health hazards reasonably anticipated to occur as a result of EGU mercury emissions, 42 U.S.C. § 7412(n)(1)(A), and clearly expected an appropriate and necessary determination shortly thereafter. EPA utterly fails to explain how its interpretation can possibly comport with the congressional intent for rapid and stringent HAP regulation found in the 1990 Amendments.

Finally, EPA's interpretation would "abrogate[] the enacted statutory text" of section 112. See Sierra Club v. EPA, 294 F.3d 155, 161 (D.C. Cir. 2002) (citing Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001)). Rather than considering the purpose, structure and context of Section 112(n), see Chemical Manuf. Ass'n v. EPA, 217 F.3d 861, 864-67 (D.C. Cir. 2000), EPA's new interpretation focuses on one sentence: "The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of [HAPs] after the imposition of the requirements of this chapter." 70 Fed. Reg. at 15,997. From this sentence, EPA "extrapolates" its new questions for determining whether regulation of power plant HAP emissions pursuant to section 112 is "appropriate and necessary." Id.

This new interpretation leads EPA to ignore three critical aspects of section 112. The framework of section 112 establishes that regulation provide for an ample margin of safety for public health, 42 U.S.C. § 7412(d)(4); (c)(9)(B)(ii), and address environmental impacts of HAPs, 42 U.S.C. § 7412(f);(c)(9)(B)(ii), and is generally structured to recognize the contributory impacts of the various sources of HAPs by requiring MACT standards for all major sources regardless of the significance of their respective emissions. EPA, however, determines that, in

assessing whether EGU regulation under section 112 is appropriate and necessary, the agency does not have to provide for an ample margin of safety for public health, 70 Fed. Reg. at 15,998, and does not have to address the environmental impacts of EGU emissions in the Delisting Rule, but rather only public health impacts, 70 Fed. Reg. at 15,997-98. EPA also determines that the Act constrains it to examine only the health effects caused solely by power plant emissions, i.e., in isolation from all other mercury source emissions, and cannot consider the contributory impacts of EGU emissions to overall mercury loading in our waterbodies. See 70 Fed. Reg. at 16,028-29. EPA, in other words, determines that Congress meant for all of the facets of effective regulation under section 112 to be abandoned simply because they are not referenced in the single line of text EPA chose to consider.

Congress, however, does not modify fundamental aspects of a regulatory scheme in vague terms or ancillary provisions. Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. at 468). It is also “emphatically not within an agency’s authority to set regulatory priorities that clearly conflict with those established by Congress.” See Sierra Club v. Johnson, 444 F. Supp. 2d 46, 58 (D.D.C. 2006). The plain language of section 112 exhibits Congress’s priorities for the regulation of HAPs that cannot be disregarded on the weight of a single “extrapolated” line of statutory text. See Sierra Club v. EPA, 294 F.3d at 161 (“the most reliable guide to congressional intent is the legislation the Congress enacted”).

**B. CAMR And CAIR Do Not Obviate The Need For, Or Appropriateness Of, EGU Regulation Under Section 112**

EPA's conclusion that EGU regulation is not appropriate under section 112 because of CAMR and CAIR also contravenes the Act and is unsupported by the record such that the Delisting Rule must be vacated. Section 112 provides a regulatory framework evincing congressional priorities for HAP regulation. First, the MACT emission standards of section 112 "require the maximum degree of reduction in emissions." 42 U.S.C. § 7412(d)(2)(emphasis added). Second, MACT standards under section 112 apply to all major sources of the listed pollutants. 42 U.S.C. § 7412(f)(4). These technology-based standards are designed to protect both the environment and public health. See, e.g., 42 U.S.C. § 7412(d) (permitting EPA to create so-called "beyond-the-floor" standards based on "environmental impacts and energy requirements"). Third, after standards are set, section 112 requires the installation of pollution controls and full compliance within three years. 42 U.S.C. § 7412(i)(3). In other words, section 112 is designed to address the pressing public health threat posed by HAPs.

In contrast, CAMR and CAIR fail to effect any of the congressional priorities for HAP regulation. While a MACT standard for power plants under section 112 would require approximately 90% reductions of mercury emissions<sup>6</sup>, CAMR requires only a 20% reduction for the next decade. As a cap-and-trade program, CAMR will also only reduce emissions at those power plants that do not buy credits for emission reductions and will do nothing to protect

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<sup>6</sup> MACT standards require emission standards for existing sources to be no less stringent than the average emission limitation achieved by the best performing 12% of existing sources. 42 U.S.C. § 7412(d)(3). Of the eighty EGUs for which EPA has data, the top 12% have an average control efficiency for mercury of more than 93%. See 69 Fed. Reg. at 4,673; EPA Memoranda by Bill Maxwell ("Maxwell Memoranda") (Nov. 26, 2003), OAR-2002-0056-0006 [JA\_] and (Oct. 21, 2005), OAR-2002-0056-6305 [JA\_].

communities and areas near such plants. In fact, EPA's own modeling predicts mercury emission increases under the plan in sixteen states and numerous individual plants until 2018. Compare <http://www.epa.gov/ttn/atw/combust/utiltox/unitxunit2.xls> (Column F) (listing EPA's unit-specific 1999 emission data) with EPA's Final CAMR Unit Mercury Allowances (final two columns), OAR-2002-0056-6155 [JA\_]. Finally, CAMR's timeline for compliance is drastically longer than section 112 regulation as CAMR requires no significant reductions until 2018 when its second-phase cap becomes effective. See 70 Fed. Reg. at 28,606. Compliance with the second-phase cap is expected to be significantly delayed due to the banking of emission credits; a 69% reduction in mercury emissions from EGUs will not likely occur until at least 2025. See 70 Fed. Reg. at 28,619 (EPA estimating that under CAMR, EGU mercury emissions in 2020 will still be 24.3 tons); see also Congressional Research Service, supra note 5.

EPA also asserts that the indirect reduction in mercury emissions from EGUs resulting from CAIR provides an alternative basis for its determination that it is not appropriate to regulate EGUs under section 112. 70 Fed. Reg. at 16,004. CAIR, however, is limited to the establishment of emission budgets for NO<sub>x</sub> and SO<sub>2</sub> for twenty-eight states in the eastern portion of the country and the District of Columbia, and EPA expects mercury emissions increases under CAIR in areas not addressed. See 70 Fed. Reg. at 28,639. Furthermore, states may seek to comply with CAIR by regulating sources other than power plants, and even if they do regulate power plants, nothing in CAIR requires states to address mercury emissions. See 70 Fed. Reg. at 25,162. Thus, EPA's assertion that CAIR will reduce mercury emissions from power plants to levels protecting public health is based purely on an assumption of the indirect benefits to mercury emissions that EPA speculates will result from control technologies used to reduce NO<sub>x</sub>

and SO<sub>2</sub> emissions. This assumption is tenuous at best as there is no guarantee that EGUs, even if they are regulated, will use the pollution controls that EPA expects. In light of the congressional mandate in the 1990 Amendments to rapidly and effectively control HAP emissions such as mercury, EPA's assumptions and speculation provide no basis for removing EGUs from section 112.

In sum, CAMR and CAIR will take decades longer to reach full implementation than section 112, while providing for only a portion of the mercury emission reductions achieved under section 112 and no comparable public health assessment to address lingering threats. While EPA may believe its cap-and-trade plan to be better policy, the agency may not impose such policy choices over the statute's express mandate, and its approach must be rejected. See Sierra Club v. Johnson, 444 F. Supp. 2d at 58.

**C. EPA's Public Health Conclusion in the Delisting Rule is Contrary to the Act and Arbitrary and Capricious**

Finally, EPA based its "revised" delisting determination on a public health analysis that considered only those impacts on public health that result solely from EGU mercury emissions and only one pathway of exposure. This approach fails to protect the public and defies the plain language of the Act, and must be rejected.

First, as mercury moves from power plants, to waterways, and to fish, the mercury bioaccumulates, getting more concentrated at every level of the food chain, and joins with mercury from other sources such as incinerators. See RTC [JA\_], 65 Fed. Reg. at 79,827; Hubbard Brook Comments, at 6 [JA\_]. The impact on an individual is then determined by the cumulative level of mercury in fish consumed, regardless of where that mercury originated. Any

individual who consumes more than 0.1 micrograms of mercury per kilogram of his or her body weight per day is exceeding health safety criteria. See 65 Fed. Reg. at 79827. EPA's limited analysis, however, recognizes a health threat only where this safety level is exceeded solely because of mercury from EGUs.

EPA's approach has been rejected by this Court and must be rejected here. This Court has recognized that "an analysis cannot treat an identified environmental concern in a vacuum," but must address the accumulated impacts of various sources. Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002); see also Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). Research indicates that approximately 630,000 U.S. babies are annually born to mothers whose blood levels of mercury exceed safety levels. See Comments of New Jersey et al., Decl. of Alan Stern ¶¶ 7-8, OAR-2002-0056-5460 [JA\_]. For these babies, each additional increment of utility-attributable mercury carries a predictable risk of additional IQ loss and other neurological effects. Id. at ¶ 10; see also National Research Council, Toxicological Effects of Methylmercury at 56-60 and 112-117, OAR-2002-0056-5927; 5928; 5929 [JA\_]. EPA's health analysis fails to address these incremental impacts and consequently, leaves unaddressed these thousands of babies affected by EGU mercury emissions.

Second, EPA considered only a single pathway through which people are exposed to mercury: "freshwater fish caught and consumed by recreational and subsistence anglers." 70 Fed. Reg. at 16,012. Thus, EPA's analysis disregarded all marine fish, commercially caught fish, and fish caught in estuaries such as the Chesapeake Bay. Id. These pathways account for millions of pounds of fish consumed by U.S. citizens annually and are significant pathways through which mercury reaches people. See e.g., EPA Technical Support Document ("TSD") at

24, OAR-2002-0056-6186 [JA\_] (recognizing that marine fish represent more than four million metric tons of caught fish in the United States annually).

EPA attempts to justify its disregard of other pathways of mercury exposure by claiming that analysis of U.S. EGU mercury impacts on marine and estuarine fish is uncertain, and that commercial fish do not represent a significant dietary pathway of U.S. EGU mercury. See EPA TSD, at 34 [JA\_]. The statutory responsibility facing EPA, however, is to assess all impacts from EGU emissions that are “reasonably anticipated.” 42 U.S.C. § 7412(n)(1)(A). Individuals who ingest mercury through marine and commercial fish can be expected to suffer health impacts by the mercury additionally ingested through the single pathway EPA considered. By excluding the pathways through which individuals are exposed to mercury, EPA has disregarded the plain language of section 112(n) and abdicated its statutory responsibility. EPA’s approach must be rejected.

### POINT III

#### **CAMR’S REGULATION OF MERCURY UNDER SECTION 111 IS CONTRARY TO THE STATUTE**

As EPA concedes, if the Delisting Rule is unlawful, CAMR similarly cannot stand. See Letter from Jeffrey R. Holmstead, EPA, to Peter C. Harvey, Attorney General of New Jersey (June 24, 2005) attached to Comments of New Jersey et al., OAR2002-0056-6282 [JA\_] (“staying the final section 112 rule would necessitate staying the final CAMR rule.”); EPA’s Opp. to Mot. for Stay Pending Review at 20 (July 18, 2005)(admitting same). Assuming, however, that EPA may exempt EGUs from regulation under section 112 – which EPA may not, as demonstrated

above – EPA still violates the Act by regulating mercury, a potent neurotoxin, under section 111 with a cap-and-trade program.

**A. EPA’s Attempt to Regulate Mercury Under Section 111 is Contrary to the Plain Language of the Act**

Section 111 authorizes EPA to promulgate New Source Performance Standards (“NSPS”), technology-based standards for new sources of “air pollution which may reasonably be anticipated to endanger public health and welfare.” 42 U.S.C. § 7411(b)(1)(A). Subsection (d) of Section 111 provides authority for regulation of existing sources, but is explicitly limited to those air pollutants that are not “emitted from a source category which is regulated under section 7412 of this title.” 42 U.S.C. § 7411(d)(1). Thus, listed HAPs emitted from source categories regulated under section 112 are not to be regulated under section 111. *Id.* Mercury is a listed HAP under section 112, 42 U.S.C. §§ 7412(b)(1), 7412(c)(6), and is emitted from a number of source categories currently regulated by section 112. *E.g.*, 71 Fed. Reg. 76,518 (Dec. 20, 2006) (establishing emission standards for HAPs including mercury from Portland Cement manufacturers); 69 Fed. Reg. 55,238 (Sept. 13, 2004) (establishing emission standards for mercury emissions from Industrial, Commercial, and Institutional Boilers and Process Heaters). Therefore, EPA may not regulate mercury emissions from EGUs under section 111, *See Arlington Cent. School Dist. Bd. of Educ.*, 126 S. Ct. at 2459 (statutory construction analysis begins with the statute’s plain language).

EPA attempts to avoid this clear limit on the scope of section 111(d) by claiming a conflict between the 1990 House and Senate versions of the amendments to section 111(d). *See* 70 Fed. Reg. at 16,030. Slightly differing language in the versions, however, does not alter

Congress' expressed intent that section 111 was not meant to regulate HAPs. See 42 U.S.C. § 7411(d)(1). Ambiguity between the amendment versions cannot be relied upon to avoid the plain meaning of the statute, but rather, the versions must be harmonized in light of the Act as a whole. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 851, 890 (D.C. Cir. 1979). Under these established canons of statutory interpretation, EPA's attempt to regulate existing sources of mercury under section 111 must be rejected.

The regulatory framework and legislative history of the Act further support the finding that listed HAPs emitted from source categories regulated under section 112 may not be regulated under section 111. First, the statutory limits on the applicability of section 111(d) demonstrate that it serves a backstop role in the Act to account for existing sources of air pollutants that are not controlled under any other provision. 42 U.S.C. § 111(d)(1). Second, as noted supra, Congress explicitly recognized the differences between sections 112 and 111 and the need to regulate HAPs under the former. See S. Rep. No. 101-228, at 167, 1990 U.S.C.C.A.N. at 3552 ("An emissions limitation based on section 112(d) will, in most cases, be more stringent than a new source performance standard for the same category of sources or pollutants . . . that is appropriate as this program is for the control of extremely harmful air pollutants"). Section 112 was enacted to address the public health threat posed by HAPs and required EPA to set standards at a level providing an ample margin of safety to protect the public health. 42 U.S.C. § 7412(c)(9)(B)(ii). In contrast, section 111 was largely designed as a technology forcing provision to promote long-term economic benefits through nationalized standards. See H.R. Rep. 95-294,

at 186 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1264 (“[T]he best technology requirement [of Section 111] was intended to create incentives for improved technology”).

**B. Even if EPA Has Authority to Regulate Mercury Emissions from EGUs Under Section 111, CAMR Violates the Requirements of That Section.**

Section 111 requires EPA to set a standard of performance defined as an air pollutant emissions standard that “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) (emphasis added). See also 42 U.S.C. §§ 7411(g)(4)(B), 7602. CAMR violates this express mandate of section 111 because: (1) existing sources already utilize control technologies that achieve much greater emission reductions than what CAMR requires; (2) the rule will actually result in future emission increases in many states; and (3) the rule will perpetuate dangerous, local “hot-spots” of mercury severely endangering public health. As CAMR conflicts with the language, purpose and intent of the CAA, and is not supported by a reasoned analysis, the Court should vacate CAMR as an abuse of discretion and arbitrary and capricious rulemaking. 42 U.S.C. § 7607(d)(9)(A); see Nat’l Asphalt Pavement Assoc. v. Train, 539 F.2d 775, 786 (D.C. Cir. 1976).

**1. CAMR Violates Section 111 Because Currently Utilized Control Technologies and Source Specific Mercury Controls Achieve Substantially Greater Emission Reductions Than CAMR Requires.**

Section 111 requires EPA to propose regulations establishing air pollutant emission standards that, applying the “best system of emission reduction,” reflect the degree of achievable

emission limitation. 42 U.S.C. §§ 7411(a)(1) (emphasis added) and (f)(1). CAMR will result in a 21% emission reduction by 2010 through an annual emissions cap of thirty-eight tons from a 1999 base line level of forty-eight tons. In contrast, EPA's estimates predict that existing sources will already have reduced their emissions to thirty-one tons - seven tons better than CAMR's phase one requirement - as of 2010. 70 Fed. Reg. at 28,619. EPA offers no explanation for how a cap set at a level seven tons above what the agency expects EGUs to be emitting at the time it becomes operational can possibly reflect the best system of reduction.

Full implementation of CAMR will ultimately result in reductions of mercury emissions from power plants of 69% somewhere around 2025. See 69 Fed. Reg. at 4,691; 71 Fed. Reg. at 33,395; Congressional Research Service, supra note 5. EPA's data, however, demonstrates that the current best performing power plants reduce their mercury emissions by an average of 93%.<sup>7</sup> EPA in fact concluded that currently available control technologies have shown "mercury capture in excess of 90 percent." 65 Fed. Reg. 79,828. Thus CAMR requires only a fraction of the efficiency achieved by existing and available control technologies. In fact, existing power plants of every category established by EPA currently exceed CAMR's performance standards for new sources.<sup>8</sup> These weak standards are unsupportable given Section 111's express language. See 42 U.S.C. § 7411(a)(1).

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<sup>7</sup> This percentage is derived from the average of the actual emissions achieved by the top 12% of the eighty coal-fired sources for which EPA has data (ten units, two that are coal-refuse-fired units and eight that are bituminous-fired). See 69 Fed. Reg. at 4,673; EPA Maxwell Memoranda [JA\_].

<sup>8</sup> For instance, CAMR's new source limit is 74% for plants burning bituminous coal while the best performing bituminous plant (Mecklenberg Co-Gen Facility) achieves 98.8% reductions in its mercury emissions. See October 21, 2005 Memorandum from Bill Maxwell to Robert Wayland at 7-10, OAR-2002-0056-6305 [JA\_]; 70 Fed. Reg. at 28,610 (establishing emissions limits which were converted to a percentage reduction format).

The weak standards are further diluted by EPA's subcategorization scheme in establishing the NSPS. 70 Fed. Reg. at 28,612. Although EPA "may" subcategorize based upon different classes, types, and sizes, 42 U.S.C. § 7411(b)(2), EPA is nevertheless statutorily required to implement standards that "reflect the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1). EPA's subcategorization scheme, based on the different types of coal EGUs burn, fails to reflect that "a number of Utility Units co-fire different ranks of coal." 70 Fed. Reg. at 28,612-13. Moreover, EPA further subcategorizes units burning subbituminous coal based upon the type of pollution control that is being utilized. *Id.* at 28,615 (EPA setting different NSPS limits for subbituminous-coal burning EGUs based on the type of Flue Gas Desulfurization or "FGD" system used); EPA's Response to Significant Public Comments at 265, OAR-2002-0056-6722 [JA\_]. Subcategorization based on technology, however, defeats the very purpose of establishing NSPS limits, because, as EPA itself acknowledged, subcategorization based on the type of air pollution control device "leads to situations where floors are established based on performance of sources that are not the best performing." 69 Fed. Reg. 394, 403 (Jan. 5, 2004). CAMR presents this situation, as a power plant using a wet FGD system is allowed to emit twice the amount of mercury as a power plant similar in every other respect except its use of a dry FGD system. 70 Fed. Reg. at 62,216.

**2. CAMR Violates Section 111 Because the Rule Will Result in Emission Increases in Some States Even Beyond 2018.**

CAMR further violates section 111's requirement that standards reflect the best system of emission reduction achievable because EPA's program will actually result in emission increases

in numerous states and individual plants. Comparing CAMR budgets to 2003 actual mercury emissions, sixteen states can increase their mercury emissions between now and 2018 while four states can continue to lawfully increase their emissions even beyond 2018. Compare Unit specific estimated mercury emission rates in 1999, at <http://www.epa.gov/ttn/atw/combust/utitlox/unitxunit2.xls> with 70 Fed. Reg. at 28,649-50. The difference between the allowed emissions under CAMR and states' actual emissions amounts to eighteen tons of excess mercury for the period between 2010 and 2018, a result that Congress could not have intended in enacting section 111. A program that allows emissions increases clearly violates section 111. See 42 U.S.C. § 7411(a)(1).

**3. CAMR Cannot Be The Best System of Emission Reduction Adequately Demonstrated Because EPA Ignored Critical Nonair Quality Health and Environmental Impacts Resulting From the Cap-and-Trade Program**

Finally, section 111 requires a standard of performance that takes into account “any nonair quality health and environmental impact.” 42 U.S.C. § 7411(a)(1). Well-documented and adverse health and environmental impacts from mercury emissions include mercury “hot-spots,” areas where the species living in waterbodies exhibit consistently high levels of mercury contamination. See Decl. of David Evers, Ex. B at 19, OAR-2002-0056-5460 [JA\_]. At least nine such hot-spots have been identified in the area from New York to Nova Scotia, affecting both the environment and public health in those areas. Id.; see also Decl. of Charles Driscoll ¶ 4, OAR-2002-0056-5460 [JA\_]; Hubbard Brooks Comments, at 13-14 [JA\_].

Research has repeatedly noted that EGU air mercury emissions play a significant role in the creation of these hot-spots. Hubbard Brooks Comments, at 7-11 [JA\_]. An EPA-funded

study found that approximately 70% of mercury wet deposition in Steubenville, Ohio, which is located in close proximity to several major coal-fired power plants, is attributable to the local sources. See Gerald J. Keeler et al., Sources of Mercury Wet Deposition in Eastern Ohio, USA, 40 Environ. Sci. & Technol. 5874 (2006), OAR-2002-0056-6748 [JA \_]. Emission reductions from local source contributors have also been accompanied by significant decreases in the mercury concentrations in fish in local waterbodies, highlighting the role these local sources play. See Hubbard Brook Comments at 13-14 [JA \_]. The record therefore reflects that individual EGUs can have significant impacts on local hot-spots of mercury contamination and a cap-and-trade program allowing individual plants to avoid any reduction can reasonably be anticipated to impact public health and the environment.

EPA has previously recognized the potential impacts of a cap-and-trade system for hazardous pollutants. See EPA, Tools of the Trade, A Guide to Designing and Operating a Cap and Trade Program for Pollution Control at 2-5 (June 2003), available at <http://www.epa.gov/airmarkets/international/tools.pdf> [JA \_] (command and control regulations work better than cap-and-trade programs where emissions are toxic and have serious local health impacts). In fact, a cap-and-trade program has never been attempted for a neurotoxin such as mercury and EPA's Office of Inspector General concluded that CAMR as initially proposed failed to adequately address either the potential for hot-spots or the potential impact on children. See EPA Office of Inspector General, Evaluation Report: Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities (Feb. 3, 2005), OAR-2002-0056-5686 [JA \_].

In the final mercury rules, EPA neglects the potential impacts of a cap-and-trade program for mercury, instead erroneously concluding that the final rule is “not significant” in light of CAIR, 70 Fed. Reg. at 28,639, and referring to the CAMR docket generally for a discussion of any impacts, 70 Fed. Reg. at 28,616. First, EPA’s reliance on CAIR is misplaced as the agency acknowledges that CAIR will result in “both increases and decreases in [mercury] deposition” with increases expected in areas not covered by CAIR. 70 Fed. Reg. at 28,639. Thus, CAIR provides no assurance to individuals living in the twenty-two states not under its authority. See 70 Fed. Reg. at 28,618.

Second, the rest of the CAMR docket also fails to address the environmental and public health impacts of the cap-and-trade plan. The rulemaking relied on a modeling program to estimate the levels of mercury deposition in the future and concluded, “we do not currently have any facts before us that would lead us to conclude that utility-attributable hot spots exist.” See 70 Fed. Reg. at 16,027-28 (emphasis added). By looking solely for “utility-attributable” hot-spots, however, EPA ignores the threats to public health posed by mercury hot-spots created by EGU emissions acting with other sources of the pollutant. As noted supra, EPA coined the “utility-attributable” term in the context of its flawed interpretation of section 112(n)(1)(A). Just as EPA’s interpretation was unlawful for section 112, the interpretation equally contradicts the mandate by section 111 that EPA consider both the health and environmental impacts resulting from a promulgated performance standard. See 42 U.S.C. § 7411(a)(1).

Finally, EPA’s reliance on large-scale modeling to predict future hot-spots is misplaced. Hot-spots are frequently created not by generalized mercury deposition over large areas, but rather by local sources such as those studied in Ohio and watershed characteristics such as the

terrain and surrounding ground cover. See Comments of New Jersey et al., Evers Decl., Ex. B at 4, 19 [JA\_]. EPA's model averages the impacts from mercury emissions over 500 square miles using thirty-six square kilometer grids, and misses the local hot-spots that pose threats to the public and the environment. See Comments of The New Hampshire Department of Environmental Services at 3, OAR-2002-0056-6490 [JA\_].

For these reasons, EPA set standards that contravene Congress' intent that standards of performance in Section 111 drive technology and provide for the best system of emission reduction and must be overturned.

### CONCLUSION

Because EPA exceeded its statutory authority and acted arbitrarily and capriciously, Government Petitioners respectfully request that the Court vacate the Delisting Rule, 70 Fed. Reg. 15,994, and vacate CAMR, 70 Fed. Reg. 28,606, with instructions to EPA to promulgate emissions standards for HAPs emitted by EGUs under section 112 of the Act.

Dated: January 11, 2007

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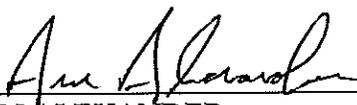
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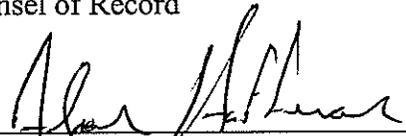
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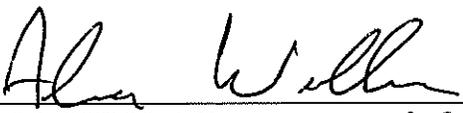
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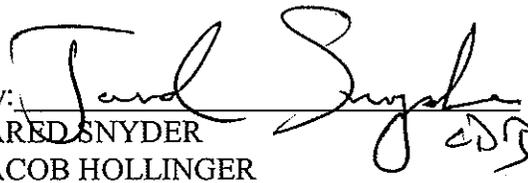
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ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 05-1097, and consolidated
	)	cases
	)	
UNITED STATES ENVIRONMENTAL	)	<b>Complex</b>
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

**REPLY BRIEF OF GOVERNMENT PETITIONERS**

**The States of New Jersey, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan Department of Environmental Quality, Minnesota, New Hampshire, New Mexico, New York, Pennsylvania Department of Environmental Protection, Rhode Island, Vermont, and Wisconsin, and the City of Baltimore**

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Dated: June 14, 2007

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\* Authorities upon which Government Petitioners chiefly rely are marked with asterisks.

### SUMMARY OF ARGUMENT

In its initial brief, the Environmental Protection Agency (“EPA”) ignores the statutory framework and plain language of section 112 by claiming inherent authority to: (1) reconsider and reverse its December 2000 determination that regulation of electric utility steam generating units (“power plants”) is appropriate and necessary under section 112 of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (“CAA” or “Act”); and (2) remove power plants from the section 112(c) list of source categories without following the express provisions of section 112(c)(9). EPA’s De-listing Rule, 70 Fed. Reg. 15,994 (Mar. 29, 2005), violates the Act because first, section 112(c)(9) explicitly sets the criteria necessary to remove a currently listed source category, and second, the plain language of section 112(n) reveals Congress’ unambiguous intent to constrain EPA discretion and impose on EPA a mandatory duty to regulate power plants under section 112 following the December 2000 determination.

The Clean Air Mercury Rule (“CAMR”), 70 Fed. Reg. 28,606 (May 18, 2005), is further based on an unreasonable interpretation of section 112(n)(1)(A) that contravenes first, the Act’s structure and purpose, and second, the plain language of section 111(d) precluding mercury regulation under that section. Finally, CAMR is arbitrary and capricious because it does not meet the requirements for a standard of performance under section 111 and fails to address hotspots of mercury contamination, allowing certain sources to continue or even increase their mercury emissions for decades to come.

## ARGUMENT

### **I. EPA may not avoid the express provisions of the Clean Air Act through claims of inherent authority.**

Section 112 provides a clear framework for the regulation of hazardous air pollutants (“HAP”) from power plants. See Opening Brief of Government Petitioners (“Gov. Br.”) at 5-6. To avoid the Act’s mandate, Respondents invoke claims of inherent authority and rely on a fundamentally flawed interpretation of the Act.<sup>1</sup> Respondents’ claims of timeless and standardless agency discretion are without basis and must be rejected.

#### **A. In claiming inherent authority, EPA ignores the Act’s statutory framework.**

Given the plain language requirements of section 112, EPA’s burden is clear: “it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” Friends of the Earth v. EPA, 446 F.3d 140, 146 (D.C. Cir. 2006) (citation omitted).

Respondents’ arguments fail to meet this burden.

EPA’s argument relies on the “fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative decision.” EPA Br. at 22. From this claim of inherent authority, EPA asserts the discretion to: (1) reconsider and revoke its determination that power plant regulation under section 112 is appropriate and necessary, EPA Br. at 21-23; and (2) remove power plants from the section 112(c) list of regulated source categories without following the express requirements of section 112(c)(9), EPA Br. at 24-33. EPA, however, has no inherent authority to reconsider and remove a listed source category from

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<sup>1</sup> Respondents in this matter include State Respondent-Intervenors, and Industry Respondent-Intervenors (“Respondents”).

section 112 regulation because Congress provided a clear statutory mechanism for de-listing “any” source category.<sup>2</sup> See 42 U.S.C. § 7412(c)(9); American Methyl Corp. v. EPA, 749 F.2d 826, 835 (D.C. Cir. 1984) (“when Congress has provided a mechanism capable of rectifying mistaken action . . . it is not reasonable to infer authority to reconsider agency action”); see also Nat’l Railroad Passenger Corp. v. Nat’l Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974).<sup>3</sup> EPA’s argument is therefore foreclosed by section 112 itself. See American Methyl, 749 F.2d at 835; Ethyl Corp. v. EPA, 51 F.3d 1053, 1061 (D.C. Cir. 1995).

EPA’s attempts to distinguish American Methyl are entirely misguided. The ruling there was not dependent on legislative history as EPA asserts, EPA Br. at 30, but on the presence of a statutory mechanism by which EPA could correct a mistakenly granted waiver under section 211(f).<sup>4</sup> See American Methyl, 749 F.2d at 835 (“Congress has provided a mechanism for

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<sup>2</sup> EPA’s attempt to analogize this matter to previous delistings is misguided. The attempted delisting here is not based on an error in the initial listing, but on a re-interpretation of the Act. See Gov. Pet. Comments In Re Petition for Reconsideration at 20-21, OAR-2002-0056 Item 6280 [JA\_\_].

<sup>3</sup> The caselaw cited by EPA is misapplied in light of American Methyl and Ethyl Corp. EPA Br. at 21-24. The general premise of the cited cases - that administrative agencies possess the some power to reconsider decisions reached in the course of exercising quasi-judicial powers - is not at issue here. It is the application of claimed inherent authority to section 112 in light of the plain language and regulatory framework of that section that is at issue. See NRDC v. Abraham, 355 F.3d 179, 202 (2d Cir. 2004) (distinguishing Dun & Bradstreet Corp. Foundation v. USPS, 946 F.2d 189 (2d Cir. 1991)). None of the cases relied upon by EPA present either a regulatory framework or statutory language comparable to section 112.

<sup>4</sup> Notably, section 211(f) - which the court found to provide no inherent revocation authority to EPA - granted EPA more discretion than that found in Section 112(n). Compare 42 U.S.C. § 7545(f)(4) (“Administrator . . . may waive the prohibitions . . . if he determines that the applicant has established [the criteria for a waiver]”) with 42 U.S.C. § 7412(n)(1)(A) (“Administrator shall regulate [power plants] under this section if the Administrator finds such regulation is appropriate and necessary”) (emphases added).

correcting error”); see also Ethyl Corp., 51 F. 3d at 1061 (“[t]he language of section 211(c)(1) demonstrates that Congress crafted a very definite scheme in which the Administrator was to consider certain criteria before taking certain actions.”) (emphasis added). Section 112(c)(9) exhibits a definite scheme for delisting sources and EPA fails to show why American Methyl should not control here.<sup>5</sup>

**B. EPA’s interpretation contravenes the plain language of section 112.**

The plain language of section 112 further belies the agency’s claims of broad discretion and inherent authority. Having made the appropriate and necessary determination in December 2000 and placed power plants on the section 112(c) list, EPA “shall” regulate under section 112 and removing “any” listed source category must meet section 112(c)(9) requirements.

Congress’ use of “shall” normally conveys a mandatory obligation. See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). In fact, the import of “shall” was clear to EPA as recently as October 2006 when the agency, in interpreting section 202 of the Act, argued:

use of the word “shall” in Section 202(a)(1) reflects a congressional judgment that, once EPA has devoted the resources necessary to determine whether particular emissions cause air pollution that may reasonably be anticipated to endanger the public health or welfare, and has concluded that the statutory

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<sup>5</sup> EPA’s remaining arguments to distinguish American Methyl are similarly unfounded. EPA Br. at 31. It is incorrect to ignore section 112(c)(9) because “section 112(n)(1)(A) alone specifically addresses power plants.” Id. There is no language in section 112(n)(1)(A) that exempts a determination under that section from the delisting requirements in section 112(c)(9), which expressly applies to “any source category.” 42 U.S.C. § 7412(c)(9). EPA also cannot rely on the lack of an express timeline for the section 112(n) determination to distinguish American Methyl because the question in both cases remains whether EPA has inherent authority to revoke previous determinations after they were made in light of express statutory provisions for such revocations, not how much time the agency was allowed to make the initial determinations.

endangerment standard is satisfied, the directive that EPA must prescribe standards is an acceptable constraint on the agency's usual rulemaking discretion.

Brief for the Federal Respondent at 41-42, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120). Applied to section 112, EPA, having devoted the resources necessary to make the December 2000 determination, is now under a "directive" to prescribe maximum achievable control technology standards for power plants as required under section 112(d), and cannot claim the discretion to refute that directive based on inherent authority.

It is similarly clear that section 112(c)(9) applies to "any" listed source category, *i.e.*, "indiscriminately of whatever kind," as long as the category is on the section 112(c) list – which power plants are. See Dep't of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("any" has an expansive meaning"); United States v. Gonzales, 520 U.S. 1, 5 (1997); NRDC v. EPA, 2007 U.S. App. LEXIS 13388, 16 (D.C. Cir. 2007). EPA's only response is to suggest disregarding section 112(c)(9) because "the section 112(n)(1)(A) language takes precedence." EPA Br. at 26. Section 112(n)(1)(A), however, does not address the delisting of a regulated source category - the action at issue here. Pursuant to the rules of statutory construction, the specific terms section of 112(c)(9) therefore prevail over any implied authority the agency may assert over power plants generally in section 112(n)(1)(A). See EPA Br. at 26 (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932)).<sup>6</sup>

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<sup>6</sup> Respondent-intervenors attempt to justify EPA's avoidance of its mandatory duty by arguing that the December 2000 determination was not a final action and cannot bind subsequent EPA administrators to the provisions of section 112(c)(9). Respondent-intervenors Br. at 16-18. Section 112(c)(9), however, is not limited to source categories listed in final agency actions but instead applies to any listed source category. See New Jersey et al., Comments to Final Delisting Rule, OAR-2002-0056, Item 6280 at 19-22 [JA\_\_]. While section 112(e)(4) forecloses judicial review of listing actions, this limitation was designed to promote rapid promulgation of section

EPA nonetheless urges the Court towards Chevron's step two by asserting that Congress has failed to "unambiguously express[] an intent to compel unnecessary and inappropriate regulation of power plants." EPA Br. at 26. EPA's only support for this position is the absence of any "preclusive language" in the statute restricting its inherent authority to revise the section 112(n) determination. EPA Br. at 23. This argument contravenes the established need to utilize normal tools of statutory construction in interpreting a statute. Chevron v. NRDC, 467 U.S. 837, 861 (1984). Moreover, "to suggest, as the [agency] effectively does, that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." Oil, Chemical and Atomic Workers Internat'l Union AFL-CIO v. NLRB, 46 F.3d 82 (D.C. Cir. 1995) (citation omitted).

Here, it is clear that Congress did express an entirely unambiguous intent that: (1) EPA regulate power plants under section 112 following an affirmative appropriate and necessary determination; and (2) once sources are listed under section 112(c), they be delisted pursuant to section 112(c)(9). Section 112 reveals no gap in the regulation of power plant emissions through which EPA can assert either discretion or inherent authority. See Chevron, 467 U.S. at 843-44 (agency discretion "is warranted only when Congress has left a gap for the agency to fill."); South Coast Air Quality Management District v. EPA, 2007 U.S. App. LEXIS 13368, 7 (D.C. Cir. 2007) (EPA can not rely upon its policy preferences where Congress sought to reduce the agency's discretion).

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112 emission standards, not to grant EPA additional discretion to reconsider determinations and delay regulation of HAPs. See Gov. Br. at 14; Env. Br. at 16-18.

Taken to its logical conclusion, EPA's interpretation of section 112 could place power plants in perpetual regulatory limbo. According to EPA, by simply asserting "a principled basis for doing so," it can reverse the appropriate and necessary determination of its predecessor and either remove power plants from, or add power plants to, the list of sources regulated under section 112,<sup>7</sup> thereby removing power plants from any meaningful regulation in perpetuity without ever complying with the provisions of section 112(c)(9).<sup>8</sup> EPA Br. at 23. It is inconceivable Congress intended to allow such unfettered agency discretion given the regulatory framework's goal of placing all major sources of HAPs under emission standards by the year 2000. See 42 U.S.C. § 7412(e); cf. NRDC v. Abraham, 355 F.3d at 197, 200 (rejecting DOE's interpretation that would "eviscerate" provisions meant to limit the department's discretion).

**II. Through CAMR, EPA exceeds its statutory authority and violates clear Congressional intent and the policy goals of the CAA.**

Assuming *arguendo* that EPA possesses the inherent authority to disregard section 112(c)(9) and revise its December 2000 section 112 determination, the agency's rulemaking still violates the Act. First, the agency argues incorrectly that the language of section 112(n)(1)(A) can be reasonably interpreted to require an analysis contrary to the well-established policy goals

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<sup>7</sup> Respondent-intervenors cite Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986)) as supporting this position. Thomas, however, dealt with a different regulatory framework and centered on a letter from the then-EPA Administrator to the Secretary of State. Id. The determination here, required by statute and a settlement agreement, see Env. Br. at 6, fn 16, 16-18, based on years of study, a report to Congress, and extensive public comment, and published in the Federal Register is easily distinguishable from the record presented in Thomas. See Gov. Br. at 6-7; 65 Fed. Reg. 79,825 (Dec. 20, 2000).

<sup>8</sup> Cf. OAR-2002-0056-2430, JA [ \_\_\_ ] (Comments of a coalition of state air agencies, identifying MACT permits that were issued based on EPA's December 2000 decision) and EPA Br. at 28 (dismissing these permits as being "during the period" of EPA's now reversed appropriate and necessary determination).

of the Act generally, and section 112 specifically. Second, EPA errs in interpreting section 111(d) to allow regulation of mercury from power plants under that subsection. Finally, EPA is badly misguided in arguing that an appropriate standard of performance for mercury from power plants could include the proposed plan under CAMR.

**A. EPA's interpretation of the phrase "appropriate and necessary" in section 112(n)(1)(A) violates the Act.**

According to EPA's new interpretation, regulation is "appropriate and necessary" under section 112(n)(1)(A) only if power plant mercury emissions acting in isolation will pose a threat to only human health after the year 2020. See EPA Br. at 40, 46; Govt Br. at 18. Based on a deeply flawed public health analysis, Govt Br. at 24-26, EPA finds regulation is not appropriate and necessary and seeks to exempt the single largest source of mercury emissions in the United States from regulation under section 112 of the Act. EPA's unreasonable interpretation of section 112(n)(1)(A) must be rejected.

First, an agency's construction of a statute is permissible only to the extent that it is consistent with the statute's purpose and "[t]he [CAA's] purpose is 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.'" Chemical Manufacturers Ass'n v. EPA, 217 F.3d 861, 866 (D.C. Cir. 2000).<sup>9</sup> Section 112 furthers this congressional purpose by requiring regulation of both major sources and area sources of HAPs.<sup>10</sup> See 42 U.S.C. § 7412(c)(3); Govt. Br. at 18-

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<sup>9</sup> While EPA limits its analysis to public health (disregarding environmental impacts), the CAA's core provisions all protect welfare as well as human health. See 42 U.S.C. § 7602(h) (defining welfare broadly to include environmental impacts); Govt. Br. at 18-21.

<sup>10</sup> See 1990 CAA Leg. History 8338, 8491 (Separate Addendum to Govt. Br. at Tab 14) (discussing area source regulation and the need for regulations of both large and small sources).

21. Here, EPA's re-interpretation of "appropriate and necessary" hinges on EPA's interpretation of the phrase "as a result of." EPA Br. at 35. Although EPA acknowledges that "as a result of" can be read to encompass actions that are a contributing cause to an ultimate harm, the agency chose to redefined the phrase to mean "solely as a result of."<sup>11</sup> EPA Br. at 36. By doing so, EPA impermissibly abandoned the Act's public health goals and left unaddressed those hundreds of thousands of individuals who are annually exposed to mercury levels above safety thresholds<sup>12</sup> and for whom any reduction in their exposure to mercury will yield health benefits.<sup>13</sup> See Chao v. Mallard Bay Drilling, 534 U.S. 235, 245 n.9 (2002) (rejecting agency interpretation inconsistent with Congressional intent to protect safety of every worker).

The true question – which EPA studiously avoids – is whether the contribution by power plants to the public health threat posed by mercury in the environment warrants section 112 regulation, not whether power plants, acting alone, cause unsafe mercury levels in individuals.<sup>14</sup>

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<sup>11</sup> This construction is also the genesis for EPA's arbitrary and capricious health analysis, which similarly fails to protect public health. See Gov. Br. at 24-26; N.J. et al., Comments In Re Reconsideration of the Mercury Rules (Dec. 19, 2005), OAR-2002-0056 at 6-13 [JA\_\_].

<sup>12</sup> See New Jersey et al., Comments to Proposed Rule, OAR-2002-0056, Item 2823 at 6-8 [JA\_\_].

<sup>13</sup> See Govt. Petitioners Comments to Final Delisting Rule at 37-38, OAR-2002-0056, Item 6280 [JA\_\_] (every additional increment of mercury to babies already excessively exposed to the toxin causes an additional, incremental impact including IQ loss). Indeed, since power plant mercury emissions account for as much as 67% of the mercury deposition in areas such as Steubenville, Ohio, reductions in those emissions may be the difference between safe and unsafe levels of mercury in many people. Even using EPA's flawed deposition modeling, reduction of power plant mercury is expected to result in a 16% decline in the mercury deposited in certain watersheds. EPA Br. at 67.

<sup>14</sup> In the true spirit of an *ignoratio elenchi*, EPA attempts to recast the question as whether Congress intended to require regulation of power plants where they "made some non-zero

EPA's construction of "appropriate and necessary," interpreting the phrase "as a result of" in a manner that fails to protect public health, and disregarding the contributory impact of power plant emissions on public health frustrates the policy that Congress sought to implement and cannot be squared with the purpose of the Act or section 112. See Chemical Manufacturers Ass'n v. NRDC, 470 U.S. 116, 151 (1985) (citation omitted).

Second, EPA's statutory construction gives no effect to the clear congressional intent for the expeditious regulation of HAPs. The agency's interpretation of "appropriate" in section 112(n)(1)(A) looks to the year 2020 – thirty years after the 1990 amendments that enacted section 112(n) – to determine whether hazards to public health are anticipated to occur at that time as a result of power plant emissions. EPA Br. at 34, 46. To justify this extremely attenuated timeline, EPA points to the lack of a deadline by which the agency is required to make the appropriate and necessary determination. EPA Br. at 54. EPA then claims that the language in section 112(n) requiring EPA to examine hazards to public health "after imposition of the requirements of [the Act]" justifies looking to the outer limits of the Clean Air Interstate Rule ("CAIR") and CAMR, regulations that were not finalized until 2006 and whose benefits will not occur until years, if not decades, later.<sup>15</sup> EPA's justifications, however, contravene the well-established rule that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

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contribution to the global pool of mercury." EPA Br. at 37. Far from a non-zero contribution, power plants emit more than 150,000 tons of HAPs annually including approximately 48 tons of mercury.

<sup>15</sup> See 71 Fed. Reg. 33,388 (June 9, 2006) (CAMR Final Rule on Reconsideration); 71 Fed. Reg. 25,304 (Apr. 28, 2006) (CAIR Reconsideration; Final Rule).

U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993).

Section 112(e)(1) sets a clear timeline by which emission standards for all source categories were to be set by November 2000. 42 U.S.C. § 7412(e)(1).<sup>16</sup> For EPA to now claim that “nothing precludes” it from looking thirty years beyond the 1990 amendments is therefore patently unreasonable and would negate the desired finality in agency decisions such as the December 2000 determination. See EPA Br. at 53; Dun & Bradstreet Corp. v. U.S. Postal Service, 946 F.2d at 193-194 (noting the “desirability of finality” in agency determinations).

**B. EPA plainly errs in interpreting section 111(d) to allow regulation of mercury emissions from power plants under section 111.**

The plain language of section 111(d) precludes regulating emissions of HAPs from existing power plants, including mercury, through a new source performance standard. Govt. Br. at 27-29; Env. Br. at 20-25. The controlling Statutes at Large contain provisions from each of the congressional chambers prohibiting HAP regulation under section 111(d). Taken together, these provisions prohibit section 111(d) from applying to: (1) any air pollutant “included on a list published under section . . . 112(b)” (Senate Amendment); or (2) “any air pollutant . . . emitted from a source category which is regulated under Section 112” (House Amendment). CAA Amendments, Pub. L. No. 101-549, §§ 108, 302, 104 Stat. 2399, 2467, 2574 (1990).

EPA’s assertion of a conflict between the text of the House and Senate amendments, EPA Br. at 104, is quickly dispatched by simply applying the facts of this case to both amendments.

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<sup>16</sup> Section 112(n)’s requirement that EPA shall regulate power plants “under this section” reinforces the conclusion that emission standards for mercury from power plants were to be set by November 2000. 42 U.S.C. § 7412(n)(1)(A). The November 2000 deadline is further supported by the requirement that EPA consider, as the basis of its determination, a 1993 study. Id.; see also 42 U.S.C. § 7412(n)(1)(B) (requiring a study of mercury emissions from power plants by November 1994).

Mercury is included on the list of HAPs listed under section 112(b) and is thus barred from regulation under section 111(d) by the Senate Amendment. See 42 U.S.C. § 112(b)(1) (listing “mercury compounds”). Mercury is also emitted from numerous source categories regulated under section 112 and is therefore also barred from regulation under section 111(d) by the House Amendment. See Gov. Br. at 27 (noting mercury emission standards for several source categories). Rather than presenting a conflict, applying either, or both, of the amendments to the present issue yields the same result: regulation of mercury under section 111(d) is expressly barred by that section’s plain language.

Undaunted, EPA gamely asserts that “pertinent legislative history supports EPA’s conclusion that the House and Senate amendments to section 111(d) conflict.” EPA Br. at 104. However, “where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent.” United States v. Western Pacific Railroad Co., 385 F.2d 161, 163 (10<sup>th</sup> Cir. 1967), cert. denied, 391 U.S. 919 (1968); see also Citizens to Save Spencer County v. EPA, 600 F.2d 844, 870 (D.C. Cir. 1979) (“It is a cardinal rule of statutory construction, however, that ambiguities should not be found where statutes are clear on their face.”). Nevertheless, the history behind the 1990 amendments, even if relevant, clearly reveals Congress’s desire to limit EPA discretion pertaining to HAP regulation. See Govt. Br. at 14, 16; Nat’l Lime Ass’n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000) (Congress established the section 112 regulatory framework “precisely because it believed EPA had failed to regulate enough HAPs under previous air toxics provisions”). Avoiding this history, EPA instead pointed to “proposed changes to section 112” – most of which were never enacted – “that would have given EPA broad discretion” (emphasis

added). EPA Br. at 109. Despite EPA's apparent belief, however, legislative history linked to failed proposals does not trump the express language of actually enacted statutes and the legislative history of those provisions.<sup>17</sup>

**C. CAMR exceeds EPA's statutory authority and is arbitrary and capricious.**

After thirty years of regulating HAPs under the HAP section of the Act, CAMR is the first EPA rule to adopt a market based cap-and-trade program under section 111 for a potent neurotoxin. Even if this program is not barred by section 111(d), CAMR exceeds EPA's statutory authority, is not supported by the evidence in the record, and violates section 111(a)'s requirement that standards reflect the best demonstrated system of emission reduction. 42 U.S.C. § 7411(a)(1).

The agency argues at length that the definition of a standard of performance under section 111 can be stretched to include a cap-and-trade program. EPA Br. at 119-133. Where Congress wanted to authorize a pollutant trading program, however, it has shown the ability to explicitly do so. See 42 U.S.C. §§ 7651 et seq. EPA incredibly claims sufficient statutory authority, based on a single line of definitional text, to implement a regulatory trading program through CAMR that is comparable to the SO<sub>2</sub> trading program – to which Congress devoted an entire title. Id. This is true interpretive hubris as Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in

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<sup>17</sup> In this argument, EPA badly misapplies Citizens to Save Spencer County, 600 F.2d at 853, which dealt with a clear conflict between two sections of the Act and there is no such conflict here. Importantly, Spencer County emphasized the rule that “statutory provisions, whenever possible, should be construed so as to be consistent with each other.” Id. at 870. EPA acknowledged that such a construction is possible here, EPA Br. at 114, but declined to implement it.

mouseholes.” Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (citation omitted).

EPA’s position, moreover, fails to distinguish between the Act’s regulatory framework for HAPs and the regulatory framework for criteria pollutants. While there is ample indicia of Congress’s comfort with capping and trading criteria pollutants, see EPA Br. at 128-129; Michigan v. EPA, 213 F.3d 663, 685-88 (D.C. Cir. 2000), no such comfort with trading HAPs is evident, as nothing in section 112’s language or legislative history suggests that Congress contemplated, let alone authorized, trading HAPs.<sup>18</sup> “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) (citation omitted).<sup>19</sup>

Even if EPA is authorized to cap-and-trade mercury under section 111, CAMR remains unlawful. EPA claims that just two elements are necessary in any promulgated standards to meet the statutory requirements of section 111: (1) limits that will achieve “real and meaningful nationwide emission reductions”; and (2) a structure that will achieve results in “as cost-effective a manner as is possible.” EPA Br. at 135-136. The language of section 111, however, requires standards to reflect the “best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1).

EPA concedes that CAMR will only result in a 50% reduction in mercury emissions from

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<sup>18</sup> See also ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978) (section 111 trading program contravened Congress’s intent that NSPS standards force “all newly constructed or modified . . . facilities” to employ the best demonstrated controls); Env. Br. at 28-29.

<sup>19</sup> Section 112(n)(5) further supports this position as it exhibits Congress’s ability to specifically authorize HAP regulation under section 111. 42 U.S.C. § 7412(n)(5).

existing power plants by the year 2020, EPA Br. at 135. The record reveals that such reductions do not reflect the best demonstrated system of emission reduction. EPA concedes that the CAMR emissions caps until 2018 are based not on the best demonstrated system, but rather the co-benefits to mercury reduction expected from CAIR. EPA Br. at 135. The best performing power plants, burning every type of coal possible, already surpass the emission reductions required by CAMR in 2020. Govt. Br. at 29-31. Setting emission reduction targets for 2020 that are 43% weaker than the results currently achieved by the top 12% of existing power plants is a clear abuse of any discretion EPA may have under section 111 to consider costs of potential controls.<sup>20</sup> *Id.* at n.7.

EPA's only response to the contrast between current best performers and CAMR is that while "individual" power plants may do better than CAMR, this is irrelevant in a "national" standard of performance. EPA Br. at 137. EPA, however, tacitly admits that CAMR does not reflect the best demonstrated system nationally as it predicts that power plants in total will do seven tons per year better than the Phase I cap. *See* 70 Fed. Reg. at 28,619; Govt. Br. at 30. Even disregarding the achievements of best performing units, the agency has offered no reasoned explanation for why CAMR did not set the Phase One cap *at least* at the level that EPA has modeled as being achieved under CAIR. It is incongruous for EPA to suggest that a mercury cap that will be achieved with a seven ton per year margin the moment it becomes effective by power plants employing no mercury specific control technologies equates to the best system of mercury

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<sup>20</sup> The NSPS standards for new power plants are also arbitrary and capricious as they rely on a scheme that subcategorizes based on emission control technology, and fails to reflect the emission reductions achieved by existing plants. Gov. Br. at 29-31; Gov. Pet. Comments In Re Reconsideration of Mercury Rules at 24-32, OAR-2002-0056, Item 6479 [JA \_\_\_].

reduction adequately demonstrated.

Finally, EPA's arguments confirm that the agency did not consider the health and environmental impacts of CAMR as required by law. See 42 U.S.C. § 7411(a)(1). Hotspots of mercury pollution exist and impact public health, and a cap-and-trade plan by its nature raises the very real risk of continuing or even exacerbating these hotspots as power plants avoid emission reductions by purchasing credits. Govt. Br. at 32-36. The agency's entire response to Petitioners' challenges on this matter was a general reference back to the section 112(n) health analysis and EPA's "utility hotspot analysis" in particular. EPA Br. at 142. No basis exists, however, for EPA's reliance on the utility hotspot analysis to satisfy the performance standard requirements of section 111. Govt. Br. at 24-26. They are, on their face, different requirements, and EPA has offered no explanation for why an analysis based entirely on its interpretation of section 112(n)(1)(A) suffices under section 111 where EPA's focus on "utility attributable" hotspots is baseless.

### CONCLUSION

The rules at issue here should be vacated, and EPA directed to promulgate emission standards for all HAPs emitted by power plants pursuant to section 112(d) of the Clean Air Act.

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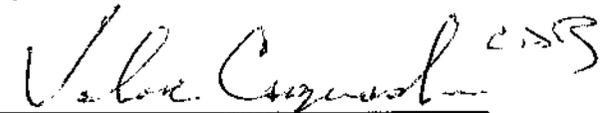
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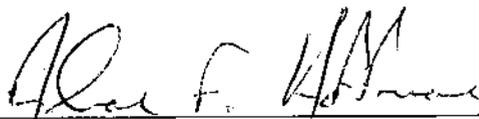
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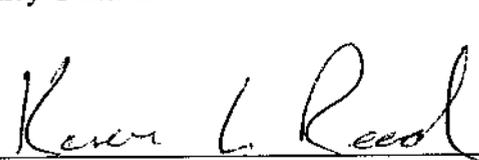
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**CERTIFICATE REGARDING WORD LIMITATION**

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Government Petitioners' Initial Opening Brief contains 5,250 words, as counted by counsel's word processing system.

Dated: June 14, 2007



**CHRISTOPHER D. BALL**

Deputy Attorney General

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply Brief of Government Petitioners has been sent via U.S. mail, first class postage prepaid, on June 14, 2007 to the following:

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Tribe, LAC Courte Oreilles Band of Lake  
Superior Chippewa Indians, Little Traverse  
Bay Bands of Odawa Indians, Lower Elwha  
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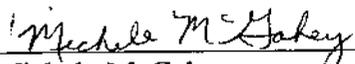
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Pennsylvania Coal Association, Virginia  
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\_\_\_\_\_  
Michele McGahey

From: Longstreth, Ben <blongstreth@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc: Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>  
Bcc:  
Subject: RE: State brief in CAMR  
Date: Thu Jan 09 2014 10:35:17 EST  
Attachments:

---

Great. Many thanks Mike!

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, January 09, 2014 10:15 AM  
To: Longstreth, Ben  
Cc: Morgan Costello  
Subject: RE: State brief in CAMR

Ben, here you go.

From: Longstreth, Ben [mailto:blongstreth@nrdc.org]  
Sent: Thursday, January 09, 2014 10:04 AM  
To: Michael J. Myers; Morgan Costello  
Subject: State brief in CAMR

Hi Mike and Morgan, do you by any chance have ready access to the State petitioners brief in the CAMR (NJ v. EPA, 517 F.3d 574 (D.C. Cir. 2008)) litigation? In case it's helpful the DC Circuit lead case number was 05-1097). Thanks, Ben

Benjamin Longstreth

Natural Resources Defense Council

1152 15th Street NW

Washington, DC 20005

Tel 202-513-6256

Fax 202-289-1060

Admitted in New York and the District of Columbia.

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<fred.augenstern@state.ma.us>  
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<kristen.driskell@energy.ca.gov>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Cc: Kennedy, Kit (kkennedy@nrdc.org)  
<kkennedy@nrdc.org>; Longstreth, Ben <blongstreth@nrdc.org>  
Bcc:  
Subject: RE: Amicus Curiae brief in APGA v. DOE (D.C. Cir. Case No. 11-1485)  
Date: Thu Jan 09 2014 13:52:36 EST  
Attachments:

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Kristen:

Happy New Year to you, as well.

We haven't had discussions about this matter in a while. I guess we need to see what the petitioner's brief looks like and then reconnoiter.

Best,

Fred

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Sent: Tuesday, January 07, 2014 2:00 PM  
To: Augenstern, Fred (AGO); Michael J. Myers  
Cc: Kennedy, Kit (kkennedy@nrdc.org); Longstreth, Ben  
Subject: Amicus Curiae brief in APGA v. DOE (D.C. Cir. Case No. 11-1485)

Happy New Year!

I hope everyone is doing well at the start of the new year! I was just browsing PACER, and came across this court order regarding the briefing schedule. I assume we will discuss the scope of our brief after January 28, 2014 (when the Intervenors in support of Petitioner submit their joint brief), but I just wanted to check in with all of you to find out if there is another plan.

Best,

Kristen

Kristen M. Driskell

Attorney

California Energy Commission

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Ph: (916) 654-3957

E-mail: Kristen.Driskell@energy.ca.gov

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To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: 2014 Investor Summit on Climate Risk and INCR Meeting  
Date: Mon Jan 13 2014 11:03:59 EST  
Attachments:

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INCR a project of Ceres  
INCR Bulletin-  
January 13, 2014

#### In the News

##### Green Bonds Take Root in Maturing Market

Green bonds, intended to finance environmentally friendly projects, are set to become a key part of investors' fixed income portfolios. Recent issues of green bonds by development banks and corporate issuers, strong investor demand and Zurich Insurance Group's recent decision to invest \$1 billion in green bonds are transforming the market.

[Read more...](#)

#### Tools & Materials

##### New Ceres Carbon Asset Risk Initiative Fact Sheet

Learn more about how investors involved in the Carbon Asset Risk Initiative are engaging the world's largest fossil fuel companies to assess the risks they face as the world moves toward a low-carbon economy as well as those they face due to the physical impacts of climate change.

[Read the fact sheet](#)

#### Events

##### INCR Policy Working Group Call

Tuesday, January 21  
1:00 - 2:00 pm ET

Join this month's INCR Policy working group call to hear from guest speakers, Ceres staff and investor peers. The discussion will focus on upcoming engagements, investor opportunities and new regulations. To register and learn more, contact Brandon Smithwood, Senior Manager, Policy Program.

##### INCR Sustainable Stock Exchanges Working Group Call

Thursday, January 30  
12:00 - 1:00 pm ET

INCR Sustainable Stock Exchanges Working Group Call - The SSE Working Group will meet to discuss the upcoming launch of the Listing Standards Comment Period by global stock exchanges, among other items. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Program.

#### Shareholder Initiative on Climate and Sustainability (SICS) Working Group Call

Wednesday, February 5  
2:00- 3:00 pm ET

The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change- related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge, Director, Shareholder Engagement, Investor Program.

#### 2014 Investor Summit on Climate Risk and INCR Meeting

UN Building This week Ceres will be holding the biennial Investor Summit on Climate Risk at the United Nations on Wednesday, January 15th following the Investor Network on Climate Risk members meeting being held Tuesday, January 14th.

These events will highlight the latest analysis and thinking on climate and carbon risk, clean energy investment opportunities, what leading international investors are doing to address these issues, and investors' role in necessary policy changes to address these growing risks and enhance related investment opportunities.

Watch the Investor Summit live starting at 9:00 a.m. EST on January 15th at <http://webtv.un.org>.

#### Welcome to New Investor Team Staff

We are delighted to announce that Rebecca Bar and Noah Klein-Markman have joined the Ceres Investor Program, providing staff support to INCR members.

Rebecca, our new Program Coordinator, will be filling Siobhan Collins' shoes, as Siobhan moves to the Ceres Water Program team. Rebecca is a graduate of Boston University, with a major in Environmental Analysis & Policy, and comes to Ceres from the Environmental Business Council of New England. You can reach Rebecca at [bar@ceres.org](mailto:bar@ceres.org).

Noah, a graduate of Wesleyan University and a former Ceres Investor Program intern, will serve as Coordinator for our Shareholder Initiative on Climate and Sustainability. Noah will be working closely with Rob Berridge to support shareholder proposals and company engagement efforts, and will also work with Tracey Rembert in supporting our Sustainable Stock Exchanges initiative and working group. You can reach Noah at [klein-markman@ceres.org](mailto:klein-markman@ceres.org).

Please join us in welcoming Rebecca and Noah to our team and program!

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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From: Sean Donahue <sean@donahuegoldberg.com>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Berman,  
Amanda (ENRD) <amanda.berman@usdoj.gov>; Pamela Campos  
<pcampos@edf.org>  
Cc:  
Bcc:  
Subject: GHG Call?  
Date: Mon Jan 13 2014 13:08:31 EST  
Attachments:

---

Did we decide to reschedule the 1 PM GHG call, or I am in the wrong place?

I'm waiting on 866-394-2346, code 4149570819.

--  
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Thank you.

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<amanda.berman@usdoj.gov>  
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<sean@donahuegoldberg.com>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Pamela Campos  
<pcampos@edf.org>  
Cc:  
Bcc:  
Subject: RE: GHG Call?  
Date: Mon Jan 13 2014 13:09:51 EST  
Attachments:

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We're at 1-866-410-9426; 2541575886

From: Sean Donahue [mailto:sean@donahuegoldberg.com]  
Sent: Monday, January 13, 2014 1:09 PM  
To: Michael Myers; Berman, Amanda (ENRD); Pamela Campos  
Subject: GHG Call?

Did we decide to reschedule the 1 PM GHG call, or I am in the wrong place?

I'm waiting on 866-394-2346, code 4149570819.

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Thank you.

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To: Berman, Amanda (ENRD)  
<amanda.berman@usdoj.gov>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Pamela  
Campos <pcampos@edf.org>  
Bcc:  
Subject: Re: GHG Call?  
Date: Mon Jan 13 2014 13:12:33 EST  
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Thank you.

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We're at 1-866-410-9426; 2541575886

From: Sean Donahue [mailto:sean@donahuegoldberg.com]  
Sent: Monday, January 13, 2014 1:09 PM  
To: Michael Myers; Berman, Amanda (ENRD); Pamela Campos  
Subject: GHG Call?

Did we decide to reschedule the 1 PM GHG call, or I am in the wrong place?

I'm waiting on 866-394-2346, code 4149570819.

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Thank you.

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Cc:  
Bcc:  
Subject: FW: Community Webinar on improving chemical facility safety  
Date: Thu Jan 16 2014 00:00:14 EST  
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Subject: FW: Community Webinar on improving chemical facility safety

FYI. Joel R Kupferman

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Cc: Richard Moore  
Subject: Community Webinar on improving chemical facility safety

Greetings Friends,

Please share this with your networks. Thanks!

Peace & Justice,

Michele

From: EO.Chemical [mailto:eo.chemical@hq.dhs.gov]  
Sent: Friday, January 10, 2014 12:33 PM  
To: Undisclosed recipients:  
Subject: Community Webinar on Executive Order 13650

## Community Webinar on Executive Order 13650: Improving Chemical Facility Safety and Security

\*Do you have questions about improving chemical facility safety and security?

\*Are you aware of the federal programs that address chemical plant safety and security?

\*Do you have ideas on improving chemical plant safety and security?

\*Do you want to know what actions the federal government is taking to improve coordination and information sharing?

\*Do you want to know more about what federal regulations are doing to safeguard chemical facilities and communities?

\*In August 2013, President Obama issued Executive Order (EO) 13650 - Improving Chemical Facility Safety and Security to improve the safety and security of chemical facilities and reduce the risks of hazardous chemical to owners and operators, workers, and communities. Do you want to know how community members can provide comments and feedback on the Executive Order in order to help improve the safety and security of chemical facilities?

If so, please join EPA's Technical Assistance for Communities (TASC) program on Thursday, January 16 from 6pm to 8pm Eastern for a webinar about the Executive Order 13650 on Improving Chemical Facility Safety and Security to learn how this order will reduce worker and community risks from hazardous chemical releases.

Who should attend: Community members and grass roots organizations, including first responders, interested in improving the safety and security of chemical facilities.

### Webinar Details

Thursday, January 16, 6pm – 8pm Eastern (another introduction webinar will be offered in the next 3-4 weeks)

\*For more information and to register for the webinar, visit [https://epa.connectsolutions.com/chemical-facility-safety-011613/event/event\\_info.html](https://epa.connectsolutions.com/chemical-facility-safety-011613/event/event_info.html).

\*Please test your computer before attending the meeting at [http://admin.adobeconnect.com/common/help/en/support/meeting\\_test.htm](http://admin.adobeconnect.com/common/help/en/support/meeting_test.htm). The Connection Test checks your computer to make sure all system requirements are met. If you pass the first three steps of the test, then you are ready to participate in a meeting. If you do not pass the test, perform the suggested actions and run the test again.

### For More Information

[kbird@skeo.com](mailto:kbird@skeo.com)

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To post to this group, send email to [northeast-environmental-justice-lawyers@googlegroups.com](mailto:northeast-environmental-justice-lawyers@googlegroups.com).  
Visit this group at <http://groups.google.com/group/northeast-environmental-justice-lawyers>.  
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<eileen.mcdonough@usdoj.gov>  
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fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Menotti, David  
<dmenotti@crowell.com>; Chung, David <dchung@crowell.com>  
Cc:  
Bcc:  
Subject: conference call -- wood heaters  
Date: Thu Jan 16 2014 11:37:14 EST  
Attachments:

---

When: Thursday, January 23, 2014 4:00 PM-4:30 PM (GMT-05:00) Eastern Time (US & Canada).  
Where: 866-410-9426 code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

From: Timothy Ballo <tballo@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: Wood Heaters Call: States and Enviros  
Date: Thu Jan 16 2014 12:06:19 EST  
Attachments:

---

From: Timothy Ballo <tballo@earthjustice.org>  
To: Lisa Rector (lrector@nescaum.org)  
<lrector@nescaum.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: Wood Heaters NSPS Call  
Date: Thu Jan 16 2014 15:37:33 EST  
Attachments:

---

From: Timothy Ballo <tballo@earthjustice.org>  
To: Lisa Rector (lrector@nescaum.org)  
<lrector@nescaum.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>; Timothy Ballo  
<tballo@earthjustice.org>  
Cc:  
Bcc:  
Subject: Copy: Wood Heaters NSPS Call  
Date: Thu Jan 16 2014 15:37:38 EST  
Attachments:

---

StartTime: Tue Jan 21 11:30:00 Eastern Standard Time 2014  
EndTime: Tue Jan 21 12:30:00 Eastern Standard Time 2014  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Thu Jan 16 17:21:00 Eastern Standard Time 2014

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Chung, David <dchung@crowell.com>;  
Menotti, David <dmenotti@crowell.com>; Timothy Ballo  
<tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: Wood heaters  
Date: Fri Jan 17 2014 12:30:43 EST  
Attachments: ENV\_DEFENSE-#668733-v1-wood\_heaters\_motion\_extend\_deadlines.DOC  
ENV\_DEFENSE-#668743-v1-wood\_heaters\_order\_reschedule.DOC

---

Attached is the motion we discussed yesterday. Please let me know if you have any comments. Thank you.

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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Document ID: 0.7.691.551509-000001

Owner: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>

Filename: ENV\_DEFENSE-#668733-v1-wood\_heaters\_motion\_extend\_deadlines.DOC

Last Modified: Fri Jan 17 12:30:43 EST 2014

---

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al.,	)	
	)	
Plaintiffs,	)	Civil Action
	)	No. 13 -1553 (GK)
v.	)	
	)	and consolidated case
GINA MCCARTHY, Administrator,	)	
Environmental Protection Agency, and	)	Civil Action
ENVIRONMENTAL PROTECTION AGENCY,	)	No. 13 -1555 (GK)
	)	
Defendants.	)	
_____	)	

**CONSENT MOTION TO AMEND SCHEDULE  
AND CONTINUE STATUS HEARING**

Defendants, Gina McCarthy, Administrator, and the United States Environmental Protection Agency (jointly referred to as “EPA”) request a 30-day extension of the deadlines for answering Plaintiffs’ complaints and for filing the Joint Meet and Confer Statement. EPA further requests that the Initial Scheduling Conference scheduled for February 3, 2014, be continued.

The parties have been engaged in settlement negotiations that may resolve this matter within the next month. The requested extensions will allow the parties to focus their attention on settlement negotiations. The requested continuance will allow the Court to avoid spending time on a Conference that may prove unnecessary.

Under the Court’s Order of December 13, 2013, the answers to Plaintiffs’ complaints are due on January 22, 2014. EPA requests that this deadline be extended to February 21, 2014. EPA further requests that the deadline for filing the Joint Meet and Confer Statement set by the Court’s order of December 27, 2013, ECF 21, be extended from January 29, 2014, to February 28, 2014.

Counsel for Plaintiffs and Intervenor-Plaintiff have consented to this motion.

Respectfully submitted,

ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment and Natural Resources Division

/s/ EILEEN T. MCDONOUGH  
United States Department of Justice  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044  
[eileen.mcdonough@usdoj.gov](mailto:eileen.mcdonough@usdoj.gov)  
(202) 514-3126

Of Counsel

SCOTT JORDAN  
U.S. Environmental Protection Agency  
Office of General Counsel  
ARN: MC-2344A  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

Document ID: 0.7.691.551509-000002

Owner: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>

Filename: ENV\_DEFENSE-#668743-v1-wood\_heaters\_order\_reschedule.DOC

Last Modified: Fri Jan 17 12:30:43 EST 2014

---

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al.,	)	
	)	
Plaintiffs,	)	Civil Action
	)	No. 13 -1553 (GK)
v.	)	
	)	and consolidated case
GINA MCCARTHY, Administrator,	)	
Environmental Protection Agency, and	)	Civil Action
ENVIRONMENTAL PROTECTION AGENCY,	)	No. 13 -1555 (GK)
	)	
Defendants.	)	
_____	)	

**ORDER**

Upon consideration of the consent motion for extension of time and continuance filed by Defendants Gina McCarthy, Administrator, and the United States Environmental Protection Agency, it is hereby ordered that the motion is granted. Defendants will respond to the Plaintiffs' complaints no later than February 21, 2014. The Parties will file the Joint Meet and Confer Statement no later than February 28, 2014. The Initial Scheduling Conference scheduled for February 3, 2014, is cancelled.

Executed this \_\_\_\_ day of January, 2014.

\_\_\_\_\_  
Hon. Gladys Kessler  
United States District Judge

From: Joanne Spalding  
<joanne.spalding@sierraclub.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; David  
Doniger <ddoniger@nrdc.org>; Vickie Patton <vpatton@edf.org>  
Cc:  
Bcc:  
Subject: Catching up on oil and gas NSPS  
Date: Fri Jan 17 2014 16:49:12 EST  
Attachments:

---

Hi Mike,

The NGOs had a call earlier today to discuss the status and next steps on the oil and gas NSPS. We'd like to touch base with you to do the same. Is there a time Tuesday that works for you? I'm open except 1-2 and 4-5 ET.

Joanne

--

Joanne Spalding  
Senior Managing Attorney  
Sierra Club  
85 Second Street  
San Francisco, CA 94105  
415-977-5725 (o)  
510-612-4062 (c)

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To: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Chung, David <dchung@crowell.com>; Menotti, David <dmenotti@crowell.com>; Timothy Ballo <tballo@earthjustice.org>; Tomas Carbonell <tcarbonell@edf.org> <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Fri Jan 17 2014 16:51:26 EST  
Attachments:

---

Eileen, this looks okay to the States. The States and NGOs have one slight change to the proposed order, which Tim will provide you with if he hasn't already. Thanks.--Mike

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]  
Sent: Friday, January 17, 2014 12:31 PM  
To: Chung, David; Menotti, David; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; Michael J. Myers; fred.augenstern@state.ma.us  
Cc: Jordan, Scott  
Subject: Wood heaters

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Environmental Defense Section

U.S. Dept. of Justice

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From: Doniger, David <ddoniger@nrdc.org>  
To: Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; vpatton@edf.org  
<vpatton@edf.org>  
Cc:  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Fri Jan 17 2014 16:59:23 EST  
Attachments:

---

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.  
David Doniger  
NRDC  
202 321-3435

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
Sent: Friday, January 17, 2014 04:49 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Vickie Patton <vpatton@edf.org>  
Subject: Catching up on oil and gas NSPS

Hi Mike,

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Sierra Club  
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To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Chung, David <dchung@crowell.com>; Menotti, David <dmenotti@crowell.com>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Fri Jan 17 2014 17:10:08 EST  
Attachments:

---

Eileen,

Mike noticed that the proposed order says the initial scheduling conference of Feb. 3 is cancelled. But as the motion asks for the conference to be continued, we think it would be more accurate to state that "The Initial Scheduling Conference scheduled for February 3, 2014, is cancelled and will be rescheduled."

The rest looks OK to the enviro groups as well.

Thanks for drafting this.

-Tim

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 17, 2014 4:51 PM  
To: 'McDonough, Eileen (ENRD)'; Chung, David; Menotti, David; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us  
Cc: Jordan, Scott  
Subject: RE: Wood heaters

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To: Chung, David; Menotti, David; Timothy Ballo; 'Tomas Carbonell (tcarbonell@edf.org)'; Michael J. Myers; fred.augenstern@state.ma.us

Cc: Jordan, Scott  
Subject: Wood heaters

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From: Joanne Spalding  
<joanne.spalding@sierraclub.org>  
To: Doniger, David <ddoniger@nrdc.org>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
vpatton@edf.org <vpatton@edf.org>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Fri Jan 17 2014 17:33:59 EST  
Attachments:

---

I'm also open Wednesday 3-5 and Thursday 11:30-1:30 ET.

On Fri, Jan 17, 2014 at 1:59 PM, Doniger, David <ddoniger@nrdc.org> wrote:

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.  
David Doniger  
NRDC  
202 321-3435

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
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Joanne

--

Joanne Spalding  
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Sierra Club  
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415-977-5725 (o)  
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<dmenotti@crowell.com>; Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>; fred.augenstern@state.ma.us  
<fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Fri Jan 17 2014 18:42:36 EST  
Attachments:

---

The drafts (including the proposed change below) look OK to HPBA.

Thanks,

David

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Friday, January 17, 2014 5:10 PM  
To: 'Michael J. Myers'; 'McDonough, Eileen (ENRD)'; Chung, David; Menotti, David; 'Tomas Carbonell (tcarbonell@edf.org)'; fred.augenstern@state.ma.us  
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Environmental Defense Section

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Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
vpatton@edf.org <vpatton@edf.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Fri Jan 17 2014 18:55:40 EST  
Attachments:

---

I am free those Thursday times. Not Weds afternoon. (The walls are closing in...)

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
Sent: Friday, January 17, 2014 5:34 PM  
To: Doniger, David  
Cc: michael.myers@ag.ny.gov; vpatton@edf.org  
Subject: Re: Catching up on oil and gas NSPS

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David Doniger

NRDC

202 321-3435

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Sent: Friday, January 17, 2014 04:49 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Vickie Patton <vpatton@edf.org>

Subject: Catching up on oil and gas NSPS

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Senior Managing Attorney

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administrative group/cn=recipients/cn=michaelmyers>  
To: Doniger, David <ddoniger@nrdc.org>;  
Joanne Spalding <joanne.spalding@sierraclub.org>  
Cc: vpatton@edf.org <vpatton@edf.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Sat Jan 18 2014 21:04:41 EST  
Attachments:

---

I'm free during that window Thurs. also.

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, January 17, 2014 6:56 PM  
To: Joanne Spalding  
Cc: Michael J. Myers; vpatton@edf.org  
Subject: RE: Catching up on oil and gas NSPS

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David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
Sent: Friday, January 17, 2014 5:34 PM  
To: Doniger, David  
Cc: michael.myers@ag.ny.gov; vpatton@edf.org  
Subject: Re: Catching up on oil and gas NSPS

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202 321-3435

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From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Doniger,  
David <ddoniger@nrdc.org>; Joanne Spalding  
<joanne.spalding@sierraclub.org>  
Cc:  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Sun Jan 19 2014 09:37:56 EST  
Attachments:

---

The Thursday window works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Saturday, January 18, 2014 7:05 PM  
To: 'Doniger, David'; Joanne Spalding  
Cc: Vickie Patton  
Subject: RE: Catching up on oil and gas NSPS

I'm free during that window Thurs. also.

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, January 17, 2014 6:56 PM  
To: Joanne Spalding  
Cc: Michael J. Myers; vpatton@edf.org  
Subject: RE: Catching up on oil and gas NSPS

I am free those Thursday times. Not Weds afternoon. (The walls are closing in...)

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]

Sent: Friday, January 17, 2014 5:34 PM

To: Doniger, David

Cc: michael.myers@ag.ny.gov; vpatton@edf.org

Subject: Re: Catching up on oil and gas NSPS

I'm also open Wednesday 3-5 and Thursday 11:30-1:30 ET.

On Fri, Jan 17, 2014 at 1:59 PM, Doniger, David <ddoniger@nrdc.org> wrote:

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.

David Doniger

NRDC

202 321-3435

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]

Sent: Friday, January 17, 2014 04:49 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Vickie Patton <vpattton@edf.org>

Subject: Catching up on oil and gas NSPS

Hi Mike,

The NGOs had a call earlier today to discuss the status and next steps on the oil and gas NSPS. We'd like to touch base with you to do the same. Is there a time Tuesday that works for you? I'm open except 1-2 and 4-5 ET.

Joanne

--

Joanne Spalding

Senior Managing Attorney

Sierra Club

85 Second Street

San Francisco, CA 94105

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510-612-4062 (c)

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From: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>  
To: Robert Schuwerk </o=lawnet/ou=exchange administrative group (fydibohf23spdl)/cn=recipients/cn=rschuwer>; Morgan Costello </o=lawnet/ou=first administrative group/cn=recipients/cn=morgancostello>; Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Lemuel Srolovic </o=lawnet/ou=first administrative group/cn=recipients/cn=lsrolovi>  
Cc:  
Bcc:  
Subject: NYT Article on Dinapoli's Climate Strategy  
Date: Tue Jan 21 2014 09:29:02 EST  
Attachments: image003.jpg

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Energy & Environment

Under Investor Pressure, Utility to Study Emissions

By DIANE CARDWELLJAN. 14, 2014

FirstEnergy, one of the country's largest electric companies, has agreed to work toward reducing its carbon emissions in response to pressure from shareholders including New York State and Connecticut pension funds, New York Comptroller Thomas P. DiNapoli said on Tuesday.

The company, which operates in six states, including Ohio, Pennsylvania and New Jersey, promised to study and report on what it could do to help meet President Obama's goal of reducing carbon emissions by 80 percent by 2050. As a result, Mr. DiNapoli, the State of Connecticut and As You Sow, a shareholder advocacy group, agreed to withdraw a shareholder resolution they had filed for First Energy's annual meeting this year.

Mr. DiNapoli said the decision could speed the adoption of agreements for environmental planning at other energy companies.

"Many of our energy holdings obviously have been very profitable for us in the short run," he said. "What we're trying to ensure is that in the long run that profitability is sustainable. We do see tremendous risk if issues of climate change are not incorporated into corporate strategy."

The Bruce Mansfield Power Station in Shippingport, Pa., is owned by FirstEnergy. Philip G. Pavely/Pittsburgh Tribune-Review, via Associated Press

The agreement comes as investors are increasingly pressuring corporations into action on climate change.

A movement to get universities, foundations and governments to rid themselves of investments in fossil-fuel companies has had some successes. Three former treasury secretaries and two billionaires

— former Mayor Michael R. Bloomberg and Tom Steyer — have started an effort called Risky Business to assess the economic risks posed if climate change is left unaddressed. And the use of shareholder resolutions calling for more focus on areas like climate change and sustainability, energy extraction procedures, energy efficiency and recycling is rising, a report from Ernst & Young said.

In the 2013 proxy season, shareholder submissions grew more than 6 percent compared with the year before, with environmental and social proposals representing the largest category, at just under 40 percent.

Many such sustainability proposals meet with success, said Allie Rutherford, director of corporate governance at Ernst & Young, given that shareholders often withdraw them in favor of discussions with the companies or actions taken by them.

“Investors have been pushing on some of these issues for a long time, and I think there’s been broader acceptance among the investor community. And that’s evident in the rising support for certain of these proposals,” Ms. Rutherford said. “I also think there’s growing recognition on the company side.”

In the case of FirstEnergy, Mr. DiNapoli and his partners filed the proposal as part of a larger effort with Ceres, a coalition of environmentalists and investors, to make companies more environmentally responsive. The New York State pension fund owns 1,205,383 shares of FirstEnergy, according to the comptroller’s office, worth about \$38 million at the market’s close on Tuesday. More than half of the power sources for the utility are coal, according to its website, but it says it has been working to reduce emissions and pollution over the last two decades by closing plants and installing more emissions-control equipment.

“The company has aggressive plans in place to further reduce emissions into the future,” Stephanie Walton, a spokeswoman for FirstEnergy, wrote in an email. “In response to shareholder interest, FirstEnergy has agreed to provide additional transparency by outlining these plans in its 2014 Sustainability Report, which will be published later this year.”

Mr. DiNapoli’s office has won settlements with a dozen companies, including coal-dependent utilities and food businesses like Dunkin’ Donuts and Smucker’s that use palm oil, whose harvesting practices can harm the environment. The office has outstanding submissions with CMS Energy, Ameren and Safeway.

As an approach, using shareholder resolutions is a “fairly blunt instrument,” said Dan Bakal, director of electric power programs at Ceres, but it was proving to be a successful one.

Although the resolutions are not binding, Mr. Bakal said, they are influential. “What it really is about is whether or not a company thinks there’s a significant number of their shareholders that are going to be concerned about how a company is addressing an issue,” he said. “Companies are not likely to respond or make commitments unless they think there’s some significant portion of their shareholders that are going to be interested.”

Correction: January 17, 2014

An article on Wednesday about FirstEnergy’s agreement to work toward reduction of carbon emissions in response to pressure from shareholders described imprecisely the shareholder proposals that Allie Rutherford, a corporate governance executive at Ernst & Young, said were meeting with success. They are proposals involving environmental or social issues, not shareholder proposals over all.

Document ID: 0.7.691.184130-000001

Owner: Alan Belenz </o=lawnet/ou=first administrative group/cn=recipients/cn=abelenz>

Filename: image003.jpg

Last Modified: Tue Jan 21 09:29:02 EST 2014

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Document ID: 0.7.691.184130-000001

Attachment Name: image003.jpg

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\mcostell\MCostell\_Live\_02242014.pst:00000000ade98bbd4bc9284c9c2a3574d05b2d6444562200:  
:0700a040bf97e6f87c8eb8b7800c2bb4e5758f4934337f0cf4d9a94078a489edd35b

Reason: It is an unsupported file type

From: Timothy Ballo <tballo@earthjustice.org>  
To: Timothy Ballo  
<tballo@earthjustice.org>; Michael J. Myers </o=lawnet/ou=first  
administrative\_group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: Canceled: Wood Heaters Call: States and Enviros  
Date: Tue Jan 21 2014 12:21:54 EST  
Attachments:

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StartTime: Wed Jan 22 09:00:00 Eastern Standard Time 2014  
EndTime: Wed Jan 22 10:00:00 Eastern Standard Time 2014  
Location:  
Invitees:  
Recurring: No  
ShowReminder: Yes  
ReminderMinutes: 5  
ReminderTime: Wed Jan 22 08:55:00 Eastern Standard Time 2014  
Accepted: Yes  
AcceptedTime: Thu Jan 16 17:23:00 Eastern Standard Time 2014

From: Timothy Ballo <tballo@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
Augenstern, Fred (AGO) (Fred.Augenstern@state.ma.us)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: Canceled: Wood Heaters Call: States and Enviros  
Date: Tue Jan 21 2014 12:21:54 EST  
Attachments:

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From: Doniger, David <ddoniger@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Monica Wagner </o=lawnet/ou=first administrative group/cn=recipients/cn=monicawagner>  
Cc:  
Bcc:  
Subject: Nice job!  
Date: Tue Jan 21 2014 21:51:02 EST  
Attachments:

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Your brief is very nicely done, reads well, and complements ours (or vice versa). Bravo!

David Doniger  
202 321-3435  
Sent from my iPad

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Doniger, David <ddoniger@nrdc.org>;  
Monica Wagner </o=lawnet/ou=first administrative group/cn=recipients/cn=monicawagner>  
Cc: Bethany Davis Noll  
</o=lawnet/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=bdavisno>; Steven Wu  
</o=lawnet/ou=first administrative group/cn=recipients/cn=stevenwu>  
Bcc:  
Subject: RE: Nice job!  
Date: Tue Jan 21 2014 22:12:39 EST  
Attachments:

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Thanks! Passing your kudos on to my appeals colleagues, who took the laboring oar on this one. And agreed, yours read very well, too. Will be an interesting argument.

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Tuesday, January 21, 2014 9:51 PM  
To: Michael J. Myers; Monica Wagner  
Subject: Nice job!

Your brief is very nicely done, reads well, and complements ours (or vice versa). Bravo!

David Doniger  
202 321-3435  
Sent from my iPad

From: Linda M. Wilson </o=lawnet/ou=first administrative group/cn=recipients/cn=lindawilson>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Judge is asked to impose deadline for EPA ozone rule  
Date: Wed Jan 22 2014 14:33:51 EST  
Attachments:

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## AIR POLLUTION:

Judge is asked to impose deadline for EPA ozone rule

Jason Plautz, E&E reporter

Published: Wednesday, January 22, 2014

Environmental groups are asking a federal judge to set a deadline for U.S. EPA to issue its long-delayed rule limiting ozone emissions, saying the agency is in violation of the Clean Air Act for stalling on the proposal.

The Sierra Club, American Lung Association, Natural Resources Defense Council and Environmental Defense Fund are seeking a court-ordered deadline of Dec. 1 for EPA to issue a proposal for its National Ambient Air Quality Standard for ozone. The final rules would be due out by Oct. 1, 2015, under the request.

In a filing with the U.S. District Court for the Northern District of California, the groups say that EPA is nearly a year past when it should have completed its regular five-year review for the NAAQS, which was last set at 75 parts per billion in 2008.

The same groups filed a lawsuit in that court in June seeking to force EPA to set the ozone standards.

The agency is still doing some analytical work but has requested a meeting of its Clean Air Scientific Advisory Council in March to consider the NAAQS review. In a statement, EPA said it would respond to the motion by Feb. 25, a date set by the court.

"The agency is continuing to work with its independent scientific advisors on the ongoing review of the ozone standard based on the extensive body of research that will inform EPA's decision," the agency said. "EPA is following its normal open and transparent review process that allows for extensive public comment."

A federal agenda for rulemaking in November didn't give a date for release of the ozone proposal (Greenwire, Nov. 27).

Ozone, a major component of smog, is linked to a host of health problems, including asthma and respiratory ailments and respiratory diseases, and EPA has said it is linked to climate change.

The agency had reviewed the current NAAQS soon after President Obama took office, but the White

House in 2011 stopped a proposal to set a tighter standard between 60 and 70 ppb. Public health groups have sought a standard set on the lower end of that range.

"The evidence is really strong that the existing standard needs to be strengthened, and that was EPA's conclusion back in 2010," said Janice Nolen of the American Lung Association. "This is always a complicated standard ... and we certainly know it can be hard to get it all lined up if there's no firm deadline."

From: Rebecca Bar, Ceres <bar@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: 2014 Investor Summit on Climate Risk  
Date: Wed Jan 22 2014 16:25:53 EST  
Attachments:

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To view this email as a web page, go [here](#).

INCR a project of Ceres  
INCR Bulletin-  
January 22, 2014

#### In the News

##### Investing in the Clean Trillion: Closing the Clean Energy Gap

In order to limit global warming to 2°C and avoid the worst effects of climate change, the world needs to invest an additional \$36 trillion in clean energy by 2050—an average of \$1 trillion per year for the next 36 years. Ceres is calling this clean energy investment gap the Clean Trillion. Closing this gap will be a tremendous challenge, but it is possible if businesses, investors and policymakers join forces.

[Learn more](#)

[Download the report](#)

#### Tools & Materials

##### Green Bonds Principals Announced at Summit

A group of 13 banks has released The Green Bonds Principals, a disclosure framework for issuers of green bonds. The Principals outline a process for designating, disclosing, managing, and reporting on the use of proceeds of a green bond and the underlying projects they finance.

[Learn more](#)

#### Events

##### INCR Sustainable Stock Exchanges Working Group Call

Thursday, January 30  
12:00 - 1:00 pm ET

INCR Sustainable Stock Exchanges Working Group Call - The SSE Working Group will meet to discuss

the upcoming launch of the Listing Standards Comment Period by global stock exchanges, among other items. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Program.

#### Shareholder Initiative on Climate and Sustainability (SICS) Working Group Call

Wednesday, February 5  
2:00- 3:00 pm ET

The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change- related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge, Director, Shareholder Engagement, Investor Program.

#### 2014 Investor Summit on Climate Risk

Clean Trillion Report Cover On January 15, more than 500 global investors and financial leaders gathered at the United Nation to discuss the growing urgency of climate change and investor actions that are needed to mitigate escalating economic risks. The biennial Investor Summit on Climate Risk has become the preeminent forum for leading global investors to discuss the implications of climate change for capital markets.

Leaders from many of the world's largest pension funds, asset management firms, and corporations articulated how they are rising to the climate challenge, with a clear message: tacking climate change and transitioning to a clean energy future is one of the greatest opportunities of the 21st century. Speakers included Christiana Figueres, UN Framework Convention on Climate Change; Tom Steyer, Farallon Capital Management; Nick Robins, HSBC; Robert E. Rubin, former Secretary of the U.S. Treasury; Richard Trumka, AFL-CIO; Timothy E. Wirth, UN Foundation.

At the Summit, Ceres released a report detailing 10 key recommendations for achieving the Clean Trillion,--an average of \$1 trillion per year in clean energy investment, necessary to ensure a safe and livable climate future. Scaling clean energy investment to this level will require concerted actions by investors, companies and policymakers to implement the steps outlined in the paper.

View video footage of the event, materials from the Summit and selected press clips.

#### INCR Meeting Investigates Investor Actions on Carbon Risk, Low Carbon Investment Solutions

Representatives from 65 INCR member organizations and a number of international guests met on January 14, 2014 to discuss actions members can take to address climate-related risks in their portfolios and to invest profitably in solutions to climate change. Speakers included Christopher Rowe, Chief of Staff at Prudential Investment Management and a sponsor of the meeting and the Investor Summit, Jack Ehnes, CEO of CalSTRS and Chair of INCR's Executive Committee, and David Blood, Managing Director of Generation Investments.

During panel discussions moderated by Maryland State Treasurer Nancy Kopp and Jack Ehnes members examined carbon asset risks in portfolios and steps investors can take to assess, manage and reduce those risks, strategies for low carbon investing in clean energy and other solutions to climate change across multiple asset classes. A final panel included representatives of the international investor networks on climate change comprising the Global Investor Coalition on Climate Change, who reported on clean energy investment and policy initiatives in their regions.

View the full agenda and list of speakers.

## INCR Meeting Highlights:

\*A panel moderated by Maryland State Treasurer Nancy Kopp examined carbon asset risks in portfolios and steps investors can take to assess, manage and reduce those risks. Panelists included Julie Gorte of PAX World Management, Bill McGrew of CalPERS and Nick Robins of HSBC.

\*Jack Ehnes moderated a panel to address strategies for low carbon investing in clean energy and other solutions to climate change across multiple asset classes. Panelists included Ian Simm, CEO of Impax Investments, Damon Silvers, Director of Policy and Special Counsel at AFL-CIO, Jimmy Yan of the New York City Comptroller's Office, and Sean Kidney, CEO of the Climate Bonds Initiative.

\*A panel of representatives of the international investor networks on climate change comprising the Global Investor Coalition on Climate Change, who reported on clean energy investment and policy initiatives in their regions. Panelists included Stephanie Pfeifer, CEO of IGCC (Europe), Nathan Fabian, CEO of IGCC (Australia/New Zealand) and Alexandra Tracy, Senior Advisor to AIGCC (Asia). Members and guests continued the discussion at a post-meeting reception.

## Investors Explore Water Risks and Opportunities in the Investment Process

A group of 60 investors and other financial leaders met at Bloomberg Headquarters to discuss the state of current ESG and water risk integration into the investment management process and explore future directions to broaden and deepen this integration.

Expert panelists including INCR member Robert Fernandez at Breckinridge Capital Advisors, Sasja Beslik, from Nordea Investment Management and Piet Klop at PGGM Investments, engaged the group by sharing ideas on innovative practices and identified next steps for the evolution of ESG and water analysis. Monika Freyman of Ceres' Water Program highlighted some of the trends in practices and investor aspirations emerging from the global investor survey currently underway. "We need to evolve water risk integration to capture the risk of cost of discontinuities, capital expenditures, and license to grow," said Piet Klop, Senior Advisor of Responsible Investment at PGGM. "Capturing the business value at water risk still remains unclear as data is rarely comparable and meaningful."

The group broke out into working sessions to explore current and projected ESG and water trends with a focus on equity, fixed income and private equity asset classes. Investors voiced a need for resource monetization and metrics around the extent and frequency of distribution of operations and supply. The group also expressed the need for continued improvement of data granularity and standardization. Since water is very product, sector and regional specific, it is important to mitigate risks and engage policymakers on this critical resource. The need to better understand how the human right to water integrates into investor and engagement decisions was also expressed.

For additional information about the event or the water survey, contact Monika Freyman, Senior Manager, Water Program.

[View the presentation slides](#)

## Leaders within Rapidly Growing Green Bonds Market Gather in New York

Ceres cosponsored the Green Bonds Dinner with Ernst & Young. Nearly 60 attendees joined in animated conversation on the rapidly growing green bonds market. Speakers expressed their appreciation that Ceres had convened this unprecedented cross section of green bond issuers, underwriters, purchasers, international organizations and NGOs around building the supply, demand and standards for green bonds as a source of investment and finance for low carbon and other environmentally beneficial projects. Green bonds promise to be a major 2014 "down payment" on the Clean Trillion.

Participating organizations included:

Bank of America, Citi, JP Morgan, BlackRock, State Street (SSgA), Prudential (PIM), Deutsche Bank,

SEB, TIAA-CREF, CalSTRS, CA Treasurer, CT Treasurer, NYS Common Fund, PA Treasury, Breckinridge, Calvert, Zurich, The Hartford, Manulife, AIG ,Munich Re, the World Bank, the International Finance Corporation and the UN Secretary General's Office.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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99 Chauncy Street

Boston, MA 02111

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From: Joanne Spalding  
<joanne.spalding@sierraclub.org>  
To: Vickie Patton <vpatton@edf.org>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Doniger,  
David <ddoniger@nrdc.org>; Natalie Spiegel  
<natalie.spiegel@sierraclub.org>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Thu Jan 23 2014 12:18:31 EST  
Attachments:

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Hi all,

We had tentatively scheduled this call for today, but unfortunately, I forgot to calendar it or send an invitation. My apologies.

I'm copying Natalie so she can reschedule at a time that works for all of us, perhaps early next week.

Joanne

On Sun, Jan 19, 2014 at 6:37 AM, Vickie Patton <vpatton@edf.org> wrote:

The Thursday window works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Saturday, January 18, 2014 7:05 PM  
To: 'Doniger, David'; Joanne Spalding  
Cc: Vickie Patton  
Subject: RE: Catching up on oil and gas NSPS

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Cc: Michael J. Myers; vpatton@edf.org  
Subject: RE: Catching up on oil and gas NSPS

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David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

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[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]  
Sent: Friday, January 17, 2014 5:34 PM  
To: Doniger, David  
Cc: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov); [vpatton@edf.org](mailto:vpatton@edf.org)  
Subject: Re: Catching up on oil and gas NSPS

I'm also open Wednesday 3-5 and Thursday 11:30-1:30 ET.

On Fri, Jan 17, 2014 at 1:59 PM, Doniger, David <[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)> wrote:

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.  
David Doniger  
NRDC  
202 321-3435

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]  
Sent: Friday, January 17, 2014 04:49 PM  
To: Michael J. Myers <[Michael.Myers@ag.ny.gov](mailto:Michael.Myers@ag.ny.gov)>; Doniger, David; Vickie Patton <[vpatton@edf.org](mailto:vpatton@edf.org)>  
Subject: Catching up on oil and gas NSPS

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Joanne

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Joanne Spalding

Senior Managing Attorney

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San Francisco, CA 94105

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Joanne Spalding  
Senior Managing Attorney  
Sierra Club  
85 Second Street  
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To: Joanne Spalding  
<joanne.spalding@sierraclub.org>  
Cc: Vickie Patton <vpatton@edf.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Doniger, David  
<ddoniger@nrdc.org>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Thu Jan 23 2014 12:51:13 EST  
Attachments:

---

Hi all,

Please see the times below for early next week when Joanne is available. Once I find the time with most availability I will send around a calendar invite and conference line. Thanks!

Monday (1/27): 9am - 10am, 11:30am - 1:30pm, 4pm - 5pm  
Tuesday (1/28): 9am - 1pm

- Natalie

On Thu, Jan 23, 2014 at 9:18 AM, Joanne Spalding <joanne.spalding@sierraclub.org> wrote:

Hi all,

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Joanne

On Sun, Jan 19, 2014 at 6:37 AM, Vickie Patton <vpatton@edf.org> wrote:

The Thursday window works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Saturday, January 18, 2014 7:05 PM  
To: 'Doniger, David'; Joanne Spalding  
Cc: Vickie Patton  
Subject: RE: Catching up on oil and gas NSPS

I'm free during that window Thurs. also.

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, January 17, 2014 6:56 PM  
To: Joanne Spalding  
Cc: Michael J. Myers; vpatton@edf.org  
Subject: RE: Catching up on oil and gas NSPS

I am free those Thursday times. Not Weds afternoon. (The walls are closing in...)

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
Sent: Friday, January 17, 2014 5:34 PM  
To: Doniger, David  
Cc: michael.myers@ag.ny.gov; vpatton@edf.org  
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David Doniger

NRDC

202 321-3435

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]

Sent: Friday, January 17, 2014 04:49 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Vickie Patton <vpatton@edf.org>

Subject: Catching up on oil and gas NSPS

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Joanne

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Joanne Spalding

Senior Managing Attorney

Sierra Club

85 Second Street

San Francisco, CA 94105

415-977-5725 (o)

510-612-4062 (c)

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Legal Assistant  
Sierra Club Environmental Law Program  
85 Second Street, Second Floor  
San Francisco, CA 94105  
natalie.spiegel@sierraclub.org  
415-977-5638

From: Henderson, Kelly <khenderson@nrdc.org>  
To: natalie.spiegel@sierraclub.org  
<natalie.spiegel@sierraclub.org>  
Cc: Doniger, David <ddoniger@nrdc.org>;  
Vickie Patton <vpatton@edf.org>; Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Thu Jan 23 2014 13:37:59 EST  
Attachments:

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Hi Natalie,

Out of the times listed below, David is available:

Monday 1/27 from 12-1:30pm or Tuesday 1/28 from 12-1pm.

Best,

Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program

Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005

202. 289. 2401 | khenderson@nrdc.org | www.nrdc.org

Blog: <http://switchboard.nrdc.org/blogs/khenderson/>

From: Natalie Spiegel [mailto:natalie.spiegel@sierraclub.org]  
Sent: Thursday, January 23, 2014 12:51 PM  
To: Joanne Spalding  
Cc: Vickie Patton; Michael J. Myers; Doniger, David  
Subject: Re: Catching up on oil and gas NSPS

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Henderson, Kelly <khenderson@nrdc.org>;  
natalie.spiegel@sierraclub.org <natalie.spiegel@sierraclub.org>  
Cc: Doniger, David <ddoniger@nrdc.org>;  
Vickie Patton <vpatton@edf.org>; Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Thu Jan 23 2014 15:49:20 EST  
Attachments:

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From: Henderson, Kelly [mailto:khenderson@nrdc.org]  
Sent: Thursday, January 23, 2014 1:38 PM  
To: natalie.spiegel@sierraclub.org  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'; Michael J. Myers  
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Natalie Spiegel

Legal Assistant

Sierra Club Environmental Law Program

85 Second Street, Second Floor

San Francisco, CA 94105

[natalie.spiegel@sierraclub.org](mailto:natalie.spiegel@sierraclub.org)

415-977-5638

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Jordan, Scott <jordan.scott@epa.gov>;  
Timothy Ballo <tballo@earthjustice.org>; Tomas Carbonell  
(tcarbonell@edf.org) <tcarbonell@edf.org>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Menotti, David  
<dmenotti@crowell.com>; Chung, David <dchung@crowell.com>  
Cc:  
Bcc:  
Subject: conference call -- wood heaters  
Date: Thu Jan 23 2014 16:31:42 EST  
Attachments:

---

When: Friday, January 31, 2014 2:00 PM-2:30 PM (GMT-05:00) Eastern Time (US & Canada).  
Where: 866-410-9426 code 2025143126

Note: The GMT offset above does not reflect daylight saving time adjustments.

\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

From: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>  
To: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>; Jordan, Scott <jordan.scott@epa.gov>; Timothy Ballo <tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org) <tcarbonell@edf.org>; fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>; Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Menotti, David <dmenotti@crowell.com>; Chung, David <dchung@crowell.com>  
Cc:  
Bcc:  
Subject: Copy: conference call -- wood heaters  
Date: Thu Jan 23 2014 16:31:42 EST  
Attachments:

StartTime: Fri Jan 31 14:00:00 Eastern Standard Time 2014  
EndTime: Fri Jan 31 14:30:00 Eastern Standard Time 2014  
Location:  
Invitees:  
Recurring: No  
ShowReminder: No  
Accepted: Yes  
AcceptedTime: Thu Jan 23 16:32:00 Eastern Standard Time 2014

When: Friday, January 31, 2014 2:00 PM-2:30 PM (GMT-05:00) Eastern Time (US & Canada).  
Where: 866-410-9426 code 2025143126

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\*~\*~\*~\*~\*~\*~\*~\*~\*~\*

From: Vickie Patton <vpatton@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Henderson, Kelly <khenderson@nrdc.org>; natalie.spiegel@sierraclub.org <natalie.spiegel@sierraclub.org>  
Cc: Doniger, David <ddoniger@nrdc.org>; Joanne.Spalding@sierraclub.org <joanne.spalding@sierraclub.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Fri Jan 24 2014 01:19:04 EST  
Attachments:

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Tuesday at 12 eastern time works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, January 23, 2014 1:49 PM  
To: 'Henderson, Kelly'; natalie.spiegel@sierraclub.org  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'  
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From: Natalie Spiegel  
<natalie.spiegel@sierraclub.org>  
To: Vickie Patton <vpatton@edf.org>  
Cc: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Henderson,  
Kelly <khenderson@nrdc.org>; Doniger, David  
<ddoniger@nrdc.org>; Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Fri Jan 24 2014 12:24:00 EST  
Attachments:

---

Hi all,

This call will take place Tuesday (1/28) from 12 - 1pm ET. The call-in number is: 866-501-6174, passcode: 2030131#. You should see a calendar invite from me shortly.

Thanks,

Natalie

On Thu, Jan 23, 2014 at 10:19 PM, Vickie Patton <vpatton@edf.org> wrote:

Tuesday at 12 eastern time works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, January 23, 2014 1:49 PM  
To: 'Henderson, Kelly'; natalie.spiegel@sierraclub.org

Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'

Subject: RE: Catching up on oil and gas NSPS

I have a meeting on Monday from 1230-130. Tues. I'm free during the 12-1 slot.

From: Henderson, Kelly [mailto:khenderson@nrdc.org]  
Sent: Thursday, January 23, 2014 1:38 PM  
To: natalie.spiegel@sierraclub.org  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'; Michael J. Myers  
Subject: RE: Catching up on oil and gas NSPS

Hi Natalie,

Out of the times listed below, David is available:

Monday 1/27 from 12-1:30pm or Tuesday 1/28 from 12-1pm.

Best,

Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program

Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005

202. 289. 2401 | khenderson@nrdc.org | www.nrdc.org

Blog: <http://switchboard.nrdc.org/blogs/khenderson/>

From: Natalie Spiegel [mailto:natalie.spiegel@sierraclub.org]

Sent: Thursday, January 23, 2014 12:51 PM

To: Joanne Spalding

Cc: Vickie Patton; Michael J. Myers; Doniger, David

Subject: Re: Catching up on oil and gas NSPS

Hi all,

Please see the times below for early next week when Joanne is available. Once I find the time with most availability I will send around a calendar invite and conference line. Thanks!

Monday (1/27): 9am - 10am, 11:30am - 1:30pm, 4pm - 5pm

Tuesday (1/28): 9am - 1pm

- Natalie

On Thu, Jan 23, 2014 at 9:18 AM, Joanne Spalding <joanne.spalding@sierraclub.org> wrote:

Hi all,

We had tentatively scheduled this call for today, but unfortunately, I forgot to calendar it or send an invitation. My apologies.

I'm copying Natalie so she can reschedule at a time that works for all of us, perhaps early next week.

Joanne

On Sun, Jan 19, 2014 at 6:37 AM, Vickie Patton <vpatton@edf.org> wrote:

The Thursday window works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Saturday, January 18, 2014 7:05 PM  
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Cc: Vickie Patton  
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To: Joanne Spalding  
Cc: Michael J. Myers; vpatton@edf.org  
Subject: RE: Catching up on oil and gas NSPS

I am free those Thursday times. Not Weds afternoon. (The walls are closing in...)

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]

Sent: Friday, January 17, 2014 5:34 PM

To: Doniger, David

Cc: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov); [vpatton@edf.org](mailto:vpatton@edf.org)

Subject: Re: Catching up on oil and gas NSPS

I'm also open Wednesday 3-5 and Thursday 11:30-1:30 ET.

On Fri, Jan 17, 2014 at 1:59 PM, Doniger, David <[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)> wrote:

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.

David Doniger

NRDC

202 321-3435

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]

Sent: Friday, January 17, 2014 04:49 PM

To: Michael J. Myers <[Michael.Myers@ag.ny.gov](mailto:Michael.Myers@ag.ny.gov)>; Doniger, David; Vickie Patton <[vpatton@edf.org](mailto:vpatton@edf.org)>

Subject: Catching up on oil and gas NSPS

Hi Mike,

The NGOs had a call earlier today to discuss the status and next steps on the oil and gas NSPS. We'd

like to touch base with you to do the same. Is there a time Tuesday that works for you? I'm open except 1-2 and 4-5 ET.

Joanne

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Joanne Spalding

Senior Managing Attorney

Sierra Club

85 Second Street

San Francisco, CA 94105

415-977-5725 (o)

510-612-4062 (c)

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Natalie Spiegel

Legal Assistant

Sierra Club Environmental Law Program

85 Second Street, Second Floor

San Francisco, CA 94105

natalie.spiegel@sierraclub.org

415-977-5638

--

Natalie Spiegel

Legal Assistant

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San Francisco, CA 94105

natalie.spiegel@sierraclub.org

415-977-5638

From: Environmental Law  
<environmental.law@sierraclub.org>  
To: David Doniger <ddoniger@nrdc.org>;  
Vickie Patton <vpatton@edf.org>; Michael J. Myers  
</o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; Joanne Spalding  
<joanne.spalding@sierraclub.org>  
Cc: khenderson@nrdc.org  
<khenderson@nrdc.org>  
Bcc:  
Subject: Invitation: CONF Call (2030131#): Oil & Gas NSPS @ Tue Jan 28, 2014 9am - 10am  
(environmental.law@sierraclub.org)  
Date: Fri Jan 24 2014 12:24:33 EST  
Attachments: invite.ics

---

more details »

CONF Call (2030131#): Oil & Gas NSPS  
When Tue Jan 28, 2014 9am – 10am Pacific Time  
Where Call-in Number: 866-501-6174, Passcode: 2030131# (map)  
Calendar environmental.law@sierraclub.org  
Who • Environmental Law - organizer  
• Natalie Spiegel - creator  
• David Doniger  
• Vickie Patton  
• Mike  
• Joanne Spalding  
• khenderson@nrdc.org - optional

Going? Yes - Maybe - No more options »

Invitation from Google Calendar

You are receiving this courtesy email at the account michael.myers@ag.ny.gov because you are an attendee of this event.

To stop receiving future notifications for this event, decline this event. Alternatively you can sign up for a Google account at <https://www.google.com/calendar/> and control your notification settings for your entire calendar.

Document ID: 0.7.691.555294-000001

Owner: Environmental Law <environmental.law@sierraclub.org>

Filename: invite.ics

Last Modified: Fri Jan 24 12:24:33 EST 2014

---

**CONF Call (2030131#): Oil & Gas NSPS  
Call-in Number: 866-501-6174, Passcode: 2030131#  
20140128T170000Z  
CONFIRMED**

**PRODID**

-//Google Inc//Google Calendar 70.9054//EN

**Version**

2.0

**CALSCALE**

GREGORIAN

**METHOD**

REQUEST

**Start Date/Time**

20140128T170000Z

**End Date/Time**

20140128T180000Z

**DTSTAMP**

20140124T172433Z

**ORGANIZER** ( CN=Environmental Law )

mailto:environmental.law@sierraclub.org

**UID**

11jqc4evtukgrek2ue1nlthr5g@google.com

**Attendee**

**mailto:ddoniger@nrdc.org**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:vpatton@edf.org**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:khenderson@nrdc.org**  
*Role* OPT-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:michael.myers@ag.ny.gov**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:joanne.spalding@sierraclub.org**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:environmental.law@sierraclub.org**

*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**CREATED**

20140124T172432Z

**Description**

View your event at [http://www.google.com/calendar/event?action=VIEW&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los\\_Angeles&hl=en](http://www.google.com/calendar/event?action=VIEW&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los_Angeles&hl=en).

**Last Modified**

20140124T172432Z

**Location**

Call-in Number: 866-501-6174, Passcode: 2030131#

**Sequence Number**

0

**Status**

CONFIRMED

**Summary**

CONF Call (2030131#): Oil & Gas NSPS

**Time Transparency**

OPAQUE



action=RESPOND&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&rst=2&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los\_Angeles&hl=en> more options »  
<<https://www.google.com/calendar/event?>

action=VIEW&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los\_Angeles&hl=en>

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You are receiving this courtesy email at the account michael.myers@ag.ny.gov because you are an attendee of this event.

To stop receiving future notifications for this event, decline this event. Alternatively you can sign up for a Google account at <https://www.google.com/calendar/> and control your notification settings for your entire calendar.

Document ID: 0.7.691.555298-000001

Owner: Environmental Law <environmental.law@sierraclub.org>

Filename: invite.ics

Last Modified: Fri Jan 24 12:24:39 EST 2014

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**CONF Call (2030131#): Oil & Gas NSPS  
Call-in Number: 866-501-6174, Passcode: 2030131#  
20140128T170000Z  
CONFIRMED**

**PRODID**

-//Google Inc//Google Calendar 70.9054//EN

**Version**

2.0

**CALSCALE**

GREGORIAN

**METHOD**

REQUEST

**Start Date/Time**

20140128T170000Z

**End Date/Time**

20140128T180000Z

**DTSTAMP**

20140124T172433Z

**ORGANIZER** ( CN=Environmental Law )

mailto:environmental.law@sierraclub.org

**UID**

11jqc4evtukgrek2ue1nlthr5g@google.com

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*Role* REQ-PARTICIPANT  
*RSVP* TRUE

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**mailto:michael.myers@ag.ny.gov**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:joanne.spalding@sierraclub.org**  
*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**Attendee**

**mailto:environmental.law@sierraclub.org**

*Role* REQ-PARTICIPANT  
*RSVP* TRUE

**CREATED**

20140124T172432Z

**Description**

View your event at [http://www.google.com/calendar/event?action=VIEW&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los\\_Angeles&hl=en](http://www.google.com/calendar/event?action=VIEW&eid=MTFqcWM0ZXZ0dWtncmVrMnVIMW5sdGhyNWcgbWljaGFibC5teWVyc0BhZy5ueS5nb3Y&tok=MzljZW52aXJvbm1lbnRhbC5sYXdAc2llcnJhY2x1Yi5vcmcwZGJiODgzYjdiOThiMGMzYmQ4NzJINzdiMzFhZWRjYTI5YjRjYWQ0&ctz=America/Los_Angeles&hl=en).

**Last Modified**

20140124T172432Z

**Location**

Call-in Number: 866-501-6174, Passcode: 2030131#

**Sequence Number**

0

**Status**

CONFIRMED

**Summary**

CONF Call (2030131#): Oil & Gas NSPS

**Time Transparency**

OPAQUE

Document ID: 0.7.691.555308

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Environmental Law  
<environmental.law@sierraclub.org>  
Cc:  
Bcc:  
Subject: Accepted: Invitation: CONF Call (2030131#): Oil & Gas NSPS @ Tue Jan 28, 2014  
9am - 10am (environmental.law@sierraclub.org)  
Date: Fri Jan 24 2014 12:28:01 EST  
Attachments:

---

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Vickie Patton <vpatton@edf.org>;  
Henderson, Kelly <khenderson@nrdc.org>;  
natalie.spiegel@sierraclub.org <natalie.spiegel@sierraclub.org>  
Cc: Doniger, David <ddoniger@nrdc.org>;  
Joanne.Spalding@sierraclub.org  
<joanne.spalding@sierraclub.org>; Hoffer, Melissa (AGO)  
(melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Mon Jan 27 2014 12:13:50 EST  
Attachments:

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I invited Melissa (cc'd here) to join us on the call tomorrow. How about CATF?

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Friday, January 24, 2014 1:19 AM  
To: Michael J. Myers; 'Henderson, Kelly'; natalie.spiegel@sierraclub.org  
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Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program

Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005

202. 289. 2401 | khenderson@nrdc.org | www.nrdc.org

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David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
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David Doniger  
NRDC  
202 321-3435

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Joanne

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Joanne Spalding

Senior Managing Attorney

Sierra Club

85 Second Street

San Francisco, CA 94105

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510-612-4062 (c)

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Sierra Club

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Joanne Spalding

Senior Managing Attorney

Sierra Club

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San Francisco, CA 94105

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Natalie Spiegel

Legal Assistant

Sierra Club Environmental Law Program

85 Second Street, Second Floor

San Francisco, CA 94105

[natalie.spiegel@sierraclub.org](mailto:natalie.spiegel@sierraclub.org)

415-977-5638

From: Joanne Spalding  
<joanne.spalding@sierraclub.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc: Vickie Patton <vpatton@edf.org>;  
Henderson, Kelly <khenderson@nrdc.org>;  
natalie.spiegel@sierraclub.org  
<natalie.spiegel@sierraclub.org>; Doniger, David  
<ddoniger@nrdc.org>; Hoffer, Melissa (AGO)  
(melissa.hoffer@state.ma.us) <melissa.hoffer@state.ma.us>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Mon Jan 27 2014 12:31:50 EST  
Attachments:

---

Good idea. I'll take care of that.

Joanne Spalding  
415-977-5725 (o)  
510-612-4062 (c)

Sent from my iPhone

On Jan 27, 2014, at 9:14 AM, "Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote:

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Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'  
Subject: RE: Catching up on oil and gas NSPS

I have a meeting on Monday from 1230-130. Tues. I'm free during the 12-1 slot.

From: Henderson, Kelly [mailto:khenderson@nrdc.org]  
Sent: Thursday, January 23, 2014 1:38 PM  
To: natalie.spiegel@sierraclub.org  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'; Michael J. Myers  
Subject: RE: Catching up on oil and gas NSPS

Hi Natalie,

Out of the times listed below, David is available:

Monday 1/27 from 12-1:30pm or Tuesday 1/28 from 12-1pm.

Best,

Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program

Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005

202. 289. 2401 | khenderson@nrdc.org | www.nrdc.org

Blog: <http://switchboard.nrdc.org/blogs/khenderson/>

From: Natalie Spiegel [mailto:natalie.spiegel@sierraclub.org]  
Sent: Thursday, January 23, 2014 12:51 PM  
To: Joanne Spalding  
Cc: Vickie Patton; Michael J. Myers; Doniger, David  
Subject: Re: Catching up on oil and gas NSPS

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Cc: Vickie Patton  
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David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]

Sent: Friday, January 17, 2014 5:34 PM

To: Doniger, David

Cc: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov); [vpatton@edf.org](mailto:vpatton@edf.org)

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David Doniger

NRDC

202 321-3435

From: Joanne Spalding [<mailto:joanne.spalding@sierraclub.org>]

Sent: Friday, January 17, 2014 04:49 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Vickie Patton <vpatton@edf.org>  
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Joanne Spalding

Senior Managing Attorney

Sierra Club

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Natalie Spiegel

Legal Assistant

Sierra Club Environmental Law Program

85 Second Street, Second Floor

San Francisco, CA 94105

[natalie.spiegel@sierraclub.org](mailto:natalie.spiegel@sierraclub.org)

415-977-5638

From: Hoffer, Melissa (AGO)  
<melissa.hoffer@state.ma.us>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>; Vickie  
Patton <vpatton@edf.org>; Henderson, Kelly  
<khenderson@nrdc.org>; natalie.spiegel@sierraclub.org  
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Cc: Doniger, David <ddoniger@nrdc.org>;  
Joanne.Spalding@sierraclub.org <joanne.spalding@sierraclub.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Mon Jan 27 2014 18:49:37 EST  
Attachments:

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Thank you all; I will join.

Best,  
Melissa

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Joanne.Spalding@sierraclub.org <joanne.spalding@sierraclub.org>  
Bcc:  
Subject: RE: Catching up on oil and gas NSPS  
Date: Mon Jan 27 2014 19:34:15 EST  
Attachments:

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Terrific Melissa! And, Mike, I would very much welcome CATF's participation.

-----Original Message-----

From: Hoffer, Melissa (AGO) [mailto:melissa.hoffer@state.ma.us]  
Sent: Monday, January 27, 2014 4:50 PM  
To: Michael J. Myers; Vickie Patton; 'Henderson, Kelly'; natalie.spiegel@sierraclub.org  
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<ddoniger@nrdc.org>  
Bcc:  
Subject: Re: Catching up on oil and gas NSPS  
Date: Mon Jan 27 2014 19:36:45 EST  
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Conrad will join for CATF.

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I invited Melissa (cc'd here) to join us on the call tomorrow. How about CATF?

From: Vickie Patton [mailto:vpatton@edf.org]  
Sent: Friday, January 24, 2014 1:19 AM  
To: Michael J. Myers; 'Henderson, Kelly'; natalie.spiegel@sierraclub.org  
Cc: Doniger, David; 'Joanne.Spalding@sierraclub.org'  
Subject: RE: Catching up on oil and gas NSPS

Tuesday at 12 eastern time works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Thursday, January 23, 2014 1:49 PM  
To: 'Henderson, Kelly'; natalie.spiegel@sierraclub.org<mailto:natalie.spiegel@sierraclub.org>  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'  
Subject: RE: Catching up on oil and gas NSPS

I have a meeting on Monday from 1230-130. Tues. I'm free during the 12-1 slot.

From: Henderson, Kelly [mailto:khenderson@nrdc.org]  
Sent: Thursday, January 23, 2014 1:38 PM  
To: natalie.spiegel@sierraclub.org<mailto:natalie.spiegel@sierraclub.org>  
Cc: Doniger, David; Vickie Patton; 'Joanne.Spalding@sierraclub.org'; Michael J. Myers  
Subject: RE: Catching up on oil and gas NSPS

Hi Natalie,

Out of the times listed below, David is available:

Monday 1/27 from 12-1:30pm or Tuesday 1/28 from 12-1pm.

Best,  
Kelly

Kelly Henderson | Program Assistant- Climate & Clean Air Program Natural Resources Defense Council | 1152 15th St. N.W. Suite 300, Washington, DC 20005 202. 289. 2401| khenderson@nrdc.org<mailto:khenderson@nrdc.org>| www.nrdc.org<http://www.nrdc.org/>  
Blog: <http://switchboard.nrdc.org/blogs/khenderson/>

From: Natalie Spiegel [mailto:natalie.spiegel@sierraclub.org]  
Sent: Thursday, January 23, 2014 12:51 PM  
To: Joanne Spalding  
Cc: Vickie Patton; Michael J. Myers; Doniger, David  
Subject: Re: Catching up on oil and gas NSPS

Hi all,

Please see the times below for early next week when Joanne is available. Once I find the time with most availability I will send around a calendar invite and conference line. Thanks!

Monday (1/27): 9am - 10am, 11:30am - 1:30pm, 4pm - 5pm Tuesday (1/28): 9am - 1pm

- Natalie

On Thu, Jan 23, 2014 at 9:18 AM, Joanne Spalding <joanne.spalding@sierraclub.org<mailto:joanne.spalding@sierraclub.org>> wrote:  
Hi all,

We had tentatively scheduled this call for today, but unfortunately, I forgot to calendar it or send an invitation. My apologies.

I'm copying Natalie so she can reschedule at a time that works for all of us, perhaps early next week.

Joanne

On Sun, Jan 19, 2014 at 6:37 AM, Vickie Patton <vpatton@edf.org<mailto:vpatton@edf.org>> wrote:

The Thursday window works for me as well.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov<mailto:Michael.Myers@ag.ny.gov>]  
Sent: Saturday, January 18, 2014 7:05 PM  
To: 'Doniger, David'; Joanne Spalding  
Cc: Vickie Patton  
Subject: RE: Catching up on oil and gas NSPS

I'm free during that window Thurs. also.

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, January 17, 2014 6:56 PM  
To: Joanne Spalding  
Cc: Michael J. Myers; vpatton@edf.org<mailto:vpattton@edf.org>  
Subject: RE: Catching up on oil and gas NSPS

I am free those Thursday times. Not Weds afternoon. (The walls are closing in...)

David D. Doniger  
Policy Director, Climate and Clean Air Program Natural Resources Defense Council  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403<tel:%28202%29%20289-2403>  
Cell: (202) 321-3435<tel:%28202%29%20321-3435>  
Fax: (202) 289-1060<tel:%28202%29%20289-1060>  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at www.nrdc.org<http://www.nrdc.org/>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org]  
Sent: Friday, January 17, 2014 5:34 PM  
To: Doniger, David  
Cc: michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov>; vpatton@edf.org<mailto:vpattton@edf.org>  
Subject: Re: Catching up on oil and gas NSPS

I'm also open Wednesday 3-5 and Thursday 11:30-1:30 ET.

On Fri, Jan 17, 2014 at 1:59 PM, Doniger, David <ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>> wrote:

I'm jammed on Tuesday. But if Tuesday works for others, please go ahead.

David Doniger

NRDC

202 321-3435<tel:202%20321-3435>

From: Joanne Spalding [mailto:joanne.spalding@sierraclub.org<mailto:joanne.spalding@sierraclub.org>]  
Sent: Friday, January 17, 2014 04:49 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov<mailto:Michael.Myers@ag.ny.gov>>; Doniger, David;  
Vickie Patton <vpattton@edf.org<mailto:vpattton@edf.org>>  
Subject: Catching up on oil and gas NSPS

Hi Mike,

The NGOs had a call earlier today to discuss the status and next steps on the oil and gas NSPS. We'd

like to touch base with you to do the same. Is there a time Tuesday that works for you? I'm open except 1-2 and 4-5 ET.

Joanne

--

Joanne Spalding  
Senior Managing Attorney  
Sierra Club  
85 Second Street  
San Francisco, CA 94105  
415-977-5725<tel:415-977-5725> (o)  
510-612-4062<tel:510-612-4062> (c)

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--

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Legal Assistant  
Sierra Club Environmental Law Program  
85 Second Street, Second Floor  
San Francisco, CA 94105  
natalie.spiegel@sierraclub.org<mailto:natalie.spiegel@sierraclub.org>  
415-977-5638

--

Joanne Spalding  
Senior Managing Attorney  
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85 Second Street  
San Francisco, CA 94105  
415-977-5725 (o)  
510-612-4062 (c)

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From: Rebecca Bar, Ceres <bar@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Policy Working Group Gears Up for Federal Tax and Regulatory Efforts  
Date: Tue Jan 28 2014 12:36:53 EST  
Attachments:

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To view this email as a web page, go here.

INCR a project of Ceres  
INCR Bulletin-  
January 27, 2014

#### In the News

INCR Members Discuss "Getting Carbon out of Your Portfolio"

INCR Members, Trillium Asset Management and Green Century Funds, discuss fossil-free investment strategies for individual's investors in a Washington Post article.

[Read more...](#)

#### Tools & Materials

#### Updated INCR Membership Benefits Information

If you are new to INCR Network or want to make sure you're getting the most out of your membership, please review our updated INCR Membership Benefits 2 pager. If you have additional questions regarding your membership and its benefits, please contact the Investor Team Coordinator, Rebecca Bar.

[Learn more about INCR Membership Benefits](#)

#### Events

INCR Sustainable Stock Exchanges Working Group Call

Thursday, January 30  
12:00 - 1:00 pm ET

The SSE Working group will meet this week to discuss the formal launch of our Listing Standards work scheduled for late February. Evan Harvey, Managing Director of Corporate Sustainability at NASDAQ OMX will brief attendees on the creation of a Sustainability Working Group at the World Federation of Exchanges, among other items. Register here. For more information, contact Tracey Rembert, Senior Manager, Investor Engagement, Investor Program.

Shareholder Initiative on Climate and Sustainability (SICS) Working Group Call

Wednesday, February 5

2:00 - 3:00 pm ET

The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change-related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge, Director, Shareholder Engagement, Investor Program.

#### Policy Working Group Gears Up for Federal Tax and Regulatory Efforts

Coal Power Plant 1 Coming into an election year and the ongoing negotiations toward an international GHG emissions reduction agreement in 2015, INCR members held their monthly Policy Working Group call on January 21st. They were joined by the Solar Energy Industries Association's Director of Federal Affairs, Emily Duncan, and Peter Shattuck, the head of Market Initiatives at Environment Northeast. Peter and Emily touched on the two developments most pivotal to federal policy (and in turn, international policy) for the coming year: the Carbon Pollution Standards for power plants and the debate over tax reform.

The Carbon Pollution Standards are a cornerstone of the President's Climate Action Plan, and key to his administration's commitment at the international level to reduce U.S. greenhouse gas emissions by 17% below 2005 levels by 2020. The tax code is the primary mechanism through which the federal government incentivizes renewable energy deployment. Faltering efforts to move tax reform have left one key incentive, the Production Tax Credit for wind, expired and leave the future of other key incentives, such as the Investment Tax Credit, uncertain.

On the regulatory front, the Environmental Protection Agency enters a key phase as it develops standards for existing power plants, where most emissions reduction potential lies. Stay up to speed on these developments and learn about opportunities for engagement with policymakers via monthly policy working group calls. Contact Brandon Smithwood with questions or to be added to the distribution list.

#### Investors Raise New Set of Issues with Companies on Public Policy and Climate

Investors have engaged companies for over 20 years on climate change. This year, as part of a larger investor climate initiative, "Raising the Bar", there is a new set of shareholder resolutions challenging companies to evaluate their public policy advocacy related to climate change.

One category of resolutions presses fossil fuel companies and major energy producers to review their public policy positions and lobbying activities related to energy policy and climate change. Timothy Smith, Director of Shareowner Engagement at Walden Asset Management, a leader in the campaign notes, "There is a widespread public perception that energy companies have regularly opposed new legislation or regulation addressing climate change. It is time for companies to evaluate their public policy positions and lobbying on climate and fully disclose the results to investors."

Recognizing the influence of trade associations like the U.S. Chamber of Commerce, which has spent more than \$1 billion on lobbying since 1998, the resolution addresses both direct advocacy by the companies, as well as through trade associations. Six companies have received such a resolution: American Electric Power, Chevron, ConocoPhillips, Devon Energy, Dominion Resources, and Exxon Mobil. Some have challenged the resolution at the Securities and Exchange Commission.

A second category of resolution calls for companies to review lobbying, including at the state level, and was filed with companies that provided financial support to the American Legislative Exchange Council ("ALEC"). ALEC has been actively promoting a wide range of public policies by creating model legislation for submission to state legislatures. Of particular concern for sustainable investors is ALEC's campaign against regulations and legislation supporting renewable energy.

ALEC's broad-based partisan agenda and controversial policy positions have prompted a review of this relationship by numerous companies. To date over 50 companies have severed ties to ALEC.

Companies receiving this resolution include: Dominion Resources, Microsoft, Occidental Petroleum, Pfizer, Time Warner Cable, United Parcel Service, and Visa. Filers include the pension plans of New York State and the State of Connecticut, various foundations, religious investors and sustainable investment firms.

View a current list of 2014 filings, including public policy and other climate and sustainability resolutions filed by INCR members and partners. For more information on the initiative or the resolutions, contact Timothy Smith or visit the Walden website.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

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99 Chauncy Street

Boston, MA 02111

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: tballo@earthjustice.org  
<tballo@earthjustice.org>; 'Tomas Carbonell'  
(tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>  
Bcc:  
Subject: Wood Heaters Proposal  
Date: Fri Jan 31 2014 10:14:16 EST  
Attachments:

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Just checked the Fed. Reg. cite. It will be published on Monday.

[http://www.ofr.gov/inspection.aspx#reg\\_E](http://www.ofr.gov/inspection.aspx#reg_E)

I assume we'll hear soon from Eileen re. whether we're going forward with our 2 pm call or not.

From: Tomas Carbonell <tcarbonell@edf.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
tballo@earthjustice.org <tballo@earthjustice.org>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>  
Bcc:  
Subject: RE: Wood Heaters Proposal  
Date: Fri Jan 31 2014 10:18:16 EST  
Attachments:

---

Thanks for the heads up, Mike, that's good to know

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 31, 2014 10:14 AM  
To: tballo@earthjustice.org; Tomas Carbonell  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us)  
Subject: Wood Heaters Proposal

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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: 'McDonough, Eileen (ENRD)'  
(Eileen.McDonough@usdoj.gov) <eileen.mcdonough@usdoj.gov>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>;  
tballo@earthjustice.org <tballo@earthjustice.org>; 'Tomas  
Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>; 'Menotti,  
David' (DMenotti@crowell.com) <dmenotti@crowell.com>;  
dchung@crowell.com <dchung@crowell.com>; Jordan, Scott  
(Jordan.Scott@epa.gov) <jordan.scott@epa.gov>  
Bcc:  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Fri Jan 31 2014 13:13:36 EST  
Attachments:

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From: Menotti, David <dmenotti@crowell.com>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
<eileen.mcdonough@usdoj.gov>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>;  
tballo@earthjustice.org <tballo@earthjustice.org>; 'Tomas  
Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>; Chung,  
David <dchung@crowell.com>; Jordan, Scott  
(Jordan.Scott@epa.gov) <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Fri Jan 31 2014 13:16:58 EST  
Attachments:

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Mike:

My understanding is that the call is happening, as scheduled. Talk to you in 45 minutes.

David

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 31, 2014 1:14 PM  
To: 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas  
Carbonell' (tcarbonell@edf.org); Menotti, David; Chung, David; Jordan, Scott (Jordan.Scott@epa.gov)  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

From: Jordan, Scott <jordan.scott@epa.gov>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
<eileen.mcdonough@usdoj.gov>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>;  
tballo@earthjustice.org <tballo@earthjustice.org>; 'Tomas  
Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>; 'Menotti,  
David' (DMenotti@crowell.com) <dmenotti@crowell.com>;  
dchung@crowell.com <dchung@crowell.com>  
Bcc:  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Fri Jan 31 2014 13:16:59 EST  
Attachments:

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Yes. I have some information and EPA's response to Plaintiffs' latest settlement proposal.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 31, 2014 1:14 PM  
To: 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas  
Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); dchung@crowell.com;  
Jordan, Scott  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>; tballo@earthjustice.org <tballo@earthjustice.org>; 'Tomas Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>  
Cc:  
Bcc:  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Fri Jan 31 2014 13:57:56 EST  
Attachments:

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If you want to do a quick de-brief afterwards, we can use my #: 866-394-2346, code 4149570819

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]  
Sent: Friday, January 31, 2014 1:17 PM  
To: Michael J. Myers; 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); chung@crowell.com  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

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Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); chung@crowell.com; Jordan, Scott  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

From: Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>  
To: Tomas Carbonell <tcarbonell@edf.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; tballo@earthjustice.org  
<tballo@earthjustice.org>  
Cc:  
Bcc:  
Subject: RE: Wood Heaters Proposal  
Date: Fri Jan 31 2014 14:09:23 EST  
Attachments:

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Talk a little?

Fred Augenstern

Assistant Attorney General

Environmental Protection Division

Office of the Attorney General

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Boston, Massachusetts 02108

Ph: 617-963-2427 (direct)

(or 617-727-2200 x.2427)

Fax: 617-727-9665

E-mail: fred.augenstern@state.ma.us

From: Tomas Carbonell [mailto:tcarbonell@edf.org]  
Sent: Friday, January 31, 2014 10:18 AM  
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From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Augenstern, Fred (AGO)  
<fred.augenstern@state.ma.us>; Tomas Carbonell  
<tcarbonell@edf.org>; tballo@earthjustice.org  
<tballo@earthjustice.org>  
Cc:  
Bcc:  
Subject: RE: Wood Heaters Proposal  
Date: Fri Jan 31 2014 14:10:22 EST  
Attachments:

---

I'm on the line: 866-394-2346, code 4149570819

From: Augenstern, Fred (AGO) [mailto:fred.augenstern@state.ma.us]  
Sent: Friday, January 31, 2014 2:09 PM  
To: Tomas Carbonell; Michael J. Myers; tballo@earthjustice.org  
Subject: RE: Wood Heaters Proposal

Talk a little?

Fred Augenstern

Assistant Attorney General

Environmental Protection Division

Office of the Attorney General

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Boston, Massachusetts 02108

Ph: 617-963-2427 (direct)

(or 617-727-2200 x.2427)

Fax: 617-727-9665

E-mail: fred.augenstern@state.ma.us

From: Tomas Carbonell [mailto:tcarbonell@edf.org]  
Sent: Friday, January 31, 2014 10:18 AM  
To: Michael J. Myers; tballo@earthjustice.org

Cc: Augenstern, Fred (AGO)  
Subject: RE: Wood Heaters Proposal

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Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us)  
Subject: Wood Heaters Proposal

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From: Vickie Patton <vpatton@edf.org>  
To: Timothy Ballo  
<tballo@earthjustice.org>; Janice Nolen  
<janice.nolen@lung.org>; Tomas Carbonell <tcarbonell@edf.org>;  
Michael J. Myers </o=lawnet/ou=first administrative  
group/cn=recipients/cn=michaelmyers>; nancy.alderman@ehhi.org  
<nancy.alderman@ehhi.org>; David Presley  
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Cc:  
Bcc:  
Subject: NSPS Proposal for Wood Combustion Devices in Monday's Federal Register  
Date: Sat Feb 01 2014 22:46:30 EST  
Attachments: 2014-00409.pdf

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Please see attached. Best wishes, Vickie

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Part III

## Environmental Protection Agency

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40 CFR Part 60

Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters; Proposed Rule

**ENVIRONMENTAL PROTECTION  
AGENCY****40 CFR Part 60**

[EPA-HQ-OAR-2009-0734; FRL-9904-05-OAR]

RIN 2060-AP93

**Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** The EPA is proposing to amend the Standards of Performance for New Residential Wood Heaters and to add two new subparts: Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces and Standards of Performance for New Residential Masonry Heaters. This proposal is aimed at achieving several objectives for new residential wood heaters and other wood-burning appliances, including applying updated emission limits that reflect the current best systems of emission reduction; eliminating exemptions over a broad suite of residential wood combustion devices; strengthening test methods as appropriate; and streamlining the certification process. This proposal does not include any requirements for heaters solely fired by gas, oil or coal. In addition, it does not include any requirements associated with appliances that are already in use. The EPA continues to encourage state, local, tribal, and consumer efforts to changeout (replace) older heaters with newer, cleaner, more efficient heaters, but that is not part of this federal rulemaking.

Particulate pollution from wood heaters is a significant national air pollution problem and human health issue. Health benefits associated with these proposed regulations are valued to be much greater than the cost to manufacture cleaner, lower emitting appliances. These proposed regulations would significantly reduce particulate matter (PM) emissions and many other pollutants from these appliances, including carbon monoxide (CO), volatile organic compounds (VOC), and hazardous air pollutants (HAP). Emissions from wood stoves occur near ground level in residential communities across the country, and setting these new requirements for cleaner stoves into the future will result in substantial reductions in exposure and improved public health.

**DATES:** Comments must be received on or before May 5, 2014. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before March 5, 2014.

**Public Hearing.** The EPA will hold a public hearing on this proposed rule on February 26, 2014, in Boston, Massachusetts. The hearing will be at the following location: EPA New England Regional Office, 5 Post Office Square, Suite 100, Leighton Hall, Boston, MA. For directions and public transportation, visit: <http://www.epa.gov/region1/directions/>. Please note that 5 Post Office Square is a federal building, and proper identification is required for entry.

The public hearing will provide interested parties the opportunity to present data, views or arguments concerning the proposed rule. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. Written comments must be postmarked by the last day of the 90-day comment period.

If you would like to present oral testimony at the hearing, please register on-line (preferred method for registering) at <http://www2.epa.gov/residential-wood-heaters> no later than February 19, 2014, to request a general time slot for you to speak and any special equipment. If this method is not available to you, please notify Mr. David Cole no later than February 19, 2014, by email: [cole.david@epa.gov](mailto:cole.david@epa.gov); or by telephone: (919) 541-5565. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing. The public hearing will begin each day at 9 a.m. (local time) and continue into the evening until 7 p.m. (local time). The EPA will make every effort to accommodate all other speakers who arrive and register before 7 p.m. (local time) on the day of the hearing. The EPA is scheduling lunch breaks from 12:30 until 2 p.m. (local time).

Testimony will be limited to five (5) minutes for each commenter to address the proposal. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations unless we receive special requests in advance. The EPA encourages commenters to provide written versions of their oral testimonies

either electronically on computer disk or CD-ROM or in paper copy.

The hearing schedule, including lists of speakers, will be posted on the EPA's Web page for the proposal at: <http://www2.epa.gov/residential-wood-heaters> prior to the hearing. Verbatim transcript of the hearing and written statements will be included in the rulemaking docket.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0734, by one of the following methods:

- [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
- **Email:** [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov), Attention Docket ID No. EPA-HQ-OAR-2009-0734.
- **Fax:** (202) 566-9744, Attention Docket ID No. EPA-HQ-OAR-2009-0734.
- **Mail:** United States (U.S.) Postal Service, send comments to EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA-HQ-OAR-2009-0734, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20004. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for EPA, 735 17th St. NW., Washington, DC 20503.
- **Hand Delivery:** EPA Docket Center, EPA West (Air Docket), Room 3334, 1301 Constitution Avenue NW., Washington, DC, Attention Docket ID Number EPA-HQ-OAR-2009-0734. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0734. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of

your comment. If you send an email comment directly to the EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at [www.epa.gov/epahome/dockets.htm](http://www.epa.gov/epahome/dockets.htm). For additional instructions on submitting comments, go to section I.D.2 of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** The EPA has established a docket for this rulemaking under Docket ID Number EPA-HQ-OAR-2009-0734. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Mr. Gil Wood, Office of Air Quality Planning and Standards, Outreach and Information Division, Community and Tribal Programs Group (C304-03), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5272; fax number: (919) 541-0242; email address: [wood.gil@epa.gov](mailto:wood.gil@epa.gov).

**SUPPLEMENTARY INFORMATION:** The information in this preamble is organized as follows:

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## I. General Information

### A. Executive Summary

#### 1. Purpose of the Regulatory Action

The purpose of this action is to propose amendments to the Standards of Performance for New Residential Wood Heaters (40 CFR part 60, subpart AAA) and to add two new subparts: Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces and Standards of Performance for New Residential Masonry Heaters (40 CFR part 60, subparts QQQQ and RRRR). This proposal was developed following a Clean Air Act (CAA) section 111(b)(1)(B) periodic review of the current residential wood heaters new source performance standards (NSPS). We concur with numerous stakeholders that the current body of evidence justifies revision of the current residential wood heaters NSPS to capture the improvements in performance of such units and to expand the applicability of this NSPS to include additional wood-burning residential heating devices that are in the market. The proposed changes are aimed at achieving several objectives, including applying updated emission limits that reflect the current best systems of emission reduction (BSER); eliminating exemptions over a broad suite of residential wood combustion devices; strengthening test methods as appropriate; and streamlining the certification process. This proposal does not include any requirements for heaters solely fired by gas, oil or coal. In addition, it does not include any requirements associated with wood heaters or other wood-burning appliances that are already in use. The EPA continues to encourage state, local, tribal, and consumer efforts to changeout (replace) older heaters with newer, cleaner, more efficient heaters, but that is not part of this federal rulemaking.

These revisions will help reduce the health impacts of fine particle pollution, of which wood smoke is a contributing factor in many areas. Residential wood smoke contains fine particles with an aerodynamic diameter of 2.5 micrometers or less (PM<sub>2.5</sub>), CO, toxic air pollutants (e.g., benzene and formaldehyde), and climate-forcing emissions (e.g., methane and black carbon). Residential wood smoke can increase PM<sub>2.5</sub> to levels that cause significant health concerns. Populations that are at greater risk for experiencing health effects related to fine particle exposures include older adults, children and individuals with pre-existing heart

or lung disease. Each year, smoke from wood heaters contributes hundreds of thousands of tons of fine particles throughout the country—mostly during the winter months. Nationally, residential wood combustion accounts for 44 percent of total stationary and mobile polycyclic organic matter (POM) emissions, nearly 25 percent of all area source air toxics cancer risks and 15 percent of noncancer respiratory effects.<sup>1</sup> Residential wood smoke causes many counties in the U.S. to either exceed the EPA's health-based national ambient air quality standards (NAAQS) for fine particles or places them on the cusp of exceeding those standards.<sup>2</sup> To the degree that older, higher emitting, less efficient wood heaters are replaced by newer heaters that meet the requirements of this rule, or better, the emissions would be reduced, the efficiencies would be increased and fewer health impacts should occur.

This action is conducted under the authority of section 111 of the CAA, "Standards of Performance for New Stationary Sources," under which the EPA establishes federal standards of performance for new sources within source categories that cause or contribute significantly to air pollution, which may reasonably be anticipated to endanger public health or welfare. Consistent with section 111(h), if it is not feasible to prescribe or enforce a standard of performance, the Administrator may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, that reflects the best 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.

## 2. Summary of the Major Provisions of This Proposed Regulatory Action

In response to the results of the NSPS review, we are proposing to amend 40 CFR part 60, subpart AAA, Standards of Performance for New Residential Wood Heaters. The current regulation applies to affected appliances manufactured after 1988. The current emission limits would remain in effect for the heaters

and model lines manufactured before the effective date of this rule until their current EPA certification expires (maximum of 5 years) or is revoked. After the certification expires or is revoked, these heaters and other new heaters would have to meet updated emission standards. We propose to broaden the applicability of the regulation beyond adjustable burn rate wood heaters (the focus of the original regulation), to specifically include all single burn rate wood heaters/stoves and pellet heaters/stoves. (Some pellet heaters/stoves were not affected by the 1988 regulation.) Note that this preamble uses the following terms interchangeably: heaters, stoves and heaters/stoves. Heaters/stoves and model lines manufactured after the effective date of the rule would be required to meet PM standards.

As with the 1988 regulation, the source category covered by this NSPS is fundamentally different from the typical NSPS source category in several ways. For example, most NSPS source categories focus on industrial or commercial facilities, and typically these heaters are installed and operated in residences, not industrial or commercial facilities. Also, residential wood heaters, hydronic heaters, forced-air furnaces, and most masonry heaters are mass-produced consumer items, rather than industrial processes typically regulated by NSPS. Therefore, as in 1988, we are proposing that manufacturers participate in a certification program that tests a representative heater per model line rather than requiring testing each heater. If the representative heater meets the applicable emission limits, the entire model line may be certified and the manufacturer would not be required to test every heater. Individual heaters within the model line would still be subject to all other requirements, including labeling and operational requirements. Manufacturers would be required to have quality assurance programs to ensure that all heaters within the model line conform to the certified design and meet the applicable emission limits. The EPA would continue to have the authority to conduct audits to ensure compliance. We ask for comments on all aspects of this approach, especially whether more than one representative heater should be tested prior to certification of the model line.

The 1988 regulation also addressed some of the specific characteristics of this source category by developing a two-step compliance approach that provided a reasonable, phased implementation of emission limits for

manufacturers. We believe such an approach is prudent this time also to allow manufacturers lead time to develop, test, field evaluate and certify current technologies across their consumer product lines. In 1988, there were "logjam" concerns about the capacity of accredited laboratories to conduct certifications tests and time for the EPA to review the tests and adequately assure compliance if all the NSPS requirements were to be immediate. Those concerns have been expressed this time also. Thus, upon the effective date of this rule, new heaters/stoves would be required to meet Step 1. Five years later, new heaters/stoves would be required to meet Step 2. The rule also would require that each unit be equipped with a permanent NSPS label. The two-step approach would apply to all the heater types addressed in this rulemaking except for masonry heaters. For masonry heaters, we are not proposing a second more stringent emission limit.

Additional requirements would apply to entities other than the manufacturer. The wood heater test laboratory would be subject to quality assurance requirements. The rule would continue to require the proper burn practices that currently apply to the owner or operator of a wood heating appliance. In addition, new pellet heater/stove owners and operators would be required to use only the grade of licensed pellet fuels that are included in the heater/stove certification tests, or better. We are proposing to streamline the current enforcement and audit provisions of the current subpart to reflect changes in industry practices and development of new tools and procedures. We are proposing improvements to the previous test methods as well as new test methods.

We are also proposing new subpart QQQQ, which would apply to new wood-fired residential hydronic heaters and forced-air furnaces, and new subpart RRRR, which would apply to new residential masonry heaters. These new subparts are being proposed to address the remaining heater appliance types in the 1987 residential wood heater source category listing that were not regulated by the 1988 NSPS. Both subparts are designed using principles similar to those in subpart AAA, *i.e.*, certification testing of a representative unit in a model line, label requirements, associated quality assurance requirements and phased implementation. Subpart RRRR has some additional features to address very small volume manufacturers, including a proposed compliance extension and the ability to use a software certification

<sup>1</sup> *Strategies for Reducing Residential Wood Smoke*. EPA-456/B-13-001, March 2013. Prepared by Outreach and Information Division, Air Quality Planning Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711. pp. 4-5.

<sup>2</sup> Air Quality and Emissions Data; Supporting Information for the Residential Wood Heater New Source Performance Standard, August 14, 2013.

approach rather than a laboratory emission test.

The proposed PM standards for subparts QQQQ and RRRR would be implemented in two steps. For subpart QQQQ, upon the effective date of the rule, hydronic heaters would be required to meet a Step 1 PM limit of 0.32 pound per million British thermal unit (lb/MMBtu) output and forced-air furnaces would be required to meet a Step 1 PM limit of 0.93 lb/MMBtu heat output. Five years after the effective date of the rule, both hydronic heaters and forced-air furnaces would be required to meet a Step 2 PM limit of 0.06 lb/MMBtu heat output. For subpart RRRR (masonry heaters), upon the effective date of the rule, large manufacturers (defined as manufacturers constructing greater than

or equal to 15 masonry heaters per year) would be required to meet a PM limit of 0.32 lb/MMBtu heat output. Five years after the effective date of the rule, small volume masonry heater manufacturers (defined as manufacturers constructing less than 15 masonry heaters per year) would be required to meet the 0.32 lb/MMBtu heat output PM limit.

3. Costs and Benefits

Consistent with Executive Order 13563, "Improving Regulation and Regulatory Review," we have estimated the cost and benefits of the proposed rule. The estimated net benefits of our proposed rule at a 3 percent discount rate are \$1.8 billion to \$4.1 billion or \$1.7 billion to \$3.7 billion at a 7 percent discount rate. The non-monetized benefits include 33,000 tons of CO

reductions; 3,200 tons of VOC reductions; reduced exposure to HAP, including formaldehyde, benzene, and POM; reduced climate effects due to reduced black carbon emissions; reduced ecosystem effects; and reduced visibility impairments. Table 1 is a summary of the results of the analysis per type of residential wood heater. We have provided estimates reflecting average annual impacts for the 2014 to 2022 timeframe, which are the implementation years for the options analyzed in the RIA for this proposal. Monetized benefits are not currently available for masonry heaters. We ask for emission and projected sales data per model that would help us prepare emission reduction estimates and corresponding monetized benefits estimates for masonry heaters.

TABLE 1—SUMMARY OF COMPLIANCE COSTS, MONETIZED BENEFITS, AND MONETIZED NET BENEFITS (2010 DOLLARS) BY TYPE OF HEATER IN THE 2014–2022 TIME FRAME FOR THE PROPOSED RULE

Type of heater	Total annualized costs (\$ millions)	Monetized benefits (\$ millions) <sup>a b</sup>	Monetized net benefits (\$ millions)
Wood stoves .....	\$4.2	\$62 to \$140 .....	\$62 to \$140.
Single burn rate stoves .....	0.9	\$290 to \$650 .....	\$290 to \$650.
Pellet stoves .....	3.5	\$19 to \$43 .....	\$19 to \$43.
Forced-air furnaces .....	2.3	\$1,000 to \$2,200 .....	\$1,000 to \$2,200.
Masonry heaters .....	0.3	N/A <sup>c</sup> .....	N/A.
Hydronic heating systems .....	4.5	\$480 to \$1,100 .....	\$480 to \$1,100.

<sup>a</sup> All estimates are for the time frame from 2014 to 2022 inclusive. These results include units anticipated to come online and the lowest cost disposal assumption. Total annualized costs are estimated at a 7 percent interest rate.

<sup>b</sup> Total monetized benefits are estimated at a 3 percent discount rate. The total monetized benefits reflect the human health benefits associated with reducing exposure to PM<sub>2.5</sub> through reductions of directly emitted PM<sub>2.5</sub>. It is important to note that the monetized benefits include many but not all health effects associated with PM<sub>2.5</sub> exposure. Benefits are shown as a range from Krewski et al. (2009) to Lepeule et al. (2012). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effect estimates by particle type. Because these estimates were generated using benefit-per-ton estimates, we do not break down the total monetized benefits into specific components.

<sup>c</sup> The monetized benefits for masonry heaters are not available because we do not have national estimates of the potential emission reductions.

B. Does this action apply to me?

The potentially regulated sources that are the subject of this proposal are listed in Table 2 of this preamble. Table 2 is

not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposed action. This standard, and any changes considered in this rulemaking,

would be directly applicable to sources as a federal program. Thus, federal, state, local and tribal government entities are not affected by this proposed action.

TABLE 2—POTENTIALLY REGULATED ENTITIES

Category	NAICS <sup>a</sup> Code	Examples of regulated entities
Residential Wood Heating ...	333414—Heating Equipment (except Warm Air Furnaces) Manufacturing.	Manufacturers, owners and operators of wood heaters, pellet heaters/stoves, hydronic heaters, and masonry heaters.
	333415—Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.	Manufacturers, owners and operators of forced-air furnaces.
	238140—Masonry Contractors .....	Manufacturers, owners, operators and testers of masonry heaters.
Testing Laboratories .....	541380—Testing Laboratories (except Medical, Veterinary).	Testers of wood heaters, pellet heaters/stoves, hydronic heaters and masonry heaters.

<sup>a</sup> North American Industry Classification System.

*C. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of this proposal, following signature by the EPA Administrator, will be posted at the following address: <http://www2.epa.gov/residential-wood-heaters>.

*D. What should I consider as I prepare my comments for the EPA?*

1. Submitting CBI

Do not submit information containing CBI to the EPA through [www.regulations.gov](http://www.regulations.gov) or email. Instead, clearly mark the part or all of the information that you claim to be CBI and send or deliver only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA-HQ-OAR-2009-0734. For CBI information on a disk or CD-ROM that you mail to the EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that you claim as CBI. In addition to one complete version of the comment that includes information claimed as CBI, you must submit a copy of the comment that does not contain the information claimed as CBI for inclusion in the public docket. If you submit a disk or CD-ROM that does not contain CBI, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. Respond to specific questions and organize comments by a section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at

your estimate in sufficient detail to allow it to be reproduced.

- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats or character assassination.
- Make sure to submit your comments by the comment period deadline.

**II. Background**

*A. What is the NSPS program?*

Under section 111 of the CAA, "Standards of Performance for New Stationary Sources," the EPA lists categories of sources that, in the EPA's judgment, cause or contribute significantly to air pollution, which may reasonably be anticipated to endanger public health or welfare pursuant to section 111(b)(1)(A), and then promulgates federal standards of performance for new sources within such categories under section 111(b)(1)(B). At the time the EPA proposes and establishes standards for certain pollutants for a source category, the EPA prepares an analysis of the potential costs and benefits associated with the NSPS, which includes the benefits from reductions in pollutants for which the standards do not set limits. For example, emission reductions associated with the requirements of this proposed rule will generate health benefits by reducing emissions of PM<sub>2.5</sub>, other criteria pollutants, such as CO, and non-criteria HAP. Consistent with section 111(h), if it is not feasible to prescribe or enforce a standard of performance, the Administrator may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best 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. The NSPS do not establish standards of performance for existing sources. However, numerous states have acted independent of this rule to address new and existing sources as part of state implementation plan (SIP) measures necessary to ensure attainment and maintenance of the NAAQS. Several examples are discussed in section II.E of this preamble.

The level of control prescribed by section 111 of the CAA historically has

been referred to as "Best Demonstrated Technology" or BDT. To better reflect that section 111 was amended in 1990 to clarify that "best systems" may or may not be "technology," the EPA is now using the term "best systems of emission reduction" or BSER. As was done previously in analyzing BDT, the EPA uses available information and considers the emissions reductions and incremental costs for different systems available at reasonable cost. The residential wood heaters source category is different from most NSPS source categories in that it is for mass-produced residential consumer products. Thus, important elements in determining that BSER include the significant costs and environmental impacts of delaying production while models with those systems are being designed, tested, field evaluated and certified. As noted earlier and discussed more fully later in this preamble, the 2-step approach that the EPA is proposing considers these factors. That is, for this rulemaking, the EPA has determined the appropriate emission limits and compliance deadlines that together are representative of BSER. Details of the BSER determinations are included in section V.B. of this preamble.

Section 111(b)(1)(B) of the CAA requires the EPA to periodically (every 8 years) review an NSPS unless it determines "that such review is not appropriate in light of readily available information on the efficacy of such standard." If needed, the EPA must revise the standards of performance to reflect improvements in methods for reducing emissions, including consideration of what emissions limitation is achieved in practice. Numerous stakeholders have suggested that the current body of evidence justifies the revision of the current residential wood heaters NSPS to capture the improvements in performance of such units and to expand the applicability of this NSPS to include additional residential wood-burning heating devices that are available today. The states of New York, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island and Vermont, as well as the Puget Sound Clean Air Agency, have filed in U.S. District Court in Washington, DC, to ask the court to order the EPA to promptly review, propose and adopt necessary updates to the NSPS for residential wood heaters. Likewise, the American Lung Association, the Environmental Defense Fund, the Clean Air Council, and Environment and Human Health, Inc., have filed a similar request. Also, some stakeholders have suggested that the

EPA develop additional NSPS to regulate residential heating devices that burn fuels other than or in addition to wood, *e.g.*, coal, corn or grass. This proposal does not include any requirements for heaters that solely burn fuels other than wood.

*B. Why was the original residential wood heaters NSPS developed?*

The development of the residential wood heater regulations began in the mid-1980s in response to the growing concern that wood smoke contributes to ambient air quality-related health problems. Several state and local governments developed their own regulations for wood heaters. Then, in response to a lawsuit filed by New York State and the Natural Resources Defense Council (NRDC), the EPA agreed to initiate a residential wood heaters NSPS rulemaking, with a schedule calling for final action by January 31, 1988. The original standard was developed using a regulatory negotiation process with the key stakeholders (the wood heating industry, state governments, and environmental and consumer groups) under the Federal Advisory Committee Act (FACA).

Pursuant to CAA section 111(b)(1)(A), the EPA listed the residential wood heater source category based on its determination that residential wood heaters cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare (52 FR 5065, February 18, 1987). The EPA also proposed regulations for residential wood heaters (52 FR 4994, February 18, 1987). The final standards were published on February 26, 1988 (53 FR 5860). At the time the original NSPS was proposed, the EPA estimated that a typical pre-NSPS conventional wood heater emits about 60 to 70 g/hr of PM and that a wood heater complying with the NSPS would emit 75 to 86 percent less than conventional wood heaters.

*C. What are the requirements of the current 1988 NSPS?*

The current subpart AAA defines a wood heater as an enclosed, wood-burning appliance capable of and intended for space heating or domestic water heating that meets all of the following criteria:

1. An air-to-fuel ratio (ratio of the mass of combustion air introduced into the firebox to the mass of dry fuel consumed) in the combustion chamber averaging less than 35-to-1 as determined by the test procedure prescribed in 40 CFR 60.534 performed at an accredited laboratory;

2. A usable firebox volume of less than 0.57 cubic meters (20 cubic feet);

3. A minimum burn rate (weight of dry test fuel consumed per hour) of less than 5 kilograms per hour (kg/hr) (11 pounds per hour (lb/hr)) as determined by the test procedure prescribed in 40 CFR 60.534 performed at an accredited laboratory; and

4. A maximum weight of 800 kg (1,760 lb), excluding fixtures and devices that are normally sold separately, such as flue pipe, chimney, and masonry components that are not an integral part of the appliance or heat distribution ducting.

In the 1988 rulemaking, the EPA identified several types of residential wood combustion appliances that are not subject to the current 1988 NSPS:

- Open masonry fireplaces constructed on site
- Boilers/Heaters
- Furnaces
- Cook Stoves

In addition, the current 1988 NSPS exempts the following from the emission limits:

- Wood heaters used solely for research and development (R&D) purposes
- Wood heaters manufactured for export
- Coal-only heaters

As noted earlier, because of the specific characteristics of this source category (*e.g.*, it applies to mass-produced residential consumer items), the residential wood heaters NSPS (also sometimes informally referred to as the wood stove NSPS) allows compliance for model lines to be certified “pre-sale” by the manufacturers. A typical NSPS source category approach that imposes emission standards and then requires a unit-specific compliance demonstration would have been very costly and impractical. Therefore, the 1988 NSPS was designed to allow manufacturers of wood heaters to use a certification program to test representative wood heaters on a model line basis. Once a model line is certified, all of the individual units within the model line are subject to labeling, operational and other requirements. Manufacturers are then required to conduct a quality assurance program to ensure that appliances produced within a model line conform to the certified design and meet the applicable emission limits. There are also provisions for the EPA to conduct audits to ensure compliance.

As discussed in the 1988 rulemaking, the standards limiting PM emissions from wood heaters in the current 1988 NSPS were phased in for this source category because of the need to consider the costs of delayed production while

new models were being developed and certified. Advanced technology heaters/stoves including both catalytic and noncatalytic systems were considered to be BDT (now called BSER), because the net emissions of both systems over time were estimated to be similar (even though the initial certification test results were lower for catalytic models) due to possible degradation and lack of catalyst replacement. The EPA considered requiring catalyst replacement on a regular schedule but determined that enforcement of such a requirement would be difficult or impractical. The EPA did require manufacturers to provide 2-year unconditional warranties on the catalysts and prohibited the operation of catalytic heaters/stoves without a catalyst. Principally because of these concerns, the EPA wanted to ensure that both catalytic and noncatalytic technology would continue to be options for manufacturers to use and further develop. The Subpart AAA Phase I standards issued in 1988 were very similar to the Oregon Department of Environmental Quality standards that had been in existence for a few years. The Subpart AAA Phase II standards, issued in 1988 and which are still in effect, are more stringent and had to be met within 2 years of publication of the final rule, *i.e.*, by 1990. Models equipped with a catalytic combustor cannot emit more than a weighted average of 4.1 g of PM per hour. Models that are not equipped with a catalytic combustor cannot emit more than a weighted average of 7.5 g of PM per hour. The lower initial emission limit for the catalytic combustor-equipped models incorporates an expected deterioration rate for the catalysts such that after 5 years the emissions from those models were expected to be similar to the emissions from noncatalytic models.

*D. What are the major developments since the original NSPS was published?*

New systems for residential wood heating devices are commercially available in the U.S. that perform at significantly lower g/hr emission rates than required under the current 1988 NSPS. Furthermore, even greater performance potentially can be achieved by greater deployment of the best U.S. systems and the typical systems already widely employed in Europe, especially for outdoor and indoor hydronic heaters. The EPA has conducted a research project “Environmental Characterization of Outdoor Wood-fired Hydronic Heaters” through a cooperative R&D agreement with the New York State Energy Research and

Development Authority (NYSERDA) that evaluated four types of technology ranging from a common outdoor wood boiler/heater to a state-of-the-art, high-efficiency pellet boiler/heater from Austria. The study showed considerable emission reduction due to a 2-stage combustion technology that includes gasification of the fuel and more complete combustion.<sup>3</sup>

Many stakeholders have expressed concern to the EPA about a broad range of residential wood heating appliances that do not have emission standards in the current 1988 NSPS. These include single burn rate wood heaters; pellet heaters/stoves that are not subject to the current standard via the NSPS air-to-fuel ratio; wood “boilers” (hydronic heaters); forced-air furnaces; and masonry heaters. Some stakeholders have also expressed an interest in regulating non-“heater” devices, such as indoor and outdoor fireplaces, fire pits, cook stoves and pizza ovens.

One category of wood heating appliances that has undergone significant growth is wood heaters/boilers or “hydronic heaters.” (Note that these units are technically called heaters rather than boilers because many are not pressurized and do not boil the liquid.) Hydronic heaters are typically located outside the buildings they heat in small sheds with short smokestacks. These appliances burn wood to heat a liquid (water or a water-antifreeze mixture) that is piped to provide heat and hot water to occupied buildings, such as homes. Often, in addition to supplying heat for homes, the same unit is used to provide heat for barns and greenhouses and to provide warm water for swimming pools. Hydronic heaters may also be located indoors and may use other biomass (such as corn or wood pellets) or coal or a combination for fuel.

Studies have shown that PM<sub>2.5</sub> concentrations in proximity to a typical outdoor hydronic heater (aka outdoor wood boiler) can exceed the 24-hour NAAQS.<sup>4</sup> Thus, the EPA developed a hydronic heater voluntary partnership program in order to encourage manufacturers to reduce impacts on air quality and health through developing

and distributing cleaner hydronic heaters for those locations where local jurisdictions allow hydronic heaters. We developed the voluntary partnership program with the goal of bringing cleaner models to market faster than the traditional federal regulatory process. Properly operated Phase 1<sup>5</sup> emission level (0.60 lb/MMBtu heat input) qualifying<sup>6</sup> units are approximately 70 percent cleaner than typical unqualified units. After March 31, 2010, units that only meet the Phase 1 emission level are no longer considered “qualified models” under the voluntary partnership program. Properly operated Phase 2 emission level (0.32 lb/MMBtu heat output) qualifying units are estimated to be approximately 90 percent cleaner than typical unqualified units. Typically, qualified models have improved insulation, secondary combustion, separation of the firebox from the water jacket, and the addition of improved heat exchangers.

In addition to the voluntary partnership program, the EPA provided technical and financial support for the Northeast States for Coordinated Air Use Management (NESCAUM) to develop a model rule that several states have adopted to regulate hydronic heaters. The model rule is a starting point for local regulatory authorities to consider, and additional actions may be needed due to site-specific concerns, *e.g.*, local terrain, meteorology, proximity of neighbors and other exposed individuals. Thus, some regulatory authorities have instituted additional requirements, such as limits on proximity to neighbors, limits on visible emissions and limits on use in non-heating seasons. Some authorities have banned hydronic heaters entirely in some areas.

The EPA also developed a similar voluntary partnership program for low mass fireplaces (engineered, pre-fabricated fireplaces) and site-built masonry fireplaces. Fireplaces were not included in the 1988 NSPS for residential wood heaters because typical fireplaces are not considered to be effective “heaters.” Most of the heat content from the wood burned in a

typical fireplace is lost out the chimney rather than heating a room. The voluntary program began in February 2009, and pertained only to low mass fireplaces at that time. In July 2009, the program was expanded to masonry fireplaces. Under this program, cleaner burning fireplaces are ones that qualify for the Phase 1 emissions level of 7.3 grams of particles emitted per kilogram (g/kg) of fuel burned (approximately 57 percent cleaner than unqualified models) or the Phase 2 emissions level of 5.1 g/kg (approximately 70 percent cleaner than unqualified models). So far, 36 models (of hundreds of models on the market) have qualified under this voluntary partnership program at the Phase 2 level. Typically, qualified models have improved insulation and added secondary combustion and/or a catalyst to reduce emissions. Some manufacturers have added doors to reduce the excess air and thus improve combustion. The Phase 2 emission level in the voluntary fireplace program has been considered as a starting point for some local regulatory authorities, and additional actions have also been considered due to site-specific concerns, *e.g.*, local terrain, meteorology, proximity of neighbors and other exposed individuals, and magnitude of other emissions in the airshed. Thus, some regulatory authorities have instituted additional requirements (*e.g.*, “no burn” days on which the fireplaces cannot be operated) and some have banned new wood-burning fireplaces in some areas.

The current 1988 NSPS in subpart AAA have been in effect for over 25 years and manufacturers and test laboratories have gained considerable experience in complying with the requirements of the program. As a result, many manufacturers and test laboratories have suggested changes to the certification process to better implement the program, such as developing an electronic system for submittals and approval. Many manufacturers and test laboratories have also questioned the effectiveness of some of the current audit procedures. In addition, they have participated in the development of new test methods and test method improvements as part of the efforts of ASTM International (formerly known as the American Society of Testing and Materials). The 1988 NSPS left a placeholder for development of an efficiency test method for use in subpart AAA. On June 1, 2007, the EPA approved the Canadian Standards Association (CSA) stack loss method in B415 as an alternative for wood heater efficiency testing in subpart AAA

<sup>3</sup> *Environmental, Energy Market, And Health Characterization Of Wood-Fired Hydronic Heater Technologies*. Prepared by U.S. EPA Office of Research and Development, *et al.*, prepared for NYSERDA. June 2012.

<sup>4</sup> For more information on wood smoke health effects, see: “Smoke Gets in Your Lungs: Outdoor Wood Boilers in New York State,” prepared by Judith Schrieber, Ph.D., *et al.*, for the Office of the Attorney General of New York. August 2005. See also: “Assessment of Outdoor Wood-fired Boilers,” prepared by NESCAUM, March 2006 (revised June 2006).

<sup>5</sup> “Phase 1” and “Phase 2” emission levels refer to levels established in EPA voluntary partnership programs. The earlier use of the term “Phase II” (with a Roman numeral) standard refers to standards established in the current subpart AAA for residential wood heaters.

<sup>6</sup> The terms “qualified” and “unqualified,” or other similar terms, refer to models that meet or have not been shown to meet the voluntary partnership program performance levels. Later use of the terms “certified” and “uncertified,” or other similar terms, refers to models that are deemed to be in compliance or noncompliance with the NSPS emission limits.

provided that the tests use the same burn rate categories specified in the EPA Reference Method 28. We are now proposing that the current version of this method be used for efficiency testing (CSA B415.1–10). We are also proposing EPA Method 28 WHH (wood-fired hydronic heaters) that has been used for qualification testing of hydronic heaters in the EPA voluntary partnership program and numerous state regulations. Other issues that have been identified over the years regarding test methods and emissions calculations include emissions averaging, burn rate weightings, hot start versus cold start, emission caps per burn rate, and catalyst degradation. Another issue is whether to change current requirements to conduct certification tests with “crib” wood to “cord” wood. “Crib wood” is a specified configuration and quality of dimensional lumber and spacers, which was intended to improve the repeatability of the test method in 1988. “Cord wood” is a different specified configuration and quality of wood that more closely resembles what a typical homeowner would use. We address all these issues as part of this proposal.

#### *E. Why is residential wood smoke a concern?*

1. Health and air quality concerns. There is increasing recognition of the health impacts of particle pollution, to which wood smoke is a contributing factor in many areas. Wood smoke contains a mixture of gases and fine particles that can cause immediate effects, including burning eyes, runny nose and bronchitis. Exposure to fine particles has been associated with a range of health effects, including aggravation of heart or respiratory problems (as indicated by increased hospital admissions and emergency department visits), changes in lung function and increased respiratory symptoms, as well as premature death. Populations at greater risk for experiencing health effects related to fine particle exposures include older adults, children and individuals with pre-existing heart or lung disease.<sup>7</sup> Residential wood smoke contains fine particles and toxic air pollutants (e.g., benzene and formaldehyde). Each year, smoke from wood heaters contributes hundreds of thousands of tons of fine particles throughout the country—mostly during the winter months. Nationally, residential wood combustion accounts for 44 percent of total stationary and mobile POM emissions, nearly 25 percent of all area

source air toxics cancer risks, and 15 percent of noncancer respiratory effects.<sup>8</sup>

In a number of communities, residential wood smoke increases particle pollution to levels that cause significant health concerns. Several areas with wood smoke problems either exceed the EPA’s health-based NAAQS for fine particles or are on the cusp of exceeding those standards. For example, in places such as Keene, New Hampshire; Sacramento, California; Tacoma, Washington; and Fairbanks, Alaska; wood combustion can contribute over 50 percent of daily wintertime fine particle emissions.<sup>9</sup>

In December 2012, the EPA issued revised NAAQS for PM to provide increased protection of public health and welfare. The 2012 NAAQS for PM strengthened the annual NAAQS for fine particles to 12 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) from the 1997 standard of 15  $\mu\text{g}/\text{m}^3$  and retained the existing 24-hour fine particle standard of 35  $\mu\text{g}/\text{m}^3$  issued in 2006. The 2012 NAAQS for PM also retains the current 24-hour PM<sub>10</sub> standards for health and environmental effects at a level of 150  $\mu\text{g}/\text{m}^3$  to continue to provide protection against effects associated with exposure to thoracic coarse particles. Areas that do not meet the standards must take steps to reduce PM emissions. The National Association of Clean Air Agencies (NACAA), the Environmental Council of States (ECOS), NESCAUM, the Western States Air Resources Council (WESTAR), and the Lake Michigan Air Directors Consortium (LADCO) have argued that more stringent standards for new wood heating devices would provide a much needed tool for states and local communities to use in addressing the growth of pollution from these sources.<sup>10 11</sup> Recent health studies considered in the review of the PM NAAQS confirm the impacts on public health. The latest information on the PM NAAQS reviews is at <http://www.epa.gov/pm/actions.html>.

<sup>8</sup> Strategies for Reducing Residential Wood Smoke. EPA–456/B–13–001, March 2013. Prepared by Outreach and Information Division, Air Quality Planning Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711. pp. 4–5.

<sup>9</sup> Memorandum dated April 4, 2013, from David Cole, EPA, to Docket ID No. EPA–HQ–OAR–2009–0734.

<sup>10</sup> Arthur Marin, Executive Director of NESCAUM and Dan Johnson, Executive Director of WESTAR, to Steve Page, Director OAQPS/EPA. April 28, 2008.

<sup>11</sup> Arthur Marin, Executive Director of NESCAUM, to Gina McCarthy, Assistant Administrator for Air and Radiation/EPA. January 14, 2011.

There is also concern about the health effects of other pollutants found in wood smoke. In addition to PM, wood smoke contains harmful chemical substances such as CO, formaldehyde and other organic gases, and nitrogen oxides (NO<sub>x</sub>).

Health effects from CO include:

- Interference with the blood’s ability to carry oxygen to the brain, which impairs thinking and reflexes

- Heart pain
- Lower birth weights and increased deaths in newborns

- Death

Health effects from formaldehyde and other organic gases include:

- Irritation of eyes, nose, and throat
- Inflammation of mucous membranes, irritation of the throat and sinuses

- Interference with lung function
- Allergic reactions
- Nose and throat cancer in animals and cancer in humans

Nitrogen oxide can irritate the eyes and respiratory system, may damage the immune system by impairing the body’s ability to fight respiratory infection and can affect lung function.<sup>12</sup>

Residential wood combustion emissions contain potentially carcinogenic compounds including formaldehyde, polycyclic aromatic hydrocarbons (PAHs), benzene, and dioxin, which are toxic air pollutants, but their effects on human health via exposure to wood smoke have not been studied as extensively.<sup>13</sup>

2. Concerns about existing sources. Many areas of the country are struggling with reducing PM emissions due to residential wood smoke from existing wood-burning appliances. Existing wood heaters will not be affected by this rule. In addition, due to the long life span of wood-burning appliances and slow turnover, it may be many years before the full benefits of these regulations on new appliances will be shown. However, there are strategies to reduce wood smoke that states, counties and townships can take to reduce wood smoke independent of this rule.<sup>14</sup> Some states have direct legislative authority, and all states have authority to address new and existing sources as SIP measures necessary to ensure attainment and maintenance of the NAAQS. For examples, the State of

<sup>12</sup> Department of Ecology, State of Washington, Brochure on Wood Smoke and Your Health. September 2008. <http://www.ecy.wa.gov/pubs/91br023.pdf>.

<sup>13</sup> EPA Burn Wise (Health Effects of Breathing Wood Smoke), [http://www.epa.gov/burnwise/pdfs/woodsmoke\\_health\\_effects\\_jan07.pdf](http://www.epa.gov/burnwise/pdfs/woodsmoke_health_effects_jan07.pdf).

<sup>14</sup> “Strategies for Reducing Residential Wood Smoke,” EPA–456/B–13–001. March 2013.

Oregon, Washoe County (NV), and Township of Mammoth Lakes (CA) have required that, when a home is sold, existing wood heaters that have not been certified to meet the NSPS be removed and destroyed and not resold. As additional SIP strategies, some states and local authorities have banned wood burning during certain high PM events, restricted the amount of burning, and regulated the type of materials being burned. Non-regulatory programs, such as education programs to teach the public how to use their wood-burning appliances in ways that minimize emissions, have also been implemented. The EPA has also implemented programs that encourage good burning practices, which can have a significant impact on emissions. The EPA, some state and local agencies, and other stakeholders, including the Hearth, Patio and Barbecue Association (HPBA), have been active in promoting wood heater/stove changeout programs to replace older, higher-emitting heaters/stoves with lower-emitting EPA-certified heaters/stoves, pellet heaters/stoves, or other cleaner burning appliances.

*F. What are the major issues that drove the review process?*

We received several requests to conduct a review of the residential wood heaters NSPS, including a joint letter from WESTAR and NESCAUM that urged us to update and develop regulations relating to a variety of wood combustion devices. The authors cited concerns that many communities are measuring ambient conditions above or very close to the PM<sub>2.5</sub> NAAQS and that, in many instances, emissions from wood smoke are a large contributor to those high PM<sub>2.5</sub> levels. In addition, wood heater technology has greatly improved since the last revision of the NSPS. The standards we are proposing today recognize the cleaner, more efficient technologies developed in recent years. Other states, environmental groups, and HPBA have also recommended several changes to the NSPS. The HPBA Outdoor Wood-fired Hydronic Heater (OWHH) Manufacturers Caucus wrote the EPA to express their unanimous support for the EPA to develop a federal regulation for OWHH.<sup>15</sup>

Specific requests from stakeholders include:

- Tightening emission standards based on current performance data

- Addressing other pollutants of concern
- Reviewing the format of the standards, including adding requirements to document the tested efficiency of the unit
- Reevaluating exemptions, such as those based on air-to-fuel ratios and size and weight
- Adding other wood heating devices such as pellet heaters/stoves, hydronic heaters, and masonry heaters to the NSPS
- Regulating fireplaces and other “non-heater” devices (e.g., cook stoves)
- Regulating heating devices that burn fuel other than wood (e.g., other solid biomass and coal)
- Updating test methods
- Streamlining the certification process to use electronic data submittals/reviews
- Considering use of International Organization for Standardization (ISO)-accredited labs and ISO-accredited certifying bodies
- Improving compliance assurance/enforceability and quality assurance/quality control
- Making the rule more consumer friendly by making more information readily available on-line

### III. Summary of Proposed Residential Wood Heater Appliance Amendments

We are proposing to amend 40 CFR part 60, subpart AAA, Standards of Performance for New Residential Wood Heaters. We are also proposing two new subparts to address additional types of residential wood heating appliances. Specifically, we are proposing subpart QQQQ, Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces, and subpart RRRR, Standards of Performance for New Residential Masonry Heaters. The following sections describe the major provisions of each subpart. This proposal does not include any requirements that would apply to heaters that are fueled solely by gas, oil or coal. In addition, this proposal does not include any requirements associated with wood heaters or other wood-burning appliances that are already in use. The EPA continues to encourage state, local, tribal, and consumer efforts to changeout (replace) older heaters with newer, cleaner, more efficient heaters, but that is not part of this federal rulemaking.

#### A. Room Heaters

The current 1988 regulation (subpart AAA) applies to affected appliances manufactured since 1988. The current emission limits would remain in effect for the heaters and model lines

manufactured before the effective date of this rule until their current EPA certification expires (maximum of 5 years) or is revoked. After the certification expires or is revoked, these heaters and other new heaters would have to meet updated emission standards. We propose to broaden the applicability of the wood heaters regulation beyond adjustable burn rate wood heaters (the focus of the original regulation) to specifically also include single burn rate wood heaters/stoves, pellet heaters/stoves, and any other affected appliance as defined in the proposed subpart AAA as a “room heater.” The proposed subpart AAA does not apply to new residential hydronic heaters, new residential forced-air furnaces and new residential masonry heaters because they would be subject to their own subparts. Like the 1988 current subpart AAA, the proposed subpart AAA does not apply to fireplaces. This proposal tightens the definition for “cook stoves” and adds definitions for “camp stoves” and “traditional Native American bake ovens” to clarify that they would not be subject to the standard other than appropriate labeling for cook stoves and camp stoves. Finally, the proposed subpart AAA clarifies that the emission limits would only apply to wood-burning devices (*i.e.*, not to devices that only burn fuels other than wood, *e.g.*, gas, oil or coal).

As discussed in section II, NSPS determinations of BSER must consider costs. The fact that this source category is for consumer products manufactured for residential sale results in cost considerations that are different from those for industrial process source categories that are typical for most NSPS. Specifically, if production and sales were to be suspended while designing, testing, field evaluating and certifying cleaner models, the cost of potential lost revenues would be significant, which necessitates reasonable lead times for compliance with proposed emission limitations. This was true in 1988, and is still true today. Thus, we propose to allow a transition period so that heaters/stoves with EPA certification currently in effect can continue to be manufactured and sold until the current certification expires (5 years from date of certification) or is revoked by the Administrator, whichever date is earlier. We would not allow renewal of these certifications. That is, in the near term, we are proposing to retain the current Phase II PM emission limits (issued in the current 1988 standards for compliance in 1990) for adjustable burn

<sup>15</sup> HPBA OWHH Caucus letter to Greg Green, Director, Outreach and Information Division, EPA, September 27, 2007.

rate wood heaters and pellet heaters/stoves with a current EPA certification issued prior to the effective date of this rule. While our top priorities are to ensure that emission reductions occur in a timely manner and that there is no backsliding from the improvements that many manufacturers have already made, it is also important to avoid unreasonable economic impacts on those manufacturers (mostly small businesses) who need additional time to develop a full range of cleaner models. The compliance schedule should also help avoid potential “logjams” at laboratories conducting certification testing. We ask for specific comments on the length of this proposed transition and the degree to which there would be any critical economic impacts on manufacturers who have heaters with current certifications if we were to not allow up to the full 5-year certification period for units manufactured after the effective date of the final rule. We also ask for specific comments on allowing grandfathering of Step 1 models that are tested in good faith according to the proposed test methods and the proposed emission limits, even though the final test methods may differ from this proposal, and if so, for how long.

We are proposing a two-step compliance approach (referred to herein

as the “Proposed Approach”) that would apply to all new adjustable burn rate wood heaters, single burn rate wood heaters and pellet heaters/stoves. Under this Proposed Approach, the Proposed Step 1 emission limits for these sources would apply to each source (a) manufactured on or after the effective date of the final rule or (b) sold at retail on or after the date 6 months from the effective date of the final rule. Proposed Step 2 emission limits for these sources would apply to each adjustable rate wood heater, single burn rate wood heater and pellet heater/stove manufactured or sold on or after the date 5 years after the effective date of the final rule. We ask for specific comments on the Proposed Approach and the degree to which these dates could be sooner.

We are also asking for comments on a three-step compliance approach (referred to herein as the “Alternative Approach”) for all adjustable rate wood heaters, single burn rate wood heaters and pellet heaters/stoves. Under this Alternative Approach, the Alternative Step 1 emission limits would apply to each source: (a) manufactured on or after the effective date of the final rule, or (b) sold at retail on or after the date 6 months from the effective date of the final rule. (Step 1 under the Alternative

Approach is the same as Step 1 under the Proposed Approach.) The Alternative Step 2 emission limits would apply to each source manufactured or sold on or after the date 3 years after the effective date of the final rule. The Alternative Step 3 emission limits would apply to each source manufactured or sold on or after the date 8 years following the effective date of the final rule (thus providing 5 years between the Alternative Step 2 and Alternative Step 3). We ask for specific comments on this Alternative Approach, including data and potential environmental and economic impacts on this alternative, and the degree to which the Alternative Approach emission levels and dates could be considered BSER. Our current preference is the Proposed Approach, but we intend to finalize a single compliance approach after fully considering the comments received during the public comment period on this proposed rulemaking.

Table 3 summarizes the PM emissions standards that would apply to each wood heater appliance under this Proposed Approach at each step. Table 4 summarizes the PM emissions standards that would apply to each wood heater appliance under each step of the Alternative Approach.

TABLE 3—PROPOSED APPROACH SUBPART AAA PM EMISSIONS LIMITS

Appliance	Phases/steps	PM emissions limit
Adjustable Rate Wood Heaters or Pellet Heaters/Stoves with current EPA certification issued prior to the effective date of the Final Rule.	Transition period from 1988 rule through the later of the effective date of the final revised rule or expiration of current certification (maximum of 5 years certification and no renewal).	4.1 g/hr for catalytic heaters/stoves and 7.5 g/hr for noncatalytic heaters/stoves.
All Other Adjustable Rate Wood Heaters, Single Burn Rate Wood Heaters or Pellet Heaters/Stoves (includes currently certified heaters after the certification expires, catalytic and noncatalytic).	Step 1: upon the effective date of final rule ..... Step 2: 5 years after the effective date of the final rule.	4.5 g/hr. 1.3 g/hr.

TABLE 4—ALTERNATIVE APPROACH SUBPART AAA PM EMISSIONS LIMITS

Appliance	Phases/steps	PM emissions limit
Adjustable Rate Wood Heaters or Pellet Heaters/Stoves with Current EPA Certification Issued Prior to the effective date of Final Rule.	Transition period from 1988 rule through the later of the effective date of the final revised rule or expiration of current certification (maximum of 5 years certification and no renewal).	4.1 g/hr for catalytic heaters/stoves and 7.5 g/hr for noncatalytic heaters/stoves.
All Other Adjustable Rate Wood Heaters, Single Burn Rate Wood Heaters or Pellet Heaters/Stoves (includes currently certified heaters after the certification expires, catalytic and noncatalytic).	Step 1: upon the effective date of final rule ..... Step 2: 3 years after the effective date of the final rule. Step 3: 8 years after the effective date of the final rule.	4.5 g/hr. 2.5 g/hr. 1.3 g/hr.

Although the 1988 promulgated subpart AAA (53 FR 5860, February 26, 1988) included an additional 1-year compliance extension for low-volume manufacturers, *i.e.*, companies that

manufacture (or export to the U.S.) fewer than 2,000 heaters per year, this proposal does not include a similar compliance extension. We are not proposing a delay for adjustable burn

rate wood heaters or pellet heaters/stoves because the majority of these appliances already comply with the proposed Step 1 emission levels. See section V.C. of this preamble for more

discussion of this topic. However, we are requesting comments on the possible need for such a compliance extension for single burn rate wood heaters, which are not subject to the current subpart AAA requirements.

We are proposing to make a single determination of BSER for both catalytic and noncatalytic heater systems. The EPA considered requiring catalyst replacement on a regular schedule but determined that federal enforcement of such a requirement would be difficult. As in the current 1988 rule, we are proposing to require manufacturers to provide warranties on the catalysts and prohibit the operation of catalytic heaters/stoves without a catalyst. In addition, we are proposing to require warranties for noncatalytic heaters/stoves. Though we are not proposing efficiency standards at this time, we are proposing to require testing and reporting of these data; however, we are requesting specific comment on the need to propose efficiency standards and any data to support the basis for these standards.

We are also proposing to require emission testing and reporting based on both crib wood and cord wood for the proposed Step 1 compliance, and allowing manufacturers to choose whether to certify with crib wood or cord wood for the proposed Step 1 upon the effective date of the final rule. For the proposed Step 2 compliance 5 years after the effective date of the final rule, we would require certifying with cord wood only. As discussed earlier in this preamble, “crib wood” is a specified configuration and quality of dimensional lumber and spacers that was intended to improve the repeatability of the test method in 1988. “Cord wood” is a different specified configuration and quality of wood that more closely resembles what a typical homeowner would use. We ask for comments and test data to compare heater performance with crib wood and cord wood.

Although we lack sufficient data to propose a separate CO emissions standard at this time, we propose to require that the manufacturer determine CO emissions during the compliance test and report those results to the EPA. We specifically request emission and cost data for systems that reduce CO emissions. If those systems warrant inclusion in the final rule, we would consider doing so. In addition, we ask for specific comments on whether the final rule should explicitly require indoor CO monitors as a critical safety component for heaters installed in occupied buildings or other buildings or enclosures in which the operator would

enter to add fuel to the heater or conduct other normal operation and maintenance of the heater. Numerous stakeholders have indicated that an explicit requirement is needed.

Like the current 1988 subpart, the EPA is using its authority under section 114 of the CAA to require each manufacturer to submit certifications of compliance with this rule for all models and all units. As in the 1988 rule, provided that the certifications are timely, complete, and accurate, the EPA is proposing to allow certification to be determined based on testing of a representative unit within the model line. As in 1988, the cost of testing each unit would be an order of magnitude greater than the cost of a wood heater/stove and would be economically prohibitive. In addition, as in 1988, the testing of each unit could create a potential “logjam” that would stymie the certification of cleaner model lines. However, as discussed earlier, we are asking for specific comments on whether we should require testing of more than one representative unit prior to certification of a model line. The proposed subpart revises the definition of “Accredited Test Laboratory,” from only EPA-accredited laboratories to laboratories approved by the EPA after being accredited by a nationally recognized accrediting body to perform testing for each of the test methods specified in this NSPS under ISO–IEC<sup>16</sup> Standard 17025, to conduct the certification testing. The laboratories would have to register their credentials with the EPA and be approved by the EPA prior to conducting any certification testing or related work used as a basis for compliance with this rule. Also, they would be required to report any changes in their accreditation and any deficiencies found under ISO 17025, and the EPA may revoke the approval if appropriate. Our proposal is this laboratory definition revision be effective upon the effective date of the final rule. However, we request specific comments on whether we should allow a transition period.

The proposal would require a “Certifying-Body-Based Certification Process,” upon the effective date of the final rule. Under this process, after testing is complete, a certification of conformity with the PM emissions standards must be issued by a certifying body with whom the manufacturer has entered into contract for certification services. The certification body would

have to be accredited under ISO–IEC Standard 17065 and register their credentials with the EPA and receive EPA approval prior to conducting any certifications or related work used as a basis for compliance with this rule and report any changes in their accreditation and any deficiencies found under ISO 17065. We believe any certifying body that is approved by the EPA and is ISO-accredited should be expected to act in such a way that will not create a conflict of interest. The EPA would oversee the certification body’s work and retain the right to revoke the approval if appropriate. Upon review of the test report and quality control plan submitted by the manufacturer, the certifying body may certify compliance and submit the required documentation to the EPA’s Office of Enforcement and Compliance Assurance for review, approval and listing of the certified appliance. Our preference is to require the new expanded certification process (*i.e.*, inclusion of ISO-accredited and EPA-approved certifying bodies) for certifications that occur after the effective date of the final rule. However, we request specific comments on whether we should allow a transition period; that is, whether we should retain the current “Administrator Approval Process” to review the certification application, including test results, for the first year following the effective date of the final rule. Note that models certified prior to the effective date of the final rule would not have to be re-tested until the certification expires or is revoked.

As in the current 1988 NSPS, each affected unit would be required to have an applicable permanent label and have an owner’s manual that contains specified information. We are proposing that permanent labels would be required for each affected unit on the effective date of the final rule. We propose to clarify that the permanent label must be installed so that it is readily visible both before and after the unit is installed. This clarification is needed to document the use of complying heaters that may be required by state and local rules and/or to determine the unit’s applicability to any future changeout programs. We also request specific comments on how to best assure that manufacturers and retailers and online marketers of wood heaters only use valid certification test data and not exaggerated claims.

In the current (1988) NSPS, temporary labels (*aka*, hangtags) were required for wood heaters that are subject to the standards and also for ones that are not (*e.g.*, coal heaters/stoves). These temporary labels were intended primarily to contain information useful

<sup>16</sup> The International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) prepare and publish international standards.

to consumers and prospective heater purchasers to be able to compare different appliance models and to inform the consumer about the importance of proper operation and maintenance. These temporary labels included the wood heater's compliance status, comparative emission and efficiency performance data, and heat output rates and explicitly stated that the appliance will achieve low smoke output and high efficiency only if properly operated and maintained. The EPA no longer believes these temporary labels are necessary for all certified heaters because we have developed and are continuing to improve our education and outreach program for consumers on selecting the cleanest certified appliances and wood fuel with appropriate moisture content and on the effective use and operation of these appliances. Consequently, we are proposing to remove the requirement for temporary labels on certified heaters. Consumers can get additional information that would normally be contained on the temporary labels at <http://www.epa.gov/compliance/monitoring/programs/caa/woodheaters.html>. We request comment on the potential impact that deleting this requirement might have on a consumer's ability to select wood heaters that meet the proposed standards and are the cleanest and whether we should consider developing a voluntary labeling program for the cleanest of the clean. As discussed elsewhere, we also ask for specific comments on language that we should require manufacturers and retailers to provide to consumers to help explain the relative benefits of high-performing heaters versus lower-performing heaters and how to reduce exaggerated claims.

In addition to the PM emissions standards, we are proposing to continue to require the proper burn practices that already apply to the owner or operator of a wood heating appliance. That is, the current 1988 standards already include the requirement that the owner or operator must operate the heater consistent with the owner's manual and not burn improper fuels and manufacturers typically void their warranties in cases of improper operation. Numerous states have expressed their support for the continuation of these requirements. Some states and local jurisdictions have enforced similar requirements, and this proposal would allow potential delegation of enforcement authority of these NSPS requirements upon the EPA approval of state requests.

The proposed revision clarifies that the current requirement to operate

according to the owner's manual continues to include a list of prohibited fuel types that create poor or even hazardous combustion conditions and includes operation of pellet fuel appliances only with the grades of pellet fuels that are included in the certification tests, or better. We propose that pellets for the certification tests be only those that have been produced under a licensing agreement with the Pellet Fuels Institute (PFI), or equivalent (after request and subsequent approval by the EPA), to meet certain minimum requirements and procedures for a quality assurance process. Details of the PFI program are available at <http://pelletheat.org/pfi-standards/pfi-standards-program/>. We are not aware of any other U.S. organization that has a pellet fuel quality assurance program similar in quality to the PFI program. However, we request specific comments on whether another high quality program exists. Manufacturers' data show that pellet fuel quality assurance is necessary to ensure that the appliances operate properly such that emissions are reduced as intended. We ask for specific comments on how to determine equivalency for fuel pellets, and whether we should include other requirements of best burn practices or adjustments to help ensure proper operation, e.g., chimney height and draft specifications, moisture content of wood and limits on visible emissions.

The proposed subpart AAA still contains the crucial quality assurance provisions in the current 1988 NSPS. A comprehensive discussion of the rationale is included in the 1988 preamble. For example, a model line must be recertified whenever any change is made in the original design that could affect the emissions rate for that model line or when any of several specified tolerances of key components are changed. The 1988 requirements for manufacturer quality assurance programs would be superseded by a Certifying-Body-Based Quality Assurance program. (As noted earlier in this preamble, we would not require retesting for models that are certified prior to the effective date of the final rule until the certification expires or is revoked.) The certifying body would conduct regular, unannounced audits to ensure that the manufacturer's quality control plan is being implemented properly.

The EPA audit testing programs of the 1988 NSPS will be maintained under the proposed changes, although they will be streamlined and simplified to better ensure compliance and to clarify that audits can be based on any information the EPA has available and

do not have to be statistically random. Also, we clarify that the EPA and states are allowed to be present during the audits and that states (and other entities, including the public) may provide the EPA with information that may ultimately be used in the EPA enforcement and compliance assurance efforts.

As discussed earlier, the EPA developed Method 28 in 1987 and 1988 as part of our efforts on the 1988 NSPS. We received input at that time from manufacturers, laboratories, and some states. Oregon Method 7 was the starting point for Method 28 and, thus, Method 28 has many aspects similar to Oregon Method 7. The details on the history and development of Method 28 are contained in the February 18, 1987, proposal in the **Federal Register** (52 FR 5003) and the February 26, 1988, final rule in the **Federal Register** (53 FR 5866).

The manufacturers, laboratories, states and the EPA have more than 25 years of experience with Method 28, and it has been very useful for certifying hundreds of model lines of wood heaters/stoves. We asked the manufacturers, EPA-accredited laboratories and states for their insights on Method 28. Many stakeholders agree that changes should be made to improve the reproducibility and repeatability of the test procedures and to address concerns about how to best ensure protection across the entire U.S. when various operating scenarios are used and various wood species and densities are used. For example, to address some of these concerns, ASTM has used a "consensus-based" process to develop E2515-10 "Standard Method for Determination of Particulate Matter Emissions in a Dilution Tunnel." The EPA is proposing that this sampling and analysis method be used for all of the appliances in this rulemaking. As with all test methods, there are opportunities for continual improvement, and the EPA requests specific comments and supporting data for additional potential improvements to E2515-10.

A number of states have expressed concern about ASTM's Intellectual Property Policy which requires all participants to give their intellectual property rights to ASTM so that, in turn, ASTM can control distribution of the drafts and final test methods and sell the final test methods to potential users. Attorneys General for several states have indicated that state employees in their states cannot give to ASTM the property rights for property that their states paid for via the employee salaries and other expenditures and thus cannot participate in ASTM's "consensus-

based” process. For this rulemaking, ASTM is allowing public review, for no charge, of the ASTM test methods and draft work products relevant to this proposed rule at [www.astm.org/epa](http://www.astm.org/epa). The EPA requests specific comments and supporting data on the substance of all of the test methods relevant to this rulemaking and specific comments on the ASTM process and ways to ameliorate the process concerns.

The ASTM methods E2779–10 “Standard Test Method for Determining Particulate Emissions from Pellet Heaters” and E2780–10 “Standard Test Method for Determining Particulate Emissions from Wood Heaters” are being considered for potentially replacing the wood heater fueling and operation requirements in Method 28 for pellet heaters and wood heaters, respectively. Note that ASTM intends to use the same E2515–10 for the sampling and analysis portion for all the appliances and then separate methods per appliance types for the fueling and operation portions of these methods. The EPA believes E2525–10 is a sound method for sampling and analysis and we are proposing its use. The EPA also believes that E2779–10 is a sound method for measuring emissions from pellet heaters/stoves and includes reasonable measures to reduce testing costs for continuously-fed appliances, and we are proposing its use. However, because, as noted earlier, some states were not able to participate in the ASTM method development process, we specifically request comments and supporting data of all aspects of not only these test methods but also all the proposed methods as part of the comments on this proposed rule.

Similarly, the EPA believes that ASTM Method E2780–10 includes improvements for testing adjustable and single burn rate wood heaters, and we are proposing many of the improvements today. For example, we are proposing the use of the E2780–10 appendix for testing single burn rate appliances. However, we, and some states, do not agree with all the changes that ASTM has made for adjustable burn rate wood heaters, and some provisions are not as protective as we, and some states, now believe they need to be. As noted above, several states are concerned about how to best ensure that the methods are protective for the entire U.S., considering differences in wood species, density, and homeowner operation. The EPA and the states are particularly concerned about scenarios in which heaters/stoves will have higher emissions in home use than the emissions measured in the laboratories. For example, the states and the EPA are

concerned about the ASTM changes on burn rate categories, *i.e.*, easing or eliminating the lowest burn rates that often occur in home operations and are typically the highest emitting and least efficient. The EPA is asking for specific comments on these issues and recommendations and supporting data for other changes. The following paragraphs discuss some of the key test method provisions we are proposing and not proposing. Additional information on the methods is at <http://www2.epa.gov/residential-wood-heaters> and at [www.astm.org/epa](http://www.astm.org/epa).

1. We do not agree with the ASTM changes to the burn rate categories, low burn rate requirement, and weightings in Method 28. Several states are very concerned that easing these items would create the potential for backsliding. Also, we are aware of several design changes being considered by a number of manufacturers that are relatively inexpensive (*i.e.*, less than \$20 dollars) and will reduce the emissions during periods when operated at low burn rates. We instead propose that the original provisions in Method 28 be retained for the burn rate categories and low burn rate requirement. We considered the weightings and believe that if weightings are to be used, they should be the same as the original requirements in Method 28. We are also proposing that the burn rates not be weighted at all for the Step 2 standards but rather that the emission limits be separate for Burn Rate Category 1 (lowest burn rate category) and Burn Rate Category 4 (maximum burn rate category) and that compliance for each be shown separately.

2. We propose to not allow 5 minutes for startup before closing the doors because startup is often the highest emitting part of the wood heater operation, and manufacturers need to ensure that startup emissions are also reduced. Again, relatively inexpensive means exist to reduce these emissions.

3. We are not proposing to use the new ASTM equation for converting the emission test values between the EPA Reference Method 5G “Determination of Particulate Emissions From Wood Heaters From a Dilution Tunnel Sampling Location” and the EPA Reference Method 5H “Determination of Particulate Emissions From Wood Heaters From a Stack Location” currently allowed in the NSPS. Rather, we are proposing that Method 5G(3) test values be reported as tested for heaters that have valid certifications prior to the effective date of this rule and ASTM E2515–10 for all other heaters and that Method 5H not be used for testing for certifications after the effective date of

this rule. We request data to help inform our decision for the final rulemaking.

4. We are not proposing to allow manufacturers to specify a smaller volume of the firebox for testing because of our concerns about how to ensure that homeowners do not circumvent such a specification during operation, thereby increasing emissions beyond the levels that are measured during testing.

5. We are proposing several tighter specifications on the test fuel moisture content, fuel load and coal bed depth in order to improve the reproducibility and repeatability of the certification tests. This part of the proposal is based on recommendations from one of the original EPA-accredited laboratories. We specifically request comments and supporting data regarding the following proposed tighter specifications for the laboratory test: (a) tightening fuel load dry-basis moisture content tightened from the Method 28-allowed 6 percentage-point range from 19 percent to 25 percent  $\pm$  1 percent; (b) tightening the Method 28-allowed range for fuel load weight from 7.0 lb/ft<sup>3</sup>  $\pm$  10 percent of the fuel load weight (or 7 lb/ft<sup>3</sup>  $\pm$  0.7 lb/ft<sup>3</sup>) to 7 lb/ft<sup>3</sup>  $\pm$  1 percent (or 7 lb  $\pm$  0.07 lb) of the fuel load weight, calculated in accordance with Method 28; and (c) tightening the Method-28-allowed range for the test-initiation coal-bed weight from 20 percent to 25 percent of the fuel load weight to 22 percent  $\pm$  1 percent of the fuel load weight.

6. We propose to require efficiency testing according to CSA B415.1–10<sup>17</sup> using the stack loss method. That is, during each test run, data must be obtained and presented for the purpose of calculation of overall efficiency as specified in CSA B415.1–10. This would include CO and carbon dioxide (CO<sub>2</sub>), flue gas temperature and appliance mass. CSA B415.1–10 was developed by a “consensus” process, but no states were part of the process. Thus, we specifically request comments on our proposal to require use of this method.

7. We propose that electronic test report submittals include the locked spreadsheets so the formulas used and relevant calculations can be evaluated in detail. We request comments on this specific proposal.

8. We propose that the test report include a narrative detailing specifics about test conditions and operations, such as how the test was run, operating conditions, issues and special procedures.

<sup>17</sup> “CSA B415.1–10: Performance testing of solid-fuel-burning heating appliances,” Canadian Standards Association, Mississauga, Ontario, Canada. 2010.

9. We propose that each individual moisture content reading must be in the range of 18 to 28 percent on a dry basis and the average moisture content of each piece of test fuel must be in the range of 19 to 25 percent. Also, we propose the following procedure for the moisture measurements: "Using a fuel moisture meter as specified, determine the fuel moisture for each test fuel piece used for the test fuel load by averaging at least five fuel moisture meter readings, one from each of three sides, measured parallel to the wood grain. Penetration of the moisture meter insulated electrodes shall be  $\frac{1}{4}$  (one-fourth) the thickness of the fuel piece or 19 millimeters (mm) ( $\frac{3}{4}$  in.), whichever is less, for 3 of the measurements made at approximately 3 inches from each end and the center. Two additional measurements at approximately one-third the thickness shall be made centered between the other three locations."

10. We also propose this alternate procedure developed by Brookhaven National Laboratory:<sup>18</sup> "Select three pieces of cord wood from the same batch of wood as the test fuel and the same weight as the average weight of the pieces in the test load  $\pm 1.0$  lb. From each of these three pieces, cut three slices. Each slice shall be  $\frac{1}{2}$ " to  $\frac{3}{4}$ " thick. One slice shall be cut across the center of the length of the piece. The other two slices shall be cut half way between the center and the end. Immediately measure the mass of each piece in pounds. Dry each slice in an oven at 220 °F for 24 hours or until no further weight change occurs. The slices shall be arranged in the oven so as to provide separation between faces. Remove from the oven and measure the mass of each piece again as soon as practical in pounds. The moisture content of each slice, on a dry basis, shall be calculated as:

$$MC_{\text{slice}} = 100 \cdot (W_{\text{SliceWet}} - W_{\text{SliceDry}}) / W_{\text{SliceDry}}$$

Where:  $W_{\text{SliceWet}}$  = weight of the slice before drying in pounds;  $W_{\text{SliceDry}}$  = weight of the slice after drying in pounds; [and]  $MC_{\text{slice}}$  = moisture content of the slice in % dry basis."

11. We propose to require two Step 1 tests, one using crib wood and one using cord wood and reasonable additional non-binding tests with a range of fuels for which the appliance is designed for warranted and/or advertized operation. These tests are needed to show how

emissions and efficiency vary according to test methods, operating scenarios, wood species and density and other variables such as cord wood versus crib wood. We believe that such testing would help assure consumers, neighbors and other stakeholders that the appliances perform as well on all manufacturer-listed fuels and operating scenarios as they do for the EPA laboratory test scenarios. Proposed Step 2 tests will use cord wood and not crib wood. The EPA, industry and states believe that moving to cord wood testing will help address concerns about actual emissions from heaters/stoves in home use versus test laboratories. We are working with states and industry on a cord wood test method and evaluating potential revisions to the current version of the ASTM E2780–10 cord wood test method. Industry is conducting tests now using the cord wood test method, and we will consider the results of that testing when it becomes available during the public comment period of this rulemaking.

#### *B. Central Heaters: Hydronic Heaters and Forced-Air Furnaces*

The proposed subpart QQQQ would apply to new wood-fired residential hydronic heaters and forced-air furnaces and any other affected appliance as defined in subpart QQQQ as a "central heater." We believe this new "central heater" categorization will better ensure that all appliances potentially affected under new proposed subpart QQQQ are included in this proposed action. The provisions of subpart QQQQ would apply to each affected unit that is manufactured or sold on or after April 4, 2014. This proposal does not include any requirements for heaters that are fueled solely by gas, oil or coal. In addition, this proposal does not include any requirements associated with appliances that are already in use. The EPA continues to encourage state, local, tribal and consumer efforts to changeout (replace) older heaters with newer, cleaner, more efficient heaters, but that is not part of this federal rulemaking.

As discussed earlier in this preamble, subpart QQQQ affects a source category of mass-produced residential consumer products rather than typical industrial processes. Thus, this proposed NSPS has many aspects that are similar to those in Subpart AAA, e.g., certification of model lines and phased implementation. This Proposed Approach would apply to all new

residential hydronic heaters and forced-air furnaces. Under the Proposed Approach, the Proposed Step 1 emission limit for residential hydronic heaters and forced air heaters would apply upon the effective date of the final rule. The Proposed Step 2 emission limit for residential hydronic heaters and forced air heaters would apply 5 years after the effective date of the final rule. We ask for specific comments on the Proposed Approach and the degree to which these dates could be sooner.

We also considered an alternative three-step approach (Alternative Approach) for residential hydronic heaters and forced air heaters. Under this Alternative Approach, as in the Proposed Approach, the Alternative Step 1 emission limits for residential hydronic heaters and forced air heaters would apply upon the effective date of the final rule. The Proposed Step 1 emission limits and the Alternative Approach Step 1 emission limits are identical. The Alternative Step 2 emission limit for residential hydronic heaters and forced air heaters would apply 3 years after the effective date of the final rule. The Alternative Step 3 emission limit for residential hydronic heaters and forced air heaters would apply 8 years after the effective date of the final rule (thus providing 5 years between the Alternative Step 2 and the Alternative Step 3). The Proposed Step 2 emission limits and the Alternative Approach Step 3 emission limits are identical. We ask for specific comments on this Alternative Approach and the degree to which these dates could be sooner.

Table 5 summarizes the proposed PM emissions standards that would apply under this Proposed Approach at each step. Table 6 summarizes the PM emissions standards that would apply under each step of the Alternative Approach. Similar to the proposed requirements for subpart AAA, we are not proposing a standard for CO or efficiency, but we are proposing to require manufacturers to collect and report CO emissions and efficiency data during certification tests. Some regulatory authorities have instituted additional requirements such as limits on visible emissions and limits on use in non-heating seasons and we ask for specific comments on the appropriateness of such limits and other requirements in this NSPS.

<sup>18</sup> "A Test Method for Certification of Cord Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage: Measurement of Particulate Matter

(PM) and Carbon Monoxide (CO) Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage." Prepared

for NYSERDA by Brookhaven National Laboratory, February 15, 2013.

TABLE 5—PROPOSED APPROACH SUBPART QQQQ PM EMISSIONS STANDARDS

Appliance	Steps	Particulate matter emissions limits
Residential Hydronic Heater .....	Step 1: Upon the effective date of the final rule .....	0.32 lb/MMBtu heat output and a cap of 7.5 g/hr for individual test runs.
	Step 2: 5 years after the effective date of final rule .....	0.06 lb/MMBtu.
Forced-Air Furnace .....	Step 1: Upon the effective date of the final rule .....	0.93 lb/MMBtu.
	Step 2: 5 years after the effective date of final rule .....	0.06 lb/MMBtu.

TABLE 6—ALTERNATIVE APPROACH SUBPART QQQQ PM EMISSIONS STANDARDS

Appliance	Steps	Particulate matter emissions limits
Residential Hydronic Heater .....	Step 1: Upon the effective date of the final rule .....	0.32 lb/MMBtu heat output and a cap of 7.5 g/hr for individual test runs.
	Step 2: 3 years after the effective date of final rule .....	0.15 lb/MMBtu.
	Step 3: 8 years after the effective date of the final rule .....	0.06 lb/MMBtu.
Forced-Air Furnace .....	Step 1: Upon the effective date of the final rule .....	0.93 lb/MMBtu.
	Step 2: 3 years after the effective date of final rule .....	0.15 lb/MMBtu.
	Step 3: 8 years after the effective date of final rule .....	0.06 lb/MMBtu.

Unlike the 1988 subpart AAA requirements, the subpart QQQQ requirements would not provide an additional time period for the sale of unsold units manufactured before the compliance date. No additional time is prudent because cleaner EPA-qualified Phase 2 hydronic heaters systems have already been readily available for several years, the older systems have caused numerous complaints nationwide, and this proposal publication is ample notice for the remaining old high-emitting units. For the same reasons, the subpart QQQQ requirements would not include a small volume manufacturer compliance extension. See section V.C. of this preamble for more discussion of this topic. We ask for comments on the timing for implementation.

As in the current subpart AAA for wood heaters/stoves, we are proposing a list of prohibited fuels because their use would cause poor combustion or even hazardous conditions. We request comment on these requirements and data to support additional requirements, if warranted. Also, as in the current subpart AAA for wood heaters/stoves, we are proposing that the owner or operator must not operate the hydronic heater or forced-air furnace in a manner that is inconsistent with the owner's manual. For pellet-fueled appliances, this proposal makes it clear that operation according to the owner's manual includes operation only with pellet fuels that have been used in the certification test and have been graded and marked under a licensing agreement with the PFI, or equivalent (after request and subsequent approval by the EPA), to meet certain minimum requirements

and procedures for a quality assurance process. Details of the PFI program are available at <http://pelletheat.org/pfi-standards/pfi-standards-program/>. Data show that quality assurance provisions are necessary to ensure that the appliances operate properly such that emissions are reduced as intended. We ask for specific comments on the use of the PFI program and the PFI specifications, especially the degree to which the PFI program will adequately ensure the absence of construction and demolition waste (and associated toxic contaminants) in the pellets. (No other organization has volunteered to develop such a quality program.)

The proposed labeling requirements and owner's manual requirements are similar to the guidelines in the EPA's current voluntary hydronic heater program with some improvements. We request specific comments on ways to improve the delivery of information on the permanent label and in the owner's manual and whether different information might be useful to the consumer and to the regulatory authorities.

The structure of the rest of the proposed subpart QQQQ is similar to the proposed subpart AAA certification and quality assurance process. We request specific comments on changes or improvements to that process that might be needed to address any special concerns related to the certification of hydronic heaters and forced-air furnaces.

As discussed earlier, the EPA developed Method 28 OWHH, in 2006, as part of our efforts for voluntary qualification of cleaner hydronic heaters. We received input at that time

from manufacturers, laboratories, and some states in order to quickly develop a mostly consensus-based method that we incorporated into the program partnership agreements. We used Method 28 for wood heaters/stoves as the foundation. Thus, Method 28 OWHH has many aspects similar to Method 28. Three significant differences are: (1) Method 28 OWHH uses larger cribs because hydronic heater fireboxes are typically much larger than wood heater fireboxes; (2) Method 28 OWHH uses red oak instead of Douglas fir because red oak is the more common fuel in the U.S.; and (3) Method 28 OWHH includes procedures for determining 8-hour heat output and efficiency. The manufacturers, laboratories, states and the EPA have now had over 7 years of experience with Method 28 OWHH and its successor Method 28 WHH (improved and expanded to include indoor heaters, not just outdoor heaters).

All the stakeholders that have provided input on the test methods agree that the methods should be thoroughly vetted and changed as necessary to improve the method's accuracy and precision and to address concerns about how to best ensure protection across the entire U.S. when various operating scenarios and wood species and densities are used. ASTM has developed E2618–13 to address some of these concerns, and the EPA believes that E2618–13 does include some improvements. However, as with the wood heater/stove methods, we and some states do not agree with all the changes that ASTM has made. For example, the states of Washington and Oregon are very concerned that Method

28 WHH and ASTM E2618–13 do not specify fueling with Douglas Fir, which is used in EPA Method 28 for wood heaters/stoves and which these states require in their regulations for residential wood heaters, including hydronic heaters. They are concerned that hydronic heaters tested with red oak will have higher emissions when fueled with Douglas Fir and other less dense species typical in their states and have provided test data that shows higher emissions. Thus, they require testing with Douglas Fir in their states. Also, a number of states and the EPA are concerned about the ASTM changes to the burn rate categories, *i.e.*, easing or eliminating testing at the lowest burn rates, which often occur in home operations and are typically the highest-emitting and least efficient. For several years, we have been communicating with European certification laboratories to learn how they conduct their tests under EN 303–5 and to consider if incorporating some of their testing procedures might improve our test methods.

More recently, because of initial concerns about some surprisingly high laboratory test efficiencies for a couple of the EPA voluntary partnership program Phase 2 qualified partial heat storage models, the EPA, the Northeast states that regulate hydronic heaters, laboratories (including EPA-accredited laboratories and Brookhaven National Laboratory) and manufacturers have conducted a review of voluntary partnership program qualifying test reports. All of the stakeholders that provided input on the test methods agree that we need a change in the test method for testing of non-integral partial heat storage models (*i.e.*, models that have separate heat storage but the storage does not have the capacity to safely handle all the heat generated by a full load of fuel). ASTM has been leading an effort to develop an Appendix X2 to the test method for such models but has not completed that effort as of this proposal. Brookhaven National Laboratory recommended a method to the New York State Department of Environmental Conservation (NYSDEC) and NYSDEC is requiring that method be used for certification of such models in their states. We are proposing that method be used for certification of the NSPS for hydronic heaters equipped with a partial heat storage unit.<sup>19</sup>

Further, we are proposing revisions to Method 28 WHH that would require that all affected non-pellet hydronic heaters, subject to new subpart QQQQ, conduct

certification compliance testing using both crib wood and cord wood for the Step 1 emission limits upon the effective date of the final rule and solely cord wood for the Step 2 emission limits 5 years after the effective date of the final rule.

We are asking for specific comments on whether the EPA should use: (1) One or more of the draft versions of Appendix X2 being considered as part of ASTM work product WK26581; (2) the European Union test method EN303–05 as the Maine Department of Environmental Protection approved for certification of hydronic heaters in their state as equivalent to the EPA Method 28 WHH; (3) the partial thermal storage test method developed by Brookhaven National Laboratory; and/or (4) some other test method(s). For use of any of the test methods, the EPA would require that the amount of heat storage for the actual sale and installation of the hydronic heaters be no less than the amount used for the certification tests. Because EN303–05 does not currently use heat storage during the certification test, if the EPA were to use EN303–05 test results, the EPA would require the installed heater to have heat storage that can safely handle at least 60 percent of the maximum heat output of the heater or a greater level if the manufacturer specifies a greater level. The EPA is asking for specific comments on the appropriateness of this heat storage level or other levels. The EPA will consider any or all of these options as the preferred reference test methods or as acceptable emission testing alternatives. (ASTM previously developed an Appendix X1 for testing of models that have “full” heat storage that can safely accept the heat from the full load of fuel.) We request comments on all aspects of heater testing and are especially interested in emission test data that compare the results for testing by these different methods.

Also, the review discussed above found a number of areas in the methods to improve the quality of the data and reduce anomalies. In June 2011, the voluntary partnership program stakeholders agreed to a number of changes to Method 28 OWHH, and we are proposing the revised method as EPA Reference Method 28 WHH. The EPA is asking for specific comments on this method and recommendations and supporting data for other changes or acceptable alternatives. The following paragraphs discuss some of the changes we are proposing for comment. Additional information on the EPA methods is available at <http://www2.epa.gov/residential-wood-heaters>. The ASTM methods and draft work

products are available at [www.astm.org/epa](http://www.astm.org/epa).

#### 1. Heater (*aka* Boiler) Temperature Range

We propose that for all tests, the return water temperature to the heater must be 120 °F or greater. We additionally propose that if the manufacturer specifies a thermal control valve or other arrangement to be installed and set to control the return temperature at 120 °F or higher, the valve must be installed and set per the manufacturer’s written instructions.

#### 2. Efficiency Calculations

We propose to require the use of thermopiles to measure the temperature change “delta T” and verify accuracy of the load side flow meter. The accuracy of the flow meter is determined separately by direct weighing of timed water collection. Thermocouples must measure water temperature at the inlet and outlet of the load side heat exchanger. We propose to delete the requirement for supply side flow measurements and require one load side reading with thermopiles (using a commercial system or a homemade system). Efficiency would be measured on the output (load) side of the heat exchanger. The flow meter would be calibrated before and after each test run within the flow range used for the test.

#### 3. Time Period for Recording Temperatures

We propose that all water temperatures, differential water temperatures and water flow rates must be recorded at time intervals of 1 minute or less. This data file must be submitted with the test report. For determination of heat output, the data for these parameters must be measured in equal time intervals no greater than 10 minutes or at a frequency that results in a minimum of 50 equal intervals per test run, whichever is greater.

#### 4. Test Fuel Moisture Content

We propose that each individual test fuel moisture content reading must be in the range of 18 to 28 percent on a dry basis and the average moisture content of each piece of test fuel must be in the range of 19 to 25 percent.

We also propose the following moisture measurement procedure: Using a fuel moisture meter as specified in the test method, determine the fuel moisture for each test fuel piece used for the test fuel load by averaging at least five fuel moisture meter readings, one from each of three sides, measured parallel to the wood grain. Penetration of the moisture meter insulated

<sup>19</sup> See footnote 18.

electrodes must be one-fourth the thickness of the fuel piece or 19 mm (3/4 in.), whichever is less for 3 of the measurements made at approximately 3 inches from each end and the center. Two additional measurements at approximately one-third the thickness shall be made centered between the other three locations. We request specific comments on the moisture content limits and the procedures for determining the moisture content and the typical variances due to the measurement procedures.

We also request specific comments on the following approach for determining moisture content. "Select three pieces of cord wood from the same batch of wood as the test fuel and the same weight as the average weight of the pieces in the test load  $\pm$  1.0 lb. From each of these three pieces, cut three slices. Each slice shall be 1/2" to 3/4" thick. One slice shall be cut across the center of the length of the piece. The other two slices shall be cut half way between the center and the end. Immediately measure the mass of each piece in pounds. Dry each slice in an oven at 220 °F for 24 hours or until no further weight change occurs. The slices shall be arranged in the oven so as to provide separation between faces. Remove from the oven and measure the mass of each piece again as soon as practical in pounds. The moisture content of each slice, on a dry basis shall be calculated as:

$$MC_{Slice} = 100 \cdot (W_{SliceWet} - W_{SliceDry}) / W_{SliceDry}$$

Where:  $W_{SliceWet}$  = weight of the slice before drying in pounds;  $W_{SliceDry}$  = weight of the slice after drying in pounds; [and]  $MC_{Slice}$  = moisture content of the slice in % dry basis."<sup>20</sup>

Also, we propose that moisture must not be added to previously dried fuel pieces except by storage under high humidity conditions and temperature up to 100 °F. Fuel moisture must be measured no more than 4 hours before using the fuel for a test. The test report must describe the source and storage history of the test fuel.

#### 5. Water Density

a. We propose that the measured volumetric flow from the flow meter be converted to mass basis by using the water density based on water temperature. The same method must be used on both the load and supply side if the optional supply side meter is used.

b. We propose that the water density be calculated using the water temperature measured at the flow meter.

#### 6. Calculations

a. We propose that the electronic test reports submittals include all data within the locked spreadsheets so the formulas used and relevant calculations can be reviewed in detail.

b. To ensure common application, we propose to require averages to be calculated on each 10-minute reading rather than averaging over the entire test run.

#### 7. Overall Efficiency (CSA B415.1–10 Stack Loss Method)

We propose that during each test run, data must be obtained and presented for the purpose of calculation of overall efficiency as specified in the stack loss method in CSA B415.1–10. This includes CO and CO<sub>2</sub>, flue gas temperature, and appliance mass (remaining fuel weight). Overall efficiency for each run must be determined as per CSA B415.1–10 and reported. Whenever the CSA B415.1–10 overall efficiency is found to be lower than the overall efficiency based on the load side measurements, as determined by this method, the report must include a discussion of the reasons for this result.

#### 8. Wood Loading

Test fuel loads would be determined by multiplying the firebox volume by 4.54 kg (10 lb) of wood (as used, wet weight) per cubic foot, or a higher load density as recommended by the manufacturer's operating instructions. As discussed earlier, the EPA will require separate tests in the proposed Step 1 using cribs and using cord wood. In the proposed Step 2, the tests would all be using cord wood. There are ongoing discussions on how to improve both types of tests. We are working with states and industry on a cord wood test method and evaluating making revisions to the current version of the ASTM cord wood test method and states' ideas on cord wood testing. Also, we are reviewing European experiences with cord wood testing.

#### 9. Drawing of Test Apparatus

The test report would be required to contain a drawing of the test apparatus, including thermocouples, piping arrangements including any recirculation loops, the thermopile and flow meter(s).

#### 10. Aquastat Settings

Aquastat or other heater output control device settings that are adjustable would be set using manufacturer specifications, either as factory set or in accordance with the

owner's manual, and must remain the same for all burn categories.

#### 11. Narrative

The test report would be required to include a statement that the test was conducted according to the method specified. If there are any deviations from the test procedure requirements, the test report would need to include a section identifying those deviations, the reasons for those deviations, and an evaluation of the data quality implications, if any, of such deviations on the test results.

12. The test report would include a standard summary page as a quick check for the reviewer that results are within method specifications.

13. We propose to require testing with a range of all fuels for which the appliance is designed, per the manufacturer's warranty and owner's manual, to show how emissions and efficiency vary according to species and density and cord wood versus crib wood.

In addition, ASTM has developed a draft test method that uses cord wood rather than crib wood to better represent real world conditions. All stakeholders agree that a test method that better represents real world conditions would be a significant improvement and help ameliorate concerns that some heaters do not perform as well in home use as they do in laboratories. We are also interested in real-time emission test methods that measure cold or warm startup emissions and emission peaks/durations. We are also interested in field test methods and less expensive test methods that regulators and neighbors can use to better quantify impacts in the real world. The EPA is asking for specific comments and data on all these potential methods, issues and recommendations.

The EPA is proposing to rely on the test method that has been developed by the CSA for forced-air furnaces. All CSA standards are developed through a consensus development process approved by the Standards Council of Canada. This process brings together volunteers representing varied viewpoints and interests to achieve consensus and develop a standard. CSA worked for years on development of this test method that has its roots in earlier U.S. efforts on wood heaters/stoves. The current version of CSA B415.1–10 was published in March 2010, and it includes not only the forced-air furnace test method but also new Canadian emission performance specifications for indoor and outdoor central heating appliances.

<sup>20</sup> See footnote 19.

Although the CSA B415.1–10 technical committee included numerous U.S. manufacturers and laboratories, it did not include any states or environmental groups, and the EPA participation was minimal during the development. Now that we have reviewed this method in substantively, we are satisfied that it warrants proposal for this rulemaking. We request specific comments and supporting data. We ask for specific comments on the appropriateness of using the CSA test method in its entirety, including the use of cord wood instead of crib wood that are used in current versions of Method 28 and Method 28 WHH. To review the CSA test method, please go to [www.csa.ca](http://www.csa.ca).

### C. Masonry Heaters

The proposed subpart RRRR would apply to new residential masonry heaters. The provisions apply to each affected unit that is manufactured on or after April 4, 2014. We are proposing that, as of the effective date of the final rule, no person would manufacture or sell a residential masonry heater that does not meet the proposed emission limit of 0.32 lb of PM per MMBtu heat output. We are also proposing a 5-year small volume manufacturer compliance extension that would apply to companies that construct fewer than 15 masonry heaters per year. See section V.C. of this preamble for more discussion of compliance date related issues. We request specific comments on the degree to which these dates can be sooner. As in the case of subpart AAA and subpart QQQQ, we are proposing requirements that would apply to the operator of the masonry heater, including a provision to operate the unit in compliance with the owner's manual; a prohibition on use of certain fuels; and a requirement to use licensed wood pellets or equivalent, if applicable. We are not proposing efficiency or CO standards for new residential masonry heaters at this time because sufficient data are not yet available to support the basis for such standards.

The EPA is proposing to rely on ASTM method E2817–11 for masonry heaters. The laboratories, some states and the masonry heater industry worked for years on drafts of this method that has its roots in earlier regulatory efforts in Colorado. The EPA has participated in the discussions from time to time over the years and has provided comments and suggestions. The current ASTM methods are ASTM E2817–11 “Standard Test Method for Test Fueling Masonry Heaters” and the draft work product ASTM WK26558 “Specification

for Calculation Method for Custom Designed, Site-built Masonry Heaters.” (<http://www.astm.org/DATABASE.CART/WORKITEMS/WK26558.htm>.) We propose that they be used for this rulemaking. We request specific comments on these methods and any changes that should be considered and supporting data for those changes. We request specific comments and supporting emission test data on the use of “Annex A1. Cordwood Fuel” and “Annex A2. Cribwood Fueling.” ASTM is allowing public review, for no charge, of the ASTM test methods and draft work products relevant to this rule at [www.astm.org/epa](http://www.astm.org/epa).

As an alternative to testing, we are proposing that manufacturers of masonry heaters may choose to submit a computer model simulation program, such as ASTM WK 26558 noted above, for the EPA's review and approval. Masonry heater manufacturers and laboratories developed computer simulations as a way to encourage good designs without having to conduct emission tests for slight variations, especially because there are so few masonry heaters built every year per manufacturer. Since these units are built on-site, it is not easy to test each of them. These units are typically cleaner than pre-NSPS certified wood stoves. Considering all of these factors, we believe a simple computer simulation showing how new models would perform may be all that is necessary for many of these models.

The structure of the rest of the proposed new subpart RRRR is similar to the proposed subpart AAA certification and quality assurance process and contains similar requirements for labels, owner's manual, etc. One difference, however, is that for small custom unit manufacturers, we are requiring less stringent quality control (QC) procedures. Specifically, we are proposing that the initial certification for these custom units is sufficient and that no further QC is necessary since each unit is a unique model and subject to certification. We request comment on changes or improvements that might be needed to address special concerns related to certification of masonry heaters.

### IV. Summary of Environmental, Cost, Economic, and Non-Air Health and Energy Impacts

The EPA estimates the proposed NSPS's total annualized average nationwide costs would be \$15.7 million (\$2010) over the 2014 through 2022 period. The economic impacts for

industries affected by this proposed rule over this same period range from 4.3 percent for manufacture of wood heater/stove models to 6.4 percent compliance cost-to-sales estimate for manufacture of single burn rate wood heater models. These impacts do not presume any pass-through of impacts to consumers. With pass-through to consumers, these impact estimates to manufacturers will decline proportionate to the degree of pass-through.

#### A. What are the air quality impacts?

To determine the air quality impacts, we developed emission factors for each appliance type and then applied those emission factors to shipment data for each of the appliance types subject to the proposed NSPS.<sup>21</sup> We developed the emission factors using the EPA Residential Wood Combustion (RWC) emission estimation tool,<sup>22</sup> which is a Microsoft Access database that compiles nationwide RWC emissions using county-level, process-specific data and calculations. The compilation of such data is a large, important, continually improving effort by the EPA and the states to ensure that we and the states have access to the best information available. We summed the estimated nationwide number of appliances and the estimated total tons of wood burned for each of the relevant product categories in the inventory and then made some adjustments/assumptions to the baseline RWC inventory to reflect emission characteristics specific to new units.

We used the resulting subset of the RWC database to calculate an average emission rate per appliance for each category, as follows. First, we multiplied the total tons of wood burned by devices within the category by the category emission factor to calculate the total tons of emissions for each of the pollutants PM<sub>2.5</sub>, VOC and CO emissions for that category. Then we divided these values by the number of appliances in the category to calculate the average emissions of PM<sub>2.5</sub>, VOC and CO per individual appliance. We then developed adjusted emission factors to reflect the NSPS options and then used the adjusted factors to calculate average tons of emissions of each of these three pollutants per appliance for each category.

<sup>21</sup> Memo to Gil Wood, USEPA, from EC/R, Inc. Estimated Emissions from Wood Heaters. February 15, 2013.

<sup>22</sup> [rwc\\_2008\\_tToolv4.1\\_feb09\\_2010.zip](#) available in the docket.

We used data in the Frost & Sullivan Market (F&S) report<sup>23</sup> on 2008 shipments by product category and F&S revenue forecasts, which incorporated the weak economy in years 2009 and 2010, to calculate the reduced number of shipments in years 2009 and 2010. We adjusted these data to include appliances not covered in the F&S report (e.g., forced-air furnaces). For years 2011 through 2038, we estimated shipments based on a forecasted revenue growth rate of 2.0 percent, in keeping with the average annual growth in real gross domestic product (GDP) predicted by the U.S. Bureau of Economic Analysis.<sup>24</sup> Historically wood heater shipments have most closely corresponded to GDP, housing starts, and price of wood relative to gas. We think the overall trend in the projection is reasonable in the absence of additional specific shipment projections. We did not change the relative percentages of one type of residential wood heater versus other types of residential wood heaters over this time period. We ask for comments

and data that would support improved projections.

The next step was to calculate the total emissions per appliance category. First, we multiplied the emission factor for each category by the inventory value of total tons of wood burned by all appliances within that category, and then divided by the number of appliances in the inventory population. The appliance value was then multiplied by the number of units shipped to calculate total emissions from each category per year using the baseline conditions emission factors (i.e., in the absence of a revised NSPS). Using the same procedure, category emissions were then calculated using the emission factors for the proposed NSPS.

Table 7 is a summary of the average emissions reductions over years 2014 through 2022 resulting from implementing the proposed NSPS compared to baseline conditions (for the years analyzed in the RIA). Note that we do not have national emission impacts from masonry heaters because they are

not included in the RWC emission estimation tool. Because of the relatively high cost of emission testing versus the current small number of masonry heaters sold per manufacturer, and in total, there are few emission test data from masonry heater manufacturers and laboratories. Based on the limited data we have, we believe that nationwide emissions from masonry heaters are relatively low, given the low number of sales. Thus, we also believe that the total emission reductions from masonry heaters will be relatively low. However, the limited data we have do show that the emission reductions could be significant for some models that do not follow current best designs, perhaps as high as 70 percent for some designs. We do not know how many of these typically custom-made heaters already use best practice designs versus other designs and thus we do not have nationwide estimates of baseline emissions. We ask for comments and data to help us prepare emission estimates.

TABLE 7—ESTIMATED ANNUAL AVERAGE (2014–2022) AIR QUALITY IMPACTS<sup>25</sup>

Appliance type	PM <sub>2.5</sub> (tons)			VOC (tons)			CO (tons)		
	Baseline	Revised NSPS	Emission reduction	Baseline	Revised NSPS	Emission reduction	Baseline	Revised NSPS	Emission reduction
Wood Heaters	548	385	163	781	551	230	7,857	5,448	2,409
Single Burn Rate Heaters	932	178	754	1,614	244	1,370	7,029	2,860	4,169
Pellet Heaters/Stoves ...	199	150	49	3	2	1	1,035	778	257
Furnace: Indoor, Cord Wood ....	3,044	434	2,610	1,290	184	1,106	20,294	2,896	17,398
Hydronic Heating Systems	1,332	84	1,249	565	35	530	8,883	557	8,326
Total ..	6,055	1,230	4,825	4,253	1,016	3,237	45,098	12,538	32,559

Note: This table only includes the emissions during the first year of the life of each wood heater. That is, this table *does not include* the emissions that continue for the duration of the lifetime of each appliance's use, typically greater than 20 years.

*B. What are the benefits?*

Emission reductions associated with the requirements of this rule will generate health benefits by reducing emissions of PM<sub>2.5</sub>, HAP, as well as criteria pollutants and their precursors, including CO and VOC. VOC are precursors to PM<sub>2.5</sub> and ozone. For this rule, we were only able to quantify the

health co-benefits associated with reduced exposure to PM<sub>2.5</sub> from directly emitted PM<sub>2.5</sub>. Our benefits reflect the average of annual PM<sub>2.5</sub> emission reductions occurring between 2014 and 2022 (inclusive). We estimate the monetized PM<sub>2.5</sub>-related health benefits of the proposed residential wood heaters NSPS in the 2014–2022 timeframe to be \$1,800 million to \$4,100

million (2010 dollars) at a 3-percent discount rate and \$1,700 million to \$3,700 million (2010 dollars) at a 7-percent discount rate. Using alternate relationships between PM<sub>2.5</sub> and premature mortality supplied by

<sup>23</sup> Market Research and Report on North American Residential Wood Heaters, Fireplaces, and Hearth Heating Products Market. Prepared by Frost & Sullivan. April 26, 2010, pp. 31–32.

<sup>24</sup> 2013 Global Outlook projections prepared by the Conference Board in November 2012; <http://www.conference-board.org/data/globaloutlook.cfm>.

<sup>25</sup> See footnote 24.

experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.<sup>26</sup> A summary of the emission reduction and monetized

benefits estimates for this rule at discount rates of 3 percent and 7 percent is in Table 8 of this preamble, except for masonry heaters. As requested earlier in this preamble, we

ask for emission and sales data per model that would help us prepare emission reduction estimates and corresponding monetized health benefits for masonry heaters.

**TABLE 8—SUMMARY OF MONETIZED PM<sub>2.5</sub>-RELATED HEALTH BENEFITS FOR PROPOSED RESIDENTIAL WOOD HEATERS NSPS IN 2014–2022 TIMEFRAME**  
[millions of 2010 dollars]<sup>a, b, c</sup>

Pollutant	Estimated emission reductions (tpy)	Total monetized benefits (3% discount rate)	Total monetized benefits (7% discount rate)
Directly emitted PM <sub>2.5</sub> .....	4,825	\$1,800 to \$4,200 .....	\$1,700 to \$3,700.
PM <sub>2.5</sub> Precursors			
VOC .....	3,250	— .....	—

<sup>a</sup> All estimates are for the 2014–2022 timeframe (inclusive) and are rounded to two significant figures so numbers may not sum across rows. The total monetized benefits reflect the human health benefits associated with reducing exposure to PM<sub>2.5</sub> through reductions of PM<sub>2.5</sub> precursors, such as NO<sub>x</sub>, and directly emitted PM<sub>2.5</sub>. It is important to note that the monetized benefits do not include reduced health effects from exposure to HAP, direct exposure to NO<sub>2</sub>, exposure to ozone, VOC, ecosystem effects or visibility impairment.

<sup>b</sup> PM benefits are shown as a range from Krewski, *et al.* (2009) to Lepeule, *et al.* (2012). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

<sup>c</sup> The emission reductions and monetized benefits for masonry heaters are not included in this summary.

These benefits estimates represent the monetized human health benefits for populations exposed to less PM<sub>2.5</sub> from emission limits established to reduce air pollutants in order to meet this rule. Due to analytical limitations, it was not possible to conduct air quality modeling for this rule. Instead, we used a “benefit-per-ton” approach to estimate the benefits of this rulemaking. To create the benefit-per-ton estimates, this approach uses a model to convert emissions of PM<sub>2.5</sub> precursors into changes in ambient PM<sub>2.5</sub> levels and another model to estimate the changes in human health associated with that change in air quality, which are then divided by the emissions in specific sectors. These benefit-per-ton estimates were derived using the approach published in Fann *et al.* (2012),<sup>27</sup> but they have since been updated to reflect these studies and population data in the 2012 p.m. NAAQS RIA.<sup>28</sup> Specifically, we multiplied the benefit-per-ton estimates from the “Residential Wood Heaters” category by the corresponding emission reductions.<sup>29</sup> All national-

average benefit-per-ton estimates reflect the geographic distribution of the modeled emissions, which may not exactly match the emission reductions in this rulemaking, and thus they may not reflect the local variability in population density, meteorology, exposure, baseline health incidence rates, or other local factors for any specific location. More information regarding the derivation of the benefit-per-ton estimates for this category is available in the technical support document, which is referenced in the footnote below and is available in the docket.

These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors depending on the location and magnitude of their impact on PM<sub>2.5</sub>

levels, which drive population exposure.

It is important to note that the magnitude of the PM<sub>2.5</sub> benefits is largely driven by the concentration response function for premature mortality. We cite two key empirical studies, one based on the American Cancer Society cohort study<sup>30</sup> and the extended Six Cities cohort study.<sup>31</sup> In the Regulatory Impact Analysis (RIA) for this rule, which is available in the docket, we also include benefits estimates derived from expert judgments (Roman *et al.*, 2008) as a characterization of uncertainty regarding the PM<sub>2.5</sub>-mortality relationship.

Considering a substantial body of published scientific literature, reflecting thousands of epidemiology, toxicology, and clinical studies, the EPA’s Integrated Science Assessment for Particulate Matter<sup>32</sup> documents the association between elevated PM<sub>2.5</sub> concentrations and adverse health effects, including increased premature mortality. This assessment, which was

<sup>26</sup> Roman, *et al.*, 2008. “Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S.,” *Environ. Sci. Technol.*, 42, 7, 2268–2274.

<sup>27</sup> Fann, N., K.R. Baker, and C.M. Fulcher. 2012. “Characterizing the PM<sub>2.5</sub>-related health benefits of emission reductions for 17 industrial, area and mobile emission sectors across the U.S.” *Environment International* 49 41–151.

<sup>28</sup> U.S. Environmental Protection Agency (U.S. EPA). *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter*. EPA-452/R-12-003. Office of Air Quality Planning and Standards,

Health and Environmental Impacts Division. December 2012. Available at <http://www.epa.gov/pm/2012/finalria.pdf>.

<sup>29</sup> U.S. Environmental Protection Agency. Technical support document: Estimating the benefit per ton of reducing PM<sub>2.5</sub> precursors from 17 sectors. Research Triangle Park, NC. January 2013.

<sup>30</sup> Krewski, C.A., III, R.T. Burnett, M.J. Thun, E.E. Calle, D. Krewski, K. Ito, and G.D. Thurston. 2002. “Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution.” *Journal of the American Medical Association* 287:1132–1141.

<sup>31</sup> Lepeule J, Laden F, Dockery D, Schwartz J 2012. “Chronic Exposure to Fine Particles and Mortality: An Extended Follow-Up of the Harvard Six Cities Study from 1974 to 2009.” *Environ Health Perspect*. Jul;120(7):965–70.

<sup>32</sup> 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>.

reviewed twice by the EPA's independent Science Advisory Board, concluded that the scientific literature consistently finds that a no-threshold model most adequately portrays the PM-mortality concentration-response relationship. Therefore, in this analysis, the EPA assumes that the health impact function for fine particles is without a threshold.

In general, we are more confident in the magnitude of the risks we estimate from simulated PM<sub>2.5</sub> concentrations that coincide with the bulk of the observed PM concentrations in the epidemiological studies that are used to estimate the benefits. Likewise, we are less confident in the risk we estimate from simulated PM<sub>2.5</sub> concentrations that fall below the bulk of the observed data in these studies. Concentration benchmark analyses (e.g., lowest measured level [LML] or one standard deviation below the mean of the air quality data in the study) allow readers to determine the portion of population exposed to annual mean PM<sub>2.5</sub> levels at or above different concentrations, which provides some insight into the level of uncertainty in the estimated PM<sub>2.5</sub> mortality benefits. There are uncertainties inherent in identifying any particular point at which our confidence in reported associations becomes appreciably less, and the scientific evidence provides no clear dividing line. However, the EPA does not view these concentration benchmarks as a concentration threshold below which we would not quantify health benefits of air quality improvements.

For this analysis, policy-specific air quality data are not available. Thus, we are unable to estimate the percentage of premature mortality associated with this specific rule's emission reductions at each PM<sub>2.5</sub> level. As a surrogate measure of mortality impacts, we provide the percentage of the population exposed at each PM<sub>2.5</sub> level using the source apportionment modeling used to calculate the benefit-per-ton estimates for this sector. Using the Krewski, *et al.* (2009) study, 93 percent of the population is exposed to annual mean PM<sub>2.5</sub> levels at or above the LML of 5.8 µg/m<sup>3</sup>. Using the Lepeule, *et al.* (2012) study, 67 percent of the population is exposed above the LML of 8 µg/m<sup>3</sup>. It is important to note that baseline exposure is only one parameter in the health impact function, along with baseline incidence rates, population, and change in air quality. Therefore, caution is warranted when interpreting the LML assessment for this rule because these results are not consistent with results from rules that had air quality modeling.

Every benefit analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, model capabilities (such as geographic coverage) and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. Despite these uncertainties, we believe the benefit analysis for this rule provides a reasonable indication of the expected health benefits of the rulemaking under a set of reasonable assumptions. In addition, we have not conducted air quality modeling for this rule, and using a benefit-per-ton approach adds another important source of uncertainty to the benefits estimates. The 2012 PM<sub>2.5</sub> NAAQS benefits analysis provides an indication of the sensitivity of our results to various assumptions.

One should note that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including exposure to HAP, VOC and ozone exposure, as well as ecosystem effects and visibility impairment. Although we do not have sufficient information or modeling available to provide monetized estimates for these benefits in this rule, we include a qualitative assessment of these unquantified benefits in the RIA <sup>33</sup> for this proposal.

For more information on the benefits analysis, please refer to the RIA for this rule, which is available in the docket.

### C. What are the cost impacts?

In analyzing the potential cost impacts of the proposed NSPS, we considered two types of impacts. The first was the impact to the manufacturer to comply with the proposed standards. The second was the increase in price of the affected unit. In both of these cases, we considered the same input variables: R&D cost to develop and certify complying model lines, certification costs (where these are separate from R&D), reporting and recordkeeping costs, numbers of shipments of each appliance category (modified, from Frost & Sullivan report), number of manufacturers, and number of models per manufacturer. This section of the preamble contains a summary of these costs. For more detailed information, see the manufacturer cost impact

memo <sup>34</sup> and unit cost memo <sup>35</sup> in the docket. Unless otherwise specified, all costs are in 2010 dollars.

To develop average R&D costs, we reviewed information provided by manufacturers. Based on this information, we estimated <sup>36</sup> average costs to develop a new model line, including testing, of 356,250 for certified wood heaters and pellet heaters/stoves. We also assumed 356,250 for single burn rate wood heaters, which may be high if currently available units can meet the standards without significant modifications as some manufacturers have suggested. We also assumed development costs for forced-air furnaces and hydronic heaters of 356,250. Finally, we also assumed development costs of 356,250 for the masonry heaters. The estimates of the cost of R&D are crucial to our estimates of overall costs and economic impacts and greatly influence our decisions on BSE, implementation lead times and small volume provisions. Thus, we request specific comments on these estimates, including whether they should be reduced and thus allow greater emission reductions sooner.

We annualized the R&D costs over 6 years, applied the NSPS implementation assumptions, and estimated the average manufacturing cost per model line per manufacturer. Under the proposed rules, pellet heaters/stoves will only face certification (testing) costs (no R&D should be required), so we estimated certification costs of 10,000 per model line. Similarly, many masonry heater model lines that would comply with the proposed standards have already been developed. These manufacturers would also face certification costs of 10,000 per model line. We estimated post R&D period certification costs for hydronic heaters and forced-air furnaces at 20,000 per model line.

The masonry heater compliance costs included implementation of a software package based on a European masonry heater design standard. This software has been verified in the laboratory and under field conditions to produce masonry heaters that would meet the proposed NSPS emission limits. The cost of this software to the user is approximately \$1,500 for the package with an approximately \$450 annual fee

<sup>34</sup> Memo to Gil Wood, USEPA, from EC/R, Inc. Residential Heater Manufacturer Cost Impacts. February 22, 2013.

<sup>35</sup> Memo to Gil Wood, USEPA, from EC/R, Inc. Unit Cost Estimates of Residential Wood Heating Appliances. February 21, 2013.

<sup>36</sup> In developing average R&D costs, the EPA used the highest industry R&D estimates supplied, in order to avoid under-estimating potential costs per model line and to avoid understating the number of model lines that would undergo R&D nationwide.

<sup>33</sup> Regulatory Impact Analysis (RIA) for Residential Wood Heaters NSPS. [INSERT DATE RULE IS SIGNED].

that commences in the second year following purchase. In addition, we believe that some manufacturers will use this approach to demonstrate that “similar” model designs meet the proposed emissions standards.

The estimate of the number of model types was derived from information provided by HPBA, individual manufacturers, and Internet searches of

product offerings. For numbers of manufacturers, we started with HPBA data and modified the dataset based on Internet searches of manufacturers of the major appliance types. Table 9 is a summary of the nationwide average annual NSPS-related cost increases to manufacturers. The average annual cost increases are presented over the 2014 to 2022 period consistent with the years

analyzed in the RIA,<sup>37</sup> as well as over the 2013 to 2038 period. The 2013 to 2038 period encompasses the first year of estimated NSPS-related costs (2013 since some companies have already started in anticipation of the NSPS) through the life span of models designed to meet the NSPS, as explained further below and in our background analyses.<sup>38</sup>

TABLE 9—SUMMARY OF NATIONWIDE AVERAGE ANNUAL COST INCREASES [2010\$]

Appliance Type	2014–2022 Period	2013–2038 Period
Wood Heaters .....	\$4,212,303	\$1,749,726
Single Burn Rate Heaters .....	901,732	456,316
Pellet Heaters/Stoves .....	3,460,489	1,702,796
Forced-Air Furnaces .....	2,252,284	1,171,222
Hydronic Heating Systems .....	4,554,152	2,221,551
Masonry Heaters .....	307,511	228,896
<b>Total Average Annual Cost .....</b>	<b>15,688,471</b>	<b>7,530,507</b>

To develop estimates of potential unit cost increases, we used major variables including the estimated number of units shipped per year, the costs to develop new models, baseline costs of models, and the schedule by which the proposed revised NSPS would be implemented. Both the number of shipped units and the baseline costs of models were based on data from the Frost & Sullivan report with modifications to address additional appliances or subsets of appliances. The 20-year model design life span and 20-year use/emitting appliance life span are based on actual historical design certification and heater use data. That is, the data show that many models developed for the current 1988 NSPS are still being sold (after 25 years), many “new” models still have the same internal working parts with merely exterior cosmetic changes, and most residential wood heaters in consumer homes emit for at least 20 years and often much longer. Therefore, our analysis tracks shipments and costs through year 2038 (*i.e.*, 19 years after a model designed to meet the NSPS Step 2 emission limits expected to be implemented in 2020 has completed development and is shipped). Finally, we also estimated the potential additional manufacturing costs to make NSPS complying models. These expenses result from the use of more

expensive structural materials, components to enhance good combustion, etc. We estimated the following additional manufacturer price increases per unit based on appliance type:

- Certified wood heaters and pellet heaters/stoves represent a well-developed technology, and we could not identify price differences between models due solely to lower emission levels compared to models with higher emission levels. Rather, price differences are more closely related to cosmetic differences and output. Therefore, we have assumed no additional manufacturing costs.
- One manufacturer estimated that it will cost an average of 100 more to manufacture a lower emitting single burn rate product.
- We have seen a range of estimates for additional price increases for manufacture of a cleaner hydronic heater, with an average being approximately 3,000 (as compared to a typical pre-regulation sales price of 7,500).
- We estimate that the additional price increases to manufacture a certified forced-air furnace will be comparable to the price increases for manufacturing certified hydronic heaters, *i.e.*, \$3,000 (as compared to a typical pre-regulation price of \$900).

Our next step was to develop the following incremental cost formula: Cost of R&D multiplied by number of units shipped per year divided by number of models multiplied by model life equals the incremental cost of developing a new unit, spread over the number of units expected to be sold during the model life. In developing this calculation, we included the concept that the R&D costs per model line are recovered in the sales price of future models, which means that the more units that are sold or the longer the model life, the lower the incremental cost per unit. For our unit cost analysis, we assumed a flat growth rate in shipments—that is, we assumed future shipments over the 20 years of model design life would be equal to the shipments estimated in the first NSPS compliance year. We did not assume lower sales due to market competition with other wood heaters or non-wood heaters. We did not assume lower projected sales for increased prices because of the uncertainty of other demand factors. Where there are additional manufacturing costs as discussed above, we added these to the unit cost number. Table 10 is a summary of the baseline unit costs, NSPS unit costs, and incremental cost increase.

<sup>37</sup> See footnote 36.

<sup>38</sup> Memo to Gil Wood, USEPA, from EC/R, Inc. Residential Heater Cost Effectiveness Analysis. February 26, 2013.

TABLE 10—SUMMARY OF UNIT COST IMPACTS  
[2010\$]

Appliance type	Baseline	Post-NSPS	Incremental increase
Certified Wood Heaters .....	\$859	\$883	\$24
Single Burn Rate Heaters .....	253	479	226
Pellet Heaters/Stoves .....	1,295	1,319	24
Forced-Air Furnaces .....	912	4,174	3,262
Masonry Heaters .....	9,157	9,245–9,997	88–840
Hydronic Heating Systems .....	7,528	13,986	6,458

We request specific comments on these estimates, which significantly affect the estimates of costs per model lines and per unit sold and potential changes in sales and, thus, affect decisions on the affordability of candidate BSER. For example, if the number of model lines was less and the number of heaters per model line was greater, then the cost per unit sold would be less and more stringent options for BSER could potentially be implemented sooner.

#### D. What are the economic impacts?

The economic impacts of the proposed rule are estimated using industry-level estimates of annualized compliance cost to value of shipments (receipts) for affected industries. In this case, cost-to-receipts ratios approximate the maximum price increase needed for a producer to fully recover the annualized compliance costs associated with a regulation. Essentially, the revenues to producers will likely fully cover the annualized compliance cost incurred by producers at this maximum price increase. Any price increase above the cost-to-receipts ratio provides revenues that exceed the compliance costs. These industry level cost-to-receipts ratios can be interpreted as an average impact on potentially affected firms in these industries. Cost-to-receipts ratios for the affected product types range from 2.3 percent for pellet heaters/stoves up to 6.4 percent for single burn rate wood heaters for the proposed option. More information on how these impacts are estimated can be found in Chapters 5 and 6 of the RIA. In estimating the net benefits of regulation, the appropriate cost measure is “social costs.” Social costs represent the welfare costs of the rule to society. We believe that the social costs are best approximated by the compliance costs estimated for this rule. Thus, the annualized social costs for this proposal are best estimated to be \$15.7 million for the proposed option, based on the estimate of costs to manufacturers for the proposal and assuming no cost pass-through to consumers. More information

on how these social costs are estimated can be found in Chapter 5 of the RIA.

#### E. What are the non-air quality health and energy impacts?

These proposed NSPS are anticipated to have no impacts or only negligible impacts on water quality or quantity, waste disposal, radiation or noise. To the extent new NSPS models are more efficient, that would lead to reduced wood consumption, thereby saving timber and preserving woodlands and vegetation for aesthetics, erosion control, carbon sequestration, and ecological needs.

It is difficult to determine the precise energy impacts that might result from this proposed rule. On the one hand, to the extent that the NSPS wood-fueled appliance is more efficient, energy outputs per mass of wood fuel consumed will rise. However, wood-fueled appliances compete with other biomass forms as well as more traditional oil, electricity, and natural gas. We have not determined the potential for consumers to choose other types of fuels and their associated appliances if the consumer costs of wood-fueled appliances increase and at what level that increase would drive consumer choice. Similarly, we have not determined the degree to which better information on the energy efficiency of the NSPS appliances will encourage consumers to choose new wood-fueled appliances over other new appliances.

#### V. Rationale for Proposed Amendments

##### A. Why are we proposing to expand the scope of appliances subject to the NSPS?

As described in section II, the EPA has had ongoing discussions with many stakeholders regarding the need to expand the scope of the current residential wood heater regulation. Stakeholders described adverse health and environmental impacts arising from the increasing use of some appliances, actions taken at the state and local levels to address such concerns, and growth in types and numbers of

appliances that are currently on the market. Numerous states (e.g., Vermont, New York, Maine, Michigan, Minnesota) have indicated to us that individuals’ concerns about smoke from residential wood burning, particularly by hydronic heaters, are the top source of environmental complaints. In the case of masonry heaters, we believe EPA certification of these typically cleaner devices, would allow them to be excellent emission reduction alternatives to replace pre-NSPS wood heaters and be a good consumer alternative in parts of the country that currently ban uncertified appliances (contingent upon approval by the local jurisdiction). We also saw a need to address the residential heating market in a way that recognizes that some heaters and fuels are substitutes for each other. Regulating only one type of heater may result in unintended incentives for consumers to favor purchase and use of unregulated and potentially higher emitting devices. We felt a comprehensive assessment was needed. Therefore, as part of the NSPS review process, we evaluated a wide range of residential biomass heating devices and non-heating devices (such as cook stoves and fireplaces) to determine what expansions in scope might be needed.<sup>39</sup>

The residential wood heaters NSPS is a “standard of performance” as defined by section 111(a) of the CAA. 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 non-air quality health and environmental impacts and energy requirements) the Administrator determines has been adequately demonstrated.” As discussed earlier, the level of control prescribed by section 111 historically has been commonly referred to as “Best Demonstrated

<sup>39</sup> Subpart AAA—Standards of Performance for New Residential Wood Heaters: Revised Draft Review Document. Prepared for EPA by EC/R Incorporated. December 30, 2009.

Technology” or BDT. To better reflect that section 111 was amended in 1990 to clarify that “best systems” may or may not be “technology,” the EPA is now using the term “best systems of emission reduction” or BSER. As previously with BDT, in determining BSER, the EPA uses available information and considers the emissions reductions and incremental costs for different systems available at reasonable cost. The residential wood heaters source category is mass-produced residential consumer products, fundamentally different from the typical NSPS source category that regulated industrial processes. Thus, for the residential wood heaters source category important elements in determining BSER include the significant costs and environmental impacts of delaying production and sales while models with those systems are being designed, tested, field evaluated, and certified. The EPA determines the appropriate emission limits representative of BSER. After the emission limits are established, in general, the source may use whatever systems meet the emission limits. In developing the proposed rule, we evaluated possible systems both at baseline conditions (conditions in the absence of additional regulation) and under other scenarios. In most cases, candidate BSER for residential wood heaters is based on improved combustion techniques, primarily improvements in model-specific combinations of time, temperature, and turbulence. That is, the improved combustion models have greater airflow residence time, better insulation to increase temperatures, and passageways and directed flows to improve mixing and turbulence. In addition, some heaters also use catalytic combustors to reduce emissions. Each manufacturer has a potential myriad of combinations of specific designs that could incorporate these key aspects. Many systems reduce emissions significantly, increase efficiency, and provide good operator flexibility. The key differences tend to be confidential business information as to the specifics of the combination that the manufacturer uses and does not share with other manufacturers but rather holds as proprietary. Similarly, the industry trade association cannot facilitate exchange of such information because of antitrust regulations. Because each appliance type has a potentially unique emissions profile, market niche, and manufacturer profile, we made BSER determinations for each heater type, as described below.

For certain types of devices, information is lacking. For example, we have no information or very limited information on emissions and emission reduction techniques for cook stoves, pizza ovens, chimineas, coal stoves and biomass (other than wood or wood pellet) stoves/furnaces (e.g., fueled with grass, corn, cherry pits). We are interested in receiving data for contributions to air quality, endangerment of public health and welfare, emissions, potential emission reductions, costs, prices, and sales of coal stoves and biomass stoves because we believe we do not have sufficient information at this time to list these sources under section 111(b) and develop proposed standards. For example, usage rates of some of these appliances are limited both in numbers of new units and in the number of markets they occupy. Also, some stakeholders have stated that use of coal stoves is more common in some coal mining regions, where the consumer may have access to free or cheap coal, but such stoves are not typically used in other areas. We request data on any of these appliances that might help us potentially develop national programs or standards for these devices in the future.

We are also deferring any regulatory action addressing emissions from wood-burning fireplaces at this time. Fireplaces typically are not designed to be “wood heaters” and thus are not within the current scope of the “residential wood heater” source category listed on February 18, 1987, pursuant to the authority of section 111(b). (Fireplaces are typically used for ambience and most of the heat content of the wood is lost out the chimney with the relatively large amounts of excess combustion air rather than heating the room. For effective heating, some homeowners have inserted a new EPA certified wood stove into an otherwise open masonry fireplace. In those cases, new wood heaters/stoves are regulated under the current 1988 rule and would be regulated by this proposal. Also, some fireplaces have restricted excess combustion air to less than 35:1 air-to-fuel ratio and are certified under the current 1988 NSPS.) Fireplaces are addressed in the current EPA voluntary partnership program that encourages the development and sale of lower-emitting wood-burning fireplaces over the sale of higher-emitting fireplaces. The EPA’s fireplace program covers new masonry and prefabricated (low-mass) fireplaces and retrofit devices for existing fireplaces. See the voluntary partnership program Web site for more information:

[www.epa.gov/burnwise/participation.html#fireplace](http://www.epa.gov/burnwise/participation.html#fireplace). We request comments and additional data on contributions to air quality, endangerment of public health and welfare, emissions, potential emission reductions, costs, prices, and sales of fireplaces. We request data that might help us potentially develop new or revised national programs or a source category listing and standards under section 111(b) for these devices in the future. We are especially interested in data on current and projected sales of new wood-burning fireplaces versus gas-fired fireplaces, current and projected usage patterns for new fireplaces versus existing fireplaces, current and projected quantities of wood burned per existing and new fireplaces, current and projected best systems of emission reduction for new fireplaces versus existing fireplaces and costs of current and projected best systems versus current costs of fireplaces. Also, we are interested in national data and how these data vary by state and local areas.

*B. How did we determine BSER and the proposed emission standards?*

As discussed earlier in this preamble, the proposed subparts AAA, QQQQ, and RRRR recognize that the sources covered by these subparts are fundamentally different from the typical NSPS source category in that residential wood heaters are mass-produced residential consumer products whereas most NSPS regulate industrial processes. Discussions in sections V.B.1 through V.B.4 of this preamble focus on the analysis of PM emission reductions under our proposed two-step phased-in standards for each appliance type affected by this proposal. In general, for this rulemaking, we have determined that the proposed first step represents the emission levels that almost all models can readily achieve now using today’s designs and technology. Further, we have determined that the proposed second step represents stronger emission levels achievable for all appliance types at reasonable cost, but allows appropriate lead times for manufacturers to redesign their model lines to accommodate the improved technology across multiple model lines and test, field evaluate, and certify the new model lines. See section V.B.5 for a discussion of the Alternative Approach we considered to reduce PM emissions based on three-step phased-in standards, under which the strongest emission standard would be 8 years after the effective date of the final rule rather than the proposed 5 years. Section V.B.6 discusses other provisions

we considered and for which we request additional data and information from commenters.

For these source categories, our BSER determination rests on: (1) the achievability of the proposed emission levels (*i.e.*, the fact that top-performing models for each appliance type are already achieving the proposed emission levels); and (2) the cost effectiveness of the proposed standards when considering the design life span and the emitting life span of the appliances in residences. The net monetized benefits of the proposal far exceed the costs for all options considered. Realistic model design and appliance emitting life span assumptions are essential components for a meaningful cost effectiveness analysis. As explained above in section IV.C. and in our background documentation,<sup>40</sup> a model design life

span of 20 years is supported by the historical data that show that the non-cosmetic aspects of wood heaters designed to meet the 1988 NSPS are still being used today in some model lines. While some manufacturers may choose to make more frequent cosmetic changes to their models, the internal design changes a manufacturer must make to a wood heater model line to comply with the NSPS are longer lasting. Furthermore, once installed in consumer homes, wood heaters emit for at least 20 years and many are operated in residences for much longer time periods (a key fact motivating wood heater/stove changeout programs). Once purchased, consumers tend to only replace appliances when they no longer serve their functional purpose. Wood heaters tend to serve the basic function of producing heat for well over 20 years.

Table 11 presents our estimated cumulative costs, PM<sub>2.5</sub> emission reductions, and associated cost per ton for our proposed limits, based on a model design life span of 20 years and an appliance emitting life span of 20 years.

For all of the standards proposed in this **Federal Register** notice, the EPA invites specific comments on the data and analyses on which we base the proposed standards. Moreover, the EPA invites specific comments that provide additional data and analyses that would support a different standard. Interested persons should note that the EPA will consider promulgating a more stringent or less stringent standard than what we are proposing for any of these categories, if the record contains data or analyses that support a different standard.

TABLE 11—COST EFFECTIVENESS OF PM<sub>2.5</sub> EMISSION REDUCTIONS OF PROPOSED STANDARDS AND EMISSION CO-REDUCTIONS BASED ON CUMULATIVE ANALYSIS [2013–2057]<sup>41</sup>

Appliance type	Nationwide cumulative cost (2010\$)	PM <sub>2.5</sub> reductions		VOC Co-Reductions		CO Co-Reductions	
		Cumulative emission reduction (tons)	Cost per ton (2010\$)	Cumulative emission reduction (tons)	Cost per ton (2010\$)	Cumulative emission reduction (tons)	Cost per ton (2010\$)
Cord Wood Stoves ..... Single Burn Rate	\$45,492,874	96,523	\$471	136,293	\$334	1,426,240	\$32
Stoves .....	11,864,204	236,254	50	416,828	28	1,602,218	7
Pellet Stoves .....	44,272,694	29,269	1,513	392	112,894	152,082	291
Furnaces .....	30,451,763	823,770	37	349,207	87	5,491,797	6
Hydronic Heaters .....	57,760,316	360,587	160	152,858	378	2,403,916	24
Total * .....	189,841,851	1,546,403	123	1,055,578	180	11,076,253	17

\* NOTE: Masonry Heaters are not included in this analysis because representative emission tons per appliance could not be determined.

1. Room Heaters

The current subpart AAA definition of “wood heater” specifies certain conditions, including that affected sources are those that have an air-to-fuel ratio of less than 35:1. As part of the regulatory negotiation for the current 1988 NSPS, the EPA included the air-to-fuel criterion in the rule primarily to exclude typical fireplaces from the affected source definition. An unintended side effect, however, is that it also resulted in the exclusion of the majority of pellet heaters/stoves. Also included in the current 1988 NSPS definition of “wood heater” is an exclusion of heaters that have a minimum burn rate of greater than 5 kg/

hr. The definition and test methods had the effect of excluding a large number of single burn rate wood heaters. As described below, we are proposing to change the applicability of subpart AAA to include all three types of “room heater” appliances: adjustable burn rate wood heaters, pellet heaters/stoves and single burn rate wood heaters. Our intent is that this rule will be stated in broad enough terms to regulate any future room heater appliances that may come into the U.S. market and function as room heaters.

a. Adjustable Burn Rate Wood Heaters

Adjustable burn rate wood heaters include freestanding heaters and heaters modified to fit within a firebox

(sometimes called fireplace inserts). These units were the primary focus of the 1988 NSPS and are subject to current NSPS limits of 7.5 g/hr for noncatalytic heaters and 4.1 g/hr for catalytic heaters. As discussed in the February 26, 1988, final rule (53 FR 5865) and earlier in this preamble, the EPA considered the performance of catalytic heaters and noncatalytic heaters co-BDT (now called BSER) because the net emissions over time were estimated to be similar (even though the initial certification test results are typically lower for catalytic models) assuming possible degradation of the catalyst and lack of catalyst replacement by the operator. The EPA considered requiring catalyst

<sup>40</sup> See footnotes 24, 36 and 38.

<sup>41</sup> Analysis period assumes that manufacturers will incur R&D costs beginning in 2013, in anticipation of final rule. Analysis is 2013 through 2057, based on assumption that the internal

emission-related components of a model designed to meet the proposed Step 2 emission limit will be manufactured/shipped for 20 years, and shipped models will emit in residences for another 20 years. See footnotes 24, 36 and 38. PM<sub>2.5</sub>, VOC and CO

costs per ton are calculated independently for illustrative purposes, even though VOC and CO reductions would actually occur with no additional cost as the PM<sub>2.5</sub> reductions are achieved.

replacement on a regular schedule, but determined that enforcement of such a requirement would be difficult. The EPA did require manufacturers to provide 2-year unconditional warranties on the catalysts and prohibited the operation of catalytic heaters/stoves without a catalyst. Additionally, because of these concerns, the EPA wanted to ensure that further development of both noncatalytic and catalytic technology would continue.

Since the 1988 NSPS was developed, the state of Washington issued standards in 1995 imposing limits of 4.5 g/hr for noncatalytic heaters and 2.5 g/hr for catalytic heaters. In developing the proposed revisions to the NSPS, we evaluated and identified these “improved” catalytic and noncatalytic systems and associated emission levels as the proposed Step 1. This analysis showed that the state of Washington level of 4.5 g/hr is achieved by 107 out of 121 (88 percent) of the EPA-certified adjustable burn rate wood heater models in production and sold in the U.S. today (noncatalytic and catalytic models combined). This statistic includes 92 of the 106 certified noncatalytic wood heater models (87 percent) and 15 of the 15 certified catalytic models (100 percent). The median certification value for noncatalytic models was 3.2 g/hr and for all certified models was 3.4 g/hr. Details of the analysis are in the docket.<sup>42</sup>

For the proposed Step 2 (5 years after the effective date of the final standard), we considered “state-of-the-art” systems that achieve a certification value of 1.3 g/hr (using crib wood as the test fuel as specified in Method 28 as required by the 1988 NSPS). This is approximately 50 percent less than the 1995 state of Washington standard for catalytic models (2.5 g/hr). The EPA certification test data show that a level of 1.3 g/hr is achieved by 27 adjustable burn rate wood heater models as of December 2013. This includes 11 certified noncatalytic wood heater models and 16 certified catalytic models. There were no apparent break points other than the current state of Washington initial certification level of 4.5 g/hr for noncatalytic heaters. That is, the distribution of certification values was relatively linear with no step functions other than at the state of Washington level of 4.5 g/hr. We ask for comments and emission test data using cord wood to help us determine if the proposed emission levels should be adjusted for

any differences between crib wood and cord wood.

This source category is fundamentally different from the typical NSPS source category composed of industrial processes. This source category involves the manufacture and sale of mass-produced residential consumer products that are significantly affected by production and sales volumes and timing of testing and certification. Thus, we are proposing implementing the proposed Step 2 BSEER emission limit 5 years after the effective date of the final standard to allow for longer lead times for redesign, testing, field evaluation and certification. This also spreads the costs over a longer time and a larger number of units. The intent behind the proposed Step 2 BSEER emission limit is to recognize that current state-of-the-art level of performance appears to be significantly better than the state of Washington limit of 4.5 g/hr met by over 85 percent of the heaters sold today on a sales-weighted basis (*i.e.*, 92 out of 106 noncatalytic models and 15 out of 15 catalytic models), and furthermore better than the state of Washington catalytic limit of 2.5 g/hr for over 25 percent of the adjustable burn rate wood heaters sold in the U.S. today (*i.e.*, 20 out of 106 or approximately 19 percent of noncatalytic models and 13 out of 15 or approximately 87 percent of catalytic models). As noted earlier and discussed more fully in the paragraphs below, our decisions on BSEER for this source category have fully considered not only the emission performance but also the cost and economic impacts, including the costs to accommodate the best systems in additional model lines. The net monetized benefits far exceed the costs of all options considered.

The cost impacts of the proposed Step 1 are very small. This is because, despite being a limit that was originally developed for only one state, over 85 percent of currently EPA-certified noncatalytic and catalytic heaters that are in active production already meet the state of Washington initial certification test values. We also believe production of any certified heaters that do not meet the proposed Step 1 standard would be discontinued, as manufacturers would likely focus on models that already comply with the proposed standard in the short term. While implementing the proposed Step 1 standard would not impose any significant additional costs on most of the manufacturers, it also would not achieve a large amount of new emissions reductions for most of the models. However, implementing an emission standard associated with the proposed Step 1 would have the benefit of ensuring consistent nationwide

standards and ensuring that the remaining 15 percent of non-complying adjustable burn rate wood heater models could no longer be sold. It would also ensure that wood heater/stove changeout programs aimed at reducing emissions from old, pre-NSPS or pre-state of Washington heaters/stoves would result in replacement models that meet the state of Washington levels or better.

The proposed Step 1 limit eliminates the distinction between catalytic and non-catalytic heater models, which we view as progress. It is important to remember that the lower emission level catalytic standards were initially instituted because of concerns that the early generation catalysts would degrade over time, resulting in eventual real world emission levels comparable to non-catalytic units. After 25 years of catalyst heater development experience, manufacturers have demonstrated that the performance of these heaters typically remains consistently good over the course of proper operation because of changes manufacturers have made to improve heater design to protect the catalysts from flame impingement and other factors that previously caused catalysts to degrade significantly. For example, one recent study of four catalytic combustors from the two selected heaters/stoves showed that the combustors maintained substrate integrity without substantial PM emissions performance reduction.<sup>43</sup> Therefore, establishing a separate limit to accommodate “degradation” seems to create a distinction where none exists and adds unnecessary confusion to the overall regulation.

We recognize that there may be concern that a single limit based on the Washington State non-catalytic limit could result in “backsliding” of current catalytic heater models. We think that the likelihood of actual backsliding is extremely low because of other factors driving the wood heater market. Given the pending implementation of the proposed Step 2 limits described below and that some manufacturers have heaters that already achieve Step 2, all manufacturers would have market incentives to improve performance as soon as possible rather than degrade performance. Also, with consumer education regarding the impacts of PM emission levels, we believe that consumer pressure will favor better performing units that in general are more energy efficient and lower

<sup>42</sup> Attachment A of Residential Wood Heaters Manufacturer Cost Memorandum to Gil Wood, USEPA, from EC/R Inc. February 22, 2013.

<sup>43</sup> The Interim Wood Stove Catalytic Combustor Longevity Study, Prepared for the Catalytic Hearth Coalition by L. Pitzman *et al.*, OMNI Environmental Services. January 4, 2010.

emitting at reasonable cost, especially as they compare wood heaters and gas heaters. However, we are requesting comments on whether we should maintain a separate, lower limit for catalytic heater models for the proposed Step 1 emission limits, based on the current state of Washington catalytic standard of 2.5 g/hr.

The proposed Step 2 state-of-the-art BSER cost and economic impacts would be significant, but our analysis shows a very reasonable cost per ton of emission reduction when considering the typical design and appliance life spans.<sup>44</sup> Our data show that at the proposed Step 2 BSER emission level of 1.3 g/hr, about 20 percent of catalytic models and 5 percent of noncatalytic models currently manufactured would already comply with the proposed Step 2 standard. Thus, manufacturers would need to either modify noncomplying lines or develop new ones to continue production for approximately 95 percent of the current market. Some unknown fraction of manufacturers may be able to switch some of their production from noncomplying models to complying models. Because we do not know this fraction, because the total of complying units is only 6 percent (combined catalytic and non-catalytic models) at this time, and because many manufacturers have no complying models at this time, we have assumed this fraction to be zero for our analysis. Historically, those manufacturers that chose to comply with the 1988 NSPS did so for a full range of models. Thus, our analysis shows the potential emission and cost impacts for the approximately 95 percent of adjustable burn rate wood heater models projected to undertake R&D needed to develop the heater-specific combinations of time, temperature, and turbulence to achieve higher efficiencies and lower (proposed Step 2 compliant) emissions. That is, although the manufacturers know the factors that are important for good combustion and low emissions, they still need to develop and test the laboratory-specific combinations that can be incorporated into the design of specific model lines. Alternatively, some manufacturers might convert noncatalytic models to catalytic models or hybrids as ways to reduce emissions.

We estimated the resulting nationwide costs based on the cost assumptions explained in section IV.C. The average annual cost increase to manufacturers of adjustable burn rate wood heaters during the 2014 through 2022 period analyzed in the RIA is approximately \$4.2 million. Estimated

nationwide annual PM<sub>2.5</sub> emissions, averaged over this same period (2014–2022), are projected to be 548 tons/year under baseline conditions versus 385 tons/year under the proposed two-step BSER, an average reduction of 163 tons/year, considering only the first year of emissions for each new heater sold. Given that limited snapshot for these cost and emission estimates, the average cost of reducing each new ton of PM<sub>2.5</sub> emissions during the 2014–2022 period would be approximately \$26,000 per ton annually. As explained in section IV.C, the cost-to-sales ratio, which is an indicator of the ability of the manufacturer to successfully absorb the regulatory impacts, is high at 4.3 percent. However, when considering the total costs and cumulative emission reductions over the more representative full model design life span and appliance emitting life span of 20 years; the overall cost effectiveness is approximately \$500 per ton (shown above in Table 11).<sup>45</sup>

Given the reasonable cost effectiveness of imposing the two-step BSER when considering total costs and cumulative emission reductions, and given the 6-year lead time (from the date of these proposed standards) until models must meet the proposed Step 2 emission limit, we determined that the two-step phased-in emission limits represent BSER for these residential consumer product appliances at this time. Thus, we are proposing a two-step standard for adjustable burn rate wood heaters, in which Proposed Step 1 is required upon the effective date of the final rule and Proposed Step 2 is required 5 years after the effective date of the final rule. Section V.B.5 discusses a three-step alternative approach that we also considered for adjustable burn rate wood heaters, and on which we are seeking comment.

We note that there have been some technical questions associated with measuring the emission levels associated with the proposed Step 2, which we are addressing in this proposed rule. That is, the currently available laboratory proficiency test results cast some doubt on the reproducibility of test results at lower levels of the standard for the current EPA Test Method 28. An HPBA analysis<sup>46</sup> found that the repeatability and reproducibility of the current test method for wood heater emissions, as demonstrated by the EPA-accredited

laboratory proficiency test data, may be poor based on the scope of their analysis. Their analysis stated:

- “At the 95-percent confidence level, repeatability for the EPA weighted average emission rate is at best  $\pm 2.9$  g/hr and ranged as high as  $\pm 5.4$  g/hr.”
- “The reproducibility was no better than  $\pm 4.5$  g/hr and ranged as high as  $\pm 6.4$  g/hr.”

We believe some mitigating factors are not accounted for in their analysis, such as the lack of regulatory requirements or incentives for the test laboratories to achieve highly reproducible results in proficiency testing (*i.e.*, the laboratories are not required to meet a certain proficiency level; they are not paid for the proficiency tests, but rather they absorb the costs as part of their overhead; and, in some cases, they intentionally staged the test to demonstrate that variability was possible within the current protocol). Also, these factors do not reflect the proposed changes to improve the repeatability and reproducibility of the test method. Consequently, we believe the previous results merit consideration of concerns about implementing a lower emission standard, but they do not mean that lower emission standards cannot be measured accurately. For example, the State of Washington Department of Ecology has successfully used lower emission levels in their regulations since 1995, and the Oregon Department of Environmental Quality has used lower levels for tax credits for low-emitting pellet heaters/stoves.

As noted earlier in this section, we ask for comments and emission test data using cord wood to help us determine if the proposed emission levels should be adjusted for any differences between crib wood and cord wood.

#### b. Pellet Heaters/Stoves

Several certified pellet heaters/stoves are subject to current subpart AAA. However, most models currently offered for sale are exempt due to air-to-fuel ratios greater than 35:1. We considered candidate options similar to those discussed earlier for wood heaters/stoves, *i.e.*, improved catalytic and improved noncatalytic systems and state-of-the-art systems. Our data set for currently manufactured U.S. pellet heaters/stoves, for which we have reproducible emissions data, contains 24 models, of which 23 would meet the 4.5 g/hr proposed Step 1 BSER emission limit. We also compared the listings of certified pellet heaters/stoves for both the EPA and the state of Washington. Of the 224 pellet heater/stove models from both lists, 221 models produced by 35 manufacturers would meet the state of

<sup>45</sup> See footnotes 24, 36 and 38.

<sup>46</sup> Final Report: EPA Wood Heater Emission Test Method Comparison Study. Prepared by Robert Ferguson, Ferguson, Andors & Company for the Hearth, Patio and Barbecue Association. December 1, 2010.

<sup>44</sup> See footnotes 24, 36 and 38.

Washington emission standard. Only three models produced by three manufacturers would not meet the standard. Assuming that the rest of the pellet heater/stove market has comparable performance, we would expect to see only a small cost impact of requiring the proposed Step 1 BSER emission levels of 4.5 g/hr for noncatalytic and catalytic pellet heaters in terms of having to redesign units to meet the proposed Step 1 BSER.

Even though additional R&D would not be required to meet the proposed Step 1 BSER, manufacturers would need to test and certify their heaters/stoves to sell them after the effective date of the final rule, which we expect to occur in 2015. Some manufacturers of pellet heaters/stoves have started incurring costs in anticipation of the final rule. They would also incur ongoing recertification costs for the fraction of heaters/stoves with expiring certifications.

Some stakeholders have argued that pellet heaters/stoves are relatively cleaner burning than other wood heaters and that regulation is not needed. Other stakeholders have argued that pellet heater/stove standards should be tighter to show how clean they are and encourage consumers to purchase pellet heaters/stoves instead of cord wood heaters/stoves. Considering both positions, and because pellet heaters/stoves are cleaner burning in general, we think there is environmental value in ensuring they have an EPA certification so they can be sold in jurisdictions that require such certification of any wood-burning appliance (contingent upon approval by the local jurisdiction). This would help avoid a competitive imbalance regarding wood heaters. Also, we believe there is environmental value in having third-party accredited laboratory test results available in all areas so that consumers can make informed choices among competing residential heaters.

We are also proposing implementation of a Step 2 state-of-the-art BSER 5 years after the effective date of the final rule. We estimate that at least 30 percent of current U.S. pellet heater/stove models already meet the proposed Step 2 emission level. We assume that manufacturers will either modify the remaining models or invest in developing new model lines that can meet the proposed Step 2 emission level. This assumption may somewhat overstate the potential cost and economic impacts of requiring a proposed Step 2 BSER, because some noncomplying models will be dropped and manufacturers may consolidate their model lines in the short term.

However, we do not know how many models will be dropped. This industry has a history of manufacturing a wide range of choices of models for the marketplace.

The nationwide annualized total costs are significant based on our cost assumptions explained in section IV.C and in our background documentation.<sup>47</sup> The average annual cost increase to manufacturers of pellet heaters/stoves during the 2014 through 2022 period analyzed in the RIA is approximately \$3.5 million. Estimated nationwide annual PM<sub>2.5</sub> emissions, averaged over this same period (2014–2022), are projected to be 199 tons/year under baseline conditions versus 150 tons/year under the proposed two-step BSER, an average reduction of 49 tons/year, considering only the first year of emissions for each new heater sold. Given this limited snapshot for these cost and emission estimates, the average cost of reducing each new ton of PM<sub>2.5</sub> emissions during the 2014–2022 period is approximately \$71,000 per ton annually as compared to the monetized health benefits of \$360,000 per ton to \$810,000 per ton of reducing direct PM<sub>2.5</sub>. The annualized cost-to-sales ratio is 2.3 percent. However, when considering the total costs and cumulative emission reductions over the more representative full model design life span and appliance emitting life span of pellet heaters/stoves, the overall cost effectiveness is approximately \$1,500 per ton (shown above in Table 11).<sup>48</sup>

Given the reasonable cost effectiveness of imposing the proposed two-step BSER when considering total costs and cumulative emission reductions, and given the 6-year lead time (from the date of these proposed standards) until model lines must come into compliance with the proposed Step 2 limit, we determined that the two-step phased-in limits represent BSER for these residential consumer appliances at this time. Thus, we are proposing a two-step standard for pellet heaters/stoves, in which Proposed Step 1 is required upon the effective date of the final rule, and Proposed Step 2 is required 5 years after the effective date of the final rule. Section V.B.5 discusses a three-step alternative approach that we also considered for pellet heater/stoves, and on which we are seeking comment.

#### c. Single Burn Rate Wood Heaters

Single burn rate wood heaters represent a huge regulatory exemption in the current residential wood heater

market. We estimate that over 40,000 of these units are sold per year. We evaluated all of the available emission data and discussed the state of R&D with manufacturers of single burn rate wood heaters. The data show that the BSER for single burn rate wood heaters based on improved combustion could achieve the same emission levels for one individual burn rate category as adjustable burn rate category wood heaters do for the weighted average of four burn rates. To compare single burn rate emissions to adjustable burn rate emissions, however, one must remember that single burn rate wood heaters are by definition incapable of operating at the lowest burn rates, and that these low burn rates result in the greatest level of emissions in an adjustable burn rate wood heater. Thus, the certification test method for single burn rate wood heaters must be modified to take the single burn rate into account (instead of the multiple burn rates for the adjustable rate heaters). For example a rate of 3.0 g/hr could be considered to be equivalent to the state of Washington standards (of 4.5 g/hr for adjustable burn rate wood heaters) adjusted to the single burn rate.

Considering that single burn rate wood heaters will not be expected to operate at the typically higher-emitting burn rates, we expect the majority of single burn rate wood heaters to meet the proposed Step 1 BSER limit of 4.5 g/hr for adjustable burn rate wood heaters, if the design is focused on one optimal single burn rate. However, some models would require modifications to ensure that they consistently pass the test and to add tamper-proof settings to ensure that operators do not circumvent the intent of the NSPS. For our analyses, we assumed that all existing models would need to be modified through R&D, resulting in significant emission reductions to achieve the proposed Step 1 BSER. We request specific data and comments regarding these assumptions. Since 2009, single burn rate wood heater designs have been undergoing R&D in anticipation of the proposed NSPS, and the information that we have from industry is that cleaner designs are nearly market-ready.<sup>49</sup> Nonetheless, because these devices were previously unregulated and may need to transfer technology from adjustable burn rate wood heaters, our cost analysis assumed that R&D efforts would intensify in order to meet the proposed Step 1 standard while also beginning R&D to develop models to meet the more stringent proposed Step 2 BSER limit. Specifically, for single burn rate wood

<sup>47</sup> See footnotes 36 and 38.

<sup>48</sup> See footnotes 24, 36, and 38.

<sup>49</sup> See footnote 36.

heaters, we doubled our R&D estimate of \$356,250 per model for other appliances in these early years.

The nationwide annualized total costs are based on the cost assumptions explained in section IV.B and in the background documentation.<sup>50</sup> The average annual cost increase to manufacturers of single burn rate heaters during the 2014 through 2022 period analyzed in the RIA is approximately \$902,000. Estimated nationwide annual PM<sub>2.5</sub> emissions, averaged over this same period (2014–2022), are projected to be 932 tons/year under the baseline (unregulated) condition versus 178 tons/year under the proposed two-step BSER, an average reduction of 754 tons/year, considering only the first year of emissions for each new heater sold. Given this limited snapshot for these cost and emission estimates, the average cost of reducing each new ton of PM<sub>2.5</sub> emissions during the 2014–2022 period is approximately \$1,200 per ton annually as compared to the monetized health benefits of \$360,000 per ton to \$810,000 per ton of reducing direct PM<sub>2.5</sub>. The cost-to-sales ratio is 6.4 percent and is calculated based on only the initial 5-year period. However, when considering the total costs and cumulative emission reductions over the more representative full model design life span and appliance emitting life span, the overall cost effectiveness is approximately \$50 per ton (shown above in Table 11).<sup>51</sup>

Given the reasonable cost effectiveness of imposing the two-step BSER when considering total costs and cumulative emission reductions, and given the 6-year lead time (from the date of these proposed standards) until new model lines must meet the proposed Step 2 emission limit, we determined that the two-step phased-in limits represent BSER for these residential consumer appliances at this time. Thus, we are proposing a two-step standard for single burn rate wood heaters, in which Proposed Step 1 is required upon the effective date of the final rule and Proposed Step 2 is required 5 years after the effective date of the final rule. Section V.B.5 discusses a three-step alternative approach that we also considered for single burn rate wood heaters, and on which we are seeking comment.

## 2. Central Heaters

We are proposing subpart QQQQ for wood-burning appliances that function as “central heaters” with the purpose of heating the entire residence, including

current new residential hydronic heaters and forced-air furnaces. Our intent is that this rule will be stated in broad enough terms to regulate any future central heater wood-burning appliances that may come into the U.S. market and function as central heaters. In this section, we describe our rationale for determining BSER and the associated proposed emission standards for both hydronic heating systems (“hydronic heaters”) and forced-air furnaces. As discussed earlier in this preamble, the source categories to be regulated by proposed subparts AAA, QQQQ, and RRRR are fundamentally different from the typical NSPS source category that includes industrial processes whereas subparts AAA, QQQQ, and RRRR include mass-produced residential consumer products. Thus, additional factors are included in the analyses presented today. Section V.B.2.a. below discusses hydronic heaters. Section V.B.2.b. discusses forced-air furnaces.

### a. Hydronic Heaters

As described in section II.D, hydronic heaters (commonly known as “outdoor wood boilers” although there are indoor units as well) are the subject of an EPA voluntary partnership program, started in January 2007. The EPA’s voluntary partnership program provided criteria in 2007 for qualification of units to be approximately 70 percent cleaner than unqualified models (Phase 1, “orange hangtag”). In October 2008, the program evolved to Phase 2, and EPA-qualified Phase 2 (“white hangtag”) units are approximately 90 percent cleaner than older, pre-program unqualified units. Under the Phase 2 voluntary partnership program, new qualified models must emit no more than 0.32 lb/MMBtu of heat output and have a cap of 18 g/hr on any individual test run conducted during the qualifying test. (As noted in the hydronic heaters test method discussion in this preamble, the EPA, the manufacturers, the laboratories, and key states conducted an additional review of the test reports to support these qualifications and made some changes to the test methods to improve the reliability and reproducibility of the test results.)

The proposed Step 1 emission limit for hydronic heaters is the Phase 2 qualifying level of the hydronic heater voluntary partnership program, 0.32 lb/MMBtu. There are currently 36 models (27 cord wood and 9 pellet models) built by 17 U.S. manufacturers that have been qualified to meet the 2008 Phase

2 level of 0.32 lb/MM BTU.<sup>52</sup> In almost all cases, the manufacturers developed models that rely upon improved combustion techniques, primarily improvements in time, temperature, and turbulence. That is, the improved combustion models have greater residence time, separation of the firebox and the water jacket and the addition of better heat exchangers and better insulation to increase temperatures, and passageways and directed flows to improve mixing and turbulence. In some cases, manufacturers are also using catalyst technology. Each manufacturer has developed their own confidential business combinations of specific designs that incorporate these key aspects and some other techniques.

In addition to the voluntary partnership program, the EPA provided technical and financial support for NESCAUM to develop a model rule for outdoor hydronic heaters, which several states have adopted or plan to adopt to regulate those units in their jurisdictions. The model rule Phase 2 emission limits and the voluntary partnership program Phase 2 emission levels/caps are identical, and are the same as our proposed Step 1 limit. In several states, the Phase 2 emission levels have become regulatory requirements for new units. Based on our experience with the hydronic heater market through the voluntary partnership program, we understand that it is dominated by a few manufacturers in terms of the bulk of sales, and each of these manufacturers has at least one qualifying model already.

For these reasons, we consider the Phase 2 voluntary partnership program level the appropriate emission level for the NSPS proposed Step 1 BSER, effective upon the effective date of the final rule. As noted above, there are currently 36 models (27 cord wood and 9 pellet models) built by 17 U.S. manufacturers that have already been qualified to meet the Phase 2 voluntary partnership program level of 0.32 lb/MM BTU.

The EPA believes the proposed Step 2 limit for hydronic heaters is achievable for some manufacturers now and would be achievable for all manufacturers 5 years after the effective date of the final rule. We consider this compliance period a reasonable amount of time for manufacturers to complete development across model lines and complete testing, field evaluation, and

<sup>52</sup> A list of cleaner hydronic heaters participating in the EPA’s voluntary partnership program is located at <http://www.epa.gov/burnwise/owhhlst.html>.

<sup>50</sup> See footnotes 24, 36 and 38.

<sup>51</sup> See footnotes 24, 36 and 38.

certification so that sufficient models are ready for sale. We reviewed all the hydronic heater emission data available, and we found our proposed Step 2 emission limit of 0.06 lb/MMBtu is already met by 4 hydronic heater models (2 cord wood and 2 pellet models) built by 2 U.S. manufacturers (using crib wood as specified in Method 28 WHH in the voluntary partnership program),<sup>53</sup> as well as over 50 European models per test method EN 303-05 (which uses cord wood).<sup>54</sup> We ask for comments and emission test data using cord wood and different test methods to help us determine if the proposed emission levels should be adjusted for any differences in test methods and test fuels, *e.g.*, between crib wood and cord wood.

Our review of the available data also showed a break point at the emission level of 0.15 lb/MMBtu heat output. We considered this break point as a candidate for interim Step 2 in the three-step Alternative Approach, as discussed in section III above. Several years ago, we discussed the 0.15 lb/MMBtu level with the voluntary program stakeholders, including states and manufacturers, as a potential future "Phase 3" interim target in the voluntary partnership program to reduce emissions to approximately one-half of the Phase 2 voluntary partnership program level. Some of the manufacturers responded quickly to this informal target and now 11 of the 36 models (6 cord wood and 5 pellet models) that currently qualify under the Phase 2 voluntary partnership program already qualify at an emission level of 0.15 lb/MMBtu or better.

The proposed BSER levels include both outdoor hydronic heaters and indoor hydronic heaters. The initial manufacturers who actively participated in the voluntary partnership program were primarily manufacturers of outdoor units, due to the very large concern about the health effects of emissions from the outdoor units and the fact that over 90 percent of hydronic heater sales were and still are for outdoor models. When we moved to Phase 2 of the voluntary partnership program in October 2008, we explicitly included indoor units to more strongly encourage cleaner indoor units and to provide another tool for the states and

local jurisdictions, especially since some states were concerned that some high-emitting indoor units were avoiding rules that only specified outdoor units. Indoor and outdoor models compete in the marketplace and having standards on only outdoor units would provide a market advantage to indoor models. Indoor and outdoor models both can use currently available improved combustion and improved heat transfer techniques to achieve similar emission levels. Given the number of years the voluntary partnership program has already been in existence, we believe our proposed Step 1 limit upon the effective date of the final rule and the proposed Step 2 limit 5 years after the effective date of the final standard provide reasonable lead time to incorporate BSER in both outdoor and indoor residential consumer models. We ask for specific comments and data on this determination and the degree to which other options would be appropriate.

We estimate that there are 30 manufacturers producing approximately 120 hydronic heater models for sale in the U.S. On a sales-weighted basis, less than 25 percent of the models currently sold would need to undertake R&D to meet the proposed Step 1 BSER limit, with a higher percentage that would need to undertake R&D to meet the proposed Step 2 BSER limit. We assumed that any manufacturer undertaking R&D to develop a new model would aim to meet the proposed Step 2 limit to maximize the lifetime of the resulting product, while shifting production to models that already meet the proposed Step 1 limit. For our cost analysis, we assumed that 100 percent of the 120 hydronic heater models would incur NSPS-related R&D costs to achieve the proposed Step 2 BSER limit. Considering typical R&D lead times, and even the different starting dates for outdoor versus indoor manufactures, we concluded that 5 years after the effective date of the final standard is an achievable compliance deadline for both outdoor and indoor models, even if they were just starting their R&D now. As discussed earlier in this preamble, most manufacturers have known of the hydronic heater emission concerns for over 7 years already.

We also investigated the performance of European models in considering BSER options. Several European countries have already established emission limits, and they are considering more stringent limits in the near future. This has encouraged the European industry to develop more energy efficient and lower emitting technologies. Most of these state-of-the-

art models use multiple-stage combustion and some use oxygen sensors and CO sensors and automated feedback controls to help optimize combustion conditions. A concern in comparing the emission performance of European models with North American models is the difference in test methods. All European models are tested on cord wood fuel in Europe by European laboratories to meet European standards. Few have been imported to the U.S. (by U.S. companies) and very few have been tested in the U.S. according to U.S. testing requirements. However, a recent report<sup>55</sup> included an effort to compare the performance of the European models to U.S. type performance standards. Although a perfect comparison is not possible due to differences in duty-cycle (*i.e.*, proportion of time the unit is operating) to be evaluated in the test and the emissions sampling and analysis protocols, the analysis indicates that the top 20 percent performing European wood boilers (*i.e.*, hydronic heaters) in the size range of 120,000–170,000 Btu would meet an output-based emission rate of 0.06 lb/MMBtu using the European test methods. The underlying test data and limited comparative testing show that over 50 European models would likely be considered state-of-the-art BSER and be capable of meeting the proposed Step 2 BSER associated emission level of 0.06 lb/MMBtu heat output, using EN 303-05, which specifies cord wood as the test fuel. We ask for comments and emission test data using different test methods and cord wood to help us determine if the proposed emission levels should be adjusted for any differences in test methods and between fuels, *e.g.*, crib wood and cord wood.

The nationwide annualized total costs are based on the cost assumptions explained in section IV.C and in the background documentation.<sup>56</sup> The average annual cost increase to manufacturers of hydronic heaters during the 2014 through 2022 period analyzed in the RIA is approximately \$4.6 million. Estimated nationwide annual PM<sub>2.5</sub> emissions, averaged over this same period (2014–2022), are projected to be 1,332 tons/year under the baseline (unregulated) condition versus 84 tons/year under the proposed two-step BSER, an average reduction of 1,249 tons/year, considering only the first year of emissions for each new heater sold. Given this limited snapshot for these cost and emission estimates, the average cost of reducing each new

<sup>53</sup> See footnote 54.

<sup>54</sup> European Wood-Heating Technology Survey: An Overview of Combustion Principles and the Energy and Emissions Performance Characteristics of Commercially Available Systems in Austria, Germany, Denmark, Norway, and Sweden; Final Report; Prepared for the New York State Energy Research and Development Authority; NYSERDA Report 10-01; April 2010.

<sup>55</sup> See footnotes 24, 36 and 38.

<sup>56</sup> See footnotes 36 and 38.

ton of PM<sub>2.5</sub> emissions during the 2014–2022 period is approximately \$3,600 per ton annually. The annualized cost-to-sales ratio is 3.3 percent for hydronic heater models. However, when considering the total costs and cumulative emission reductions over the more representative full model design life span and appliance emitting life span, the overall cost effectiveness is approximately \$160 per ton (shown above in Table 11).<sup>57</sup>

Given the reasonable cost effectiveness of imposing the two-step BSER, and given the 6-year lead time (from the date of these proposed standards) until model lines must come into compliance with the proposed Step 2 limit, we determined that the two-step phased-in limits represent BSER for these residential consumer appliances at this time. Thus, we are proposing a two-step standard for hydronic heaters, in which Proposed Step 1 is required upon the effective date of the final rule, and Proposed Step 2 is required 5 years after publication of the final rule. Section V.B.5 discusses a three-step alternative approach that we also considered for hydronic heaters, and on which we are seeking comment.

#### b. Forced-air Furnaces

Emissions from wood-fired, forced-air furnaces have not previously received much attention in the U.S. However, industry information suggests that there are three times more sales of wood-fired, forced-air furnaces each year compared to wood-fired hydronic heaters. These units are relatively easy to retrofit into existing structures, and their sales price is substantially less than hydronic heaters but greater than gas or oil furnaces. Because they are whole-house heating systems, they have the capacity to generate large amounts of emissions. Also, they compete with wood-fired hydronic heaters, which we propose to regulate. Not regulating wood-fired, forced-air furnaces could create an adverse competitive imbalance with the wood-fired hydronic heater market segment of the residential wood heater source category. Both forced-air furnaces and hydronic heaters compete with oil and gas furnaces. Consumer choices vary with consideration of upfront sales price, financing costs, and operating costs, *e.g.*, the cost of obtaining seasoned wood versus oil or gas.

Wood-fired, forced-air furnaces are not currently regulated in the U.S. (with the exceptions of broader bans or use limits on wood-burning appliances), but they are beginning to be regulated in

Canada. The main regulatory mechanisms are local and provincial regulations requiring listing per CSA B415.1–10, which is the CSA specification for emission performance of solid-fuel-burning heating appliances.<sup>58</sup> All CSA standards are developed through a consensus standards development process approved by the Standards Council of Canada. This process brings together stakeholder volunteers representing varied viewpoints and interests to achieve consensus and develop a standard. The most recent B415.1–10 Committee consisted of manufacturers, Environment Canada,<sup>59</sup> provincial agency staff, test laboratories and the EPA. The current version of B415.1–10 was published in March 2010, and it includes new requirements for indoor and outdoor central heating appliances, including wood-fired forced-air furnaces. In addition to establishing performance test requirements, B415.1–10 also includes emissions requirements for PM. Section 4.2.1(c) of the CSA standard establishes an average particulate emission rate of less than or equal to 0.40 g/MJ, which is equivalent to 0.93 lb/MMBtu. Manufacturers anticipate that CSA Standard B415.1–10 will effectively establish the minimum requirements for future units sold in Canada. For example, the province of British Columbia has enacted regulations limiting the sale of wood-burning appliances to those that comply with B415.1–10 (or the U.S. NSPS when the EPA issues such a standard), and other provinces and municipalities in Canada are in the process of amending their regulations to apply to central heating systems, including forced-air furnaces.

In developing the B415.1–10 emissions limit of 0.40 g/MJ (0.93 lb/MMBtu) for solid-fuel central heating systems, the CSA committee thoroughly reviewed the best systems available, developed a test method for such systems and supported emission testing of candidate best systems. A B415.1–10 validation-testing program performed by Intertek in Middleton, Wisconsin, included both a high-tech furnace and a conventional furnace. The high-tech furnace achieved average particulate emissions of 0.46 g/MJ output (1.067 lb/

MMBtu). The conventional furnace achieved average particulate emissions of 1.65 g/MJ (3.828 lb/MMBtu) output. Thus, the CSA limit of 0.40 g/MJ (0.93 lb/MMBtu) output corresponds to a 75 percent reduction in emissions when using the average particulate emissions of the conventional furnace tested by Intertek as part of the CSA B415.1–10 validation program.

We also investigated the performance of European production forced-air furnace models to determine whether their performance might be better than what CSA found in North America. However, forced-air furnaces are not commonly used in Europe because they are considered to be an inferior technology for home heating in Europe; thus we had no European candidate BSER to consider.

Manufacturers are actively conducting R&D in response to both the current CSA standard and the anticipated NSPS we are proposing. For example, one company has recently had an EPA-certified laboratory test two of their newest models. These tests, using the test method in CSA B415.1–10, show particle emissions below 0.1 lb/MMBtu heat output. Considering all of the above, we believe that BSER for forced-air furnaces may be demonstrated at the same emission levels as for hydronic heaters. We have considered proposing standards for forced-air furnaces that match the Step 1 and Step 2 standards we are proposing for hydronic heaters, that is, a proposed Step 1 BSER of 0.32 lb/MMBtu heat output and a cap of 18 g/hr as determined by the test methods and procedures in CSA B415.1–10 upon the effective date of the final standard and a proposed Step 2 BSER of 0.06 lb/MMBtu heat output as determined by the test methods and procedures in CSA B415.1–10, 5 years after the effective date of the final standard. However, we have concerns that only one U.S. manufacturer currently has models that have been tested by CSA B415.1–10 and shown to achieve these levels, and, thus, we are proposing that the Step 1 BSER for forced-air furnaces match the current CSA B415.1–10 level of 0.93 lb/MMBtu heat output. We are also proposing, however, that by 5 years after the effective date of the final standard, forced-air furnaces be subject to the same standards as hydronic heaters and be required to meet the proposed Step 2 BSER of 0.06 lb/MMBtu that hydronic heaters must meet then under this proposal.

Given that the largest U.S. forced-air furnace manufacturer already has a catalytic model meeting 0.06 lb/MMBtu, we think the 6 years of lead time is sufficient time in which to conduct R&D

<sup>58</sup> CSA B415.1–10: Performance testing of solid-fuel-burning heating appliances, Canadian Standards Association, Mississauga, Ontario, Canada. March 2010.

<sup>59</sup> Environment Canada was created in 1971, and has the responsibility to implement the Government of Canada's environmental agenda including, but not limited to, Canada's environmental and wildlife legislation, enforcement activities and other efforts to protect, conserve and enhance the environment.

<sup>57</sup> See footnotes 36 and 38.

to produce comparably lower emitting model lines, although we are seeking comment on an alternative 3-step approach with a longer lead time. Since there are limited emissions data available for forced-air furnaces that reflect hydronic heater proposed Step 1 and proposed Step 2 BSER, we request specific comments and data on the proposed emission levels and compliance deadlines, as well as the environmental impacts and market implications for setting emission limits that match what we are proposing for hydronic heaters.

The nationwide annualized total costs are based on the cost assumptions explained in section IV.C and in the background documentation.<sup>60</sup> The average annual cost increase to manufacturers of forced air furnaces during the 2014 through 2022 period analyzed in the RIA is approximately \$2.3 million. Estimated nationwide annual PM<sub>2.5</sub> emissions, averaged over this same period (2014–2022), are projected to be 3,044 tons/year under the baseline (unregulated) condition versus 434 tons/year under the proposed two-step BSER, an average reduction of 2,610 tons/year, considering only the first year of emissions for each new heater sold. Given this limited snapshot for these cost and emission estimates, the average cost of reducing each ton of PM<sub>2.5</sub> emissions during the 2014–2022 period is approximately \$860 per ton annually, as compared to the monetized health benefits of \$360,000 per ton to \$810,000 per ton of reducing direct PM<sub>2.5</sub>. The cost-to-sales ratio is 2.4 percent. However, when considering the total costs and cumulative emission reductions over the more representative full model design life span and appliance emitting life span, the overall cost effectiveness is approximately \$40 per ton (shown above in Table 11).<sup>61</sup>

Given the reasonable cost effectiveness of imposing the two-step BSER, and given the 6-year lead time (from the date of these proposed standards) until new model lines must come into compliance with the proposed Step 2 limit, we determined that the two-step phased-in limits represent BSER for these residential consumer appliances at this time. Thus, we are proposing a two-step standard for forced air furnaces, in which Proposed Step 1 is required upon the effective date of the final rule and Proposed Step 2 is required 5 years after the effective date of the final rule. Section V.B.5 discusses the three-step

alternative approach that we also considered for forced air furnaces, and on which we are seeking comment.

### 3. Masonry Heaters

We are proposing subpart RRRR for new masonry heaters. With a few exceptions, masonry heater emissions are not subject to specific PM emission limits in North America or Europe. Some states and local areas do not allow any residential wood heaters that are not certified to meet the current residential wood heater NSPS. The states of Colorado and Washington have set 6 grams of particles emitted per kilogram of wood burned (g/kg) and 7.3 g/kg limits, respectively (each of which is based on different test methods), and a small number of appliances have been tested and certified for those states. (The BSER level we are proposing below uses a different format but is commonly accepted to be only slightly more stringent than the Colorado and Washington limits.) We considered various forms for a masonry heater standard, and we believe that an appropriate format could be a daily average g/hr limit for the heating cycle coupled with a limit for emissions per heat output (lb/MMBtu output). The daily average over the heating cycle format seems to be well adapted to the nature of the technology of masonry heater operation, which involves one or two short high burn rate cycles where hot gases are generated during combustion of a fuel load in the firebox and then pass through the channels, saturating the masonry mass with heat. The masonry mass then radiates heat into the area around the masonry heater for 12 to 24 hours. Unfortunately, we lack sufficient data to set the level of a daily average data approach, so we are proposing instead a heat output format. The heat output format has the advantage of providing a good metric for consumers and regulatory agencies to compare emissions of competing residential heating appliances for an equivalent heat output. We ask for specific comments on whether a g/kg format would be better.

We had numerous discussions with states, masonry heater manufacturers, and laboratories on heater designs, test methods and heater emissions and performance. The best performing improved combustion technology masonry heaters have well-engineered designs with long channels to maximize complete combustion and heat transfer. The manufacturers provided all available current emissions data. For example, one manufacturer provided an archive of available data. The data set included results from 31 tests

(measuring emissions per heat output) that ranged from 0.07 g/MJ to 0.51 g/MJ (~0.17 to 1.22 lb/MMBtu), with an average rate of 0.26 g/MJ (0.621 lb/MMBtu). As we discussed earlier in this preamble, we do not have good information on how many heaters emit at each of these levels and thus have not developed a good estimate of baseline emissions and we ask for data that would help inform us. However, looking at this data set in more detail, we can see that the best “improved combustion” systems have an emission level of 0.13 g/MJ (0.32 lb/MMBtu) heat output. We note that this level is consistent with the proposed Step 1 BSER for hydronic heaters.

As discussed earlier in this preamble, the source categories to be regulated by the proposed subparts AAA, QQQQ, and RRRR are fundamentally different from the typical NSPS source category in that most NSPS regulate industrial processes whereas the source categories in subparts AAA, QQQQ, and RRRR include mass-produced residential consumer products. Thus, additional factors are included in the analyses presented today as compared to typical NSPS. For example, we considered whether we should allow longer lead time over which small manufacturers/builders could spread their R&D costs in order to stay in business. The Small Business Regulatory Enforcement Act Panel strongly recommended that we consider allowing more time. See section V.C of this preamble for discussion of this topic.

We estimated proposed Step 1 improved combustion BSER emissions and cost and economic impacts based on four groups of costs. The first group of costs consisted of the two large manufacturers that we know have already developed potentially complying models and would only face the costs of certification tests. For the second group of costs, we estimated the costs incurred by an additional two large manufacturers that conduct R&D to develop a total of four new model lines. For the third group of costs, we estimated the cost of one of the manufacturers using the computer simulation approach to certify additional model lines. Finally, for the fourth group of costs, we estimated the cost for all of the small, custom-built manufacturers using the computer simulation approach to certify their model lines. We do not anticipate a large nationwide emission reduction resulting from requiring the proposed Step 1 BSER versus what most manufacturers would have done in the absence of a rule; however we believe there are some masonry heaters that do

<sup>60</sup> See footnotes 37 and 38.

<sup>61</sup> See footnotes 24, 36 and 38.

not use current best designs and for those heaters there can be an emission reduction of 70 percent or more. We believe it is important to ensure that all new models achieve the BSER emission levels and avoid backsliding.

The nationwide annualized total costs are based on the cost assumptions explained in section IV.C and in the background documentation.<sup>62</sup> The average annual cost increase to manufacturers of masonry heaters during the 2014 through 2022 period analyzed in the RIA is approximately \$294,000. The estimated cost-to-sales ratio is 4.8 percent. If one were to spread the costs over the much longer typical lifetimes of masonry heaters (over 40 years), the average annual costs would be much lower. We concluded that the proposed Step 1 BSER level of 0.32 lb/MMBtu heat output is appropriate for these appliances.

For masonry heaters, we are proposing that large manufacturers of masonry heaters (defined as those manufacturers constructing 15 or more masonry heaters per year) would be required to comply with these standards upon the effective date of the final rule. We are proposing that small manufacturers (defined as those manufacturers of less than 15 masonry heaters per year) would be required to comply with these standards 5 years after the effective date of the final rule.

We are requesting specific comments on the proposed BSER option and data that might support alternative findings and enhance our impact analyses. For example, if we were to develop a g/hr average format in addition to the lb/MMBtu heat output format, are there products that might meet a daily average over the heating period versus the averaging only over the combustion period, and if so, how would this affect levels of performance and impacts on the environment? Further, we are seeking comment on the degree to which these dates could be sooner.

4. Alternative Approach for Comment

As noted in section III, in addition to the proposed two-step standards described above for appliances regulated as “room heaters” under subpart AAA (currently catalytic and noncatalytic adjustable burn rate wood heaters, single burn rate wood heaters, and pellet heaters/stoves) and for appliances regulated as “central heaters” under subpart QQQQ (currently hydronic heaters and forced-air furnaces), we also considered a different approach, an “alternative three-step approach” for subparts AAA and QQQQ. We seek comments on whether the final rule should be our (preferred) proposed two-step approach or whether the final rule should be this alternative three-step approach. We do

not intend for the final rule to allow a choice between the two approaches. We did not develop a three-step approach for masonry heaters under subpart RRRR, since it is a one-emission-level standard, but we are seeking comments on our proposed 5-year compliance extension for small volume masonry heater manufacturers.

We compared unit cost increases,<sup>63</sup> nationwide manufacturer cost estimates,<sup>64</sup> emission reductions,<sup>65</sup> and overall cost effectiveness of the two-step proposal to the three-step alternative approach considered.<sup>66</sup> Table 12 compares the unit cost increase, nationwide average cost to manufacturers and the annual particulate emission reductions, during the 2014 through 2022 period analyzed in the RIA, for appliances currently affected by this proposal, considering only the first year of emissions for each new heater sold. Based on the cost and emission reduction estimates presented in this table, the overall cost effectiveness for this proposal over the 2014–2022 period is \$3,250 per ton, but \$5,800 per ton for the alternative approach considered (assuming no emission reductions for masonry heaters, for the sake of this analysis). Additional information on the impacts is included in the RIA in the docket.

TABLE 12—COMPARISON OF PROPOSAL AND ALTERNATIVE APPROACH (2014–2022)

Appliance type	Unit cost increase from baseline (2010\$)		Nationwide average cost increase from baseline (2010\$)		Emission reduction from baseline (tons)	
	Proposal	Alternative	Proposal	Alternative	Proposal	Alternative
Certified Wood Heaters .....	24 .....	48 .....	4,212,303	8,090,026	163 .....	136
Single Burn Rate Heaters .....	226 .....	337 .....	901,732	1,540,600	754 .....	756
Pellet Heaters/Stoves .....	24 .....	47 .....	3,460,489	6,255,536	49 .....	24
Forced-Air Furnaces .....	3,262 .....	4,891 .....	2,252,284	3,813,898	2,610 .....	2,712
Hydronic Heating Systems .....	6,458 .....	9,672 .....	4,554,152	8,302,026	1,249 .....	1,250
Masonry Heaters .....	300 (ave.) ...	300 (ave.) ...	307,511	293,776	Not estimated	Not estimated.
<b>Total .....</b>	<b>10,294 .....</b>	<b>15,295 .....</b>	<b>15,688,471</b>	<b>28,295,862</b>	<b>4,825 .....</b>	<b>4,878</b>

We are seeking comment and information on potential justifications for implementing such a three-step standard, instead of our proposed two-step standard for each of the appliances affected by this proposed rule, to provide additional flexibility for manufacturers that have different capabilities and resources to ultimately reach the most stringent BSER. The proposed two-step standards rely on the

assumption that the proposed Step 2 BSER, already demonstrated by various models in each appliance category affected by the proposed rule, is achievable within 5 years of the proposed Step 1 BSER. There is a significant emission reduction achieved by the proposed Step 2 BSER compared to the proposed Step 1 BSER in each appliance category discussed above in section V, but there are no proposed

interim emission limits imposed during the transition from the proposed Step 1 to the proposed Step 2. In the alternative approach considered, there is a longer transition period of 8 years between Step 1 and Step 3 (with the same significant emission reduction achieved between our proposed Step 1 and proposed Step 2), but there is an interim Step 2 limit which manufacturers must meet 3 years after

<sup>62</sup> See footnotes 24, 36 and 38.

<sup>63</sup> See footnote 38.

<sup>64</sup> See footnote 24, 36 and 38.

<sup>65</sup> See footnote 24.

<sup>66</sup> See footnote 24, 36 and 38.

the proposed Step 1. If we were to give a longer timeframe to redesign across model lines to accommodate the best systems, test, field evaluate, and certify a wide range of model lines, we believe there would be benefit to establishing required interim limits to codify progress in reducing emissions and to focus positive attention on early achievers as they show compliance in the period between 2015 and 2023.

We expect that the manufacturers that do not already meet the strongest emission limits would like the longer time to meet the Alternative Approach Step 3 but would prefer to not have an interim Step 2 requirement. However, we do not currently see adequate justification for allowing extra time without also requiring satisfactory progress, especially because numerous models already achieve the strongest emission levels. We also have concerns about the complexity of a 3-step approach and whether it would be harder for the EPA to enforce. Thus, we seek comment, including data and potential environmental and economic justifications, on whether the described Alternative Approach Step 2 emission limits represent BSER within 3 years of the effective date of the final rule. We also seek comment on whether an additional 5 years would be necessary to transition from the Alternative Approach Step 2 to the Alternative Approach Step 3 limit, or whether such a transition could be made in a shorter time period. Finally, for single burn rate wood heaters and forced-air furnaces, we are seeking comment on whether the alternative Step 1 limit should become effective upon the effective date of the final rule or after a 1-year "adjustment" period. The EPA seeks to encourage national achievement of the (proposed Step 2) BSER for each appliance category as soon as possible and as efficiently as possible, which is why we prefer the proposal over the alternative approach we considered. However, we also seek to balance industry's R&D needs with timely and efficient standards, and so we are seeking comment on the alternative approach outlined immediately above and in section III.

## 5. Other Proposed Emissions Testing and Reporting

### a. Efficiency Testing and Reporting

While the CAA gives the EPA authority to set standards for emissions, and we have issued final rules that have used a variety of formats for such standards, including efficiency, we lack sufficient data to propose efficiency standards for residential wood heaters at

this time. We are proposing only to require testing and reporting but not a minimum efficiency standard. Current data and other information from manufacturers and testing laboratories and the NYSERDA "European Wood-Heating Technology Survey" discussed earlier in this preamble show that, in general, the same types of improved combustion BSER designs that tend to reduce PM<sub>2.5</sub> emissions also tend to increase combustion efficiency, reduce CO emissions and improve efficiency. Current subpart AAA allows sources to either measure efficiency or report a default efficiency value. We believe these proposed subparts are an excellent opportunity to standardize the collection and reporting of such data.

Most industry members support the collection and reporting of tested efficiency values, but some do not necessarily support an efficiency standard because they have concerns that efficiency standards would encourage a "ratings race" and worry that some manufacturers would sacrifice operational viability in the field for a higher efficiency rating. We agree that some heat loss is necessary to ensure adequate draft out the chimney/stack and not backdrafting into living areas. However, we do not expect manufacturers to jeopardize their reputation or operator safety for a higher rating, and we believe that competition among manufacturers to increase their heaters/stoves' efficiencies is good for consumers and the environment. We request specific comments and supporting data that would help inform the need for and level of a possible efficiency standard. Also, we ask for specific comments on how, in the meantime, to best ensure consumers have access to the best information on efficiency performance, e.g., labels, owner's manual, Burn Wise Web site and/or other means.

### b. CO Testing and Reporting

We considered developing CO emission limits for all new residential wood heaters. However, our current data for CO emissions performance and methods of control are not sufficiently robust to support strong CO emission limits, and it would delay the NSPS if we were to seek additional data elsewhere at this time to support strong CO emission limits. We expect the CO emissions to be reduced as a result of the control of PM, because meeting the PM standards will be achieved primarily by BSER based on good combustion (and in some cases catalysts and hybrids) which will also result in good CO reductions without additional standards for CO. However, we are

proposing that manufacturers measure and report CO. We believe this information will be useful to consumers and state and local regulators. Requiring manufacturers to measure and report CO emissions would also result in the collection of data that could be used in the future to establish a CO emissions limit. We are requesting specific comments and supporting data on the need for and level of a possible CO emissions standard. Also, we ask for comments on whether we should require CO monitors to help ensure proper operation of the heater and to reduce health and safety concerns for appliances that are installed in occupied areas.

### c. Pellet Fuel Requirements

A wide variety of pellet fuels is available for purchase. However, in some cases, quality claims on the pellet fuel bag do not necessarily reflect what is in the bag and there can be variable performance. Manufacturers' data show that some fuel qualities have worse burning characteristics and operational characteristics than others, which results not only in heater performance problems but also increased emissions of PM. The PFI, an industry trade organization, has had pellet fuel quality standards in place since 1995, with updated standards issued in 2005, and again, most recently in 2011 (<http://pelletheat.org/wp-content/uploads/2011/11/PFI-Standard-Specification-November-2011.pdf>), in response to the EPA's planned revisions to the residential wood heaters NSPS. We have reviewed the PFI program and believe it is a good program that obviates the need for the EPA to develop our own program at this time. Under the proposed NSPS, pellet burning appliances would be tested using PFI (or, upon request to the EPA Administrator, an equivalent organization's) graded pellet fuel(s). Once certified, pellet burning appliances would only be allowed to burn the grade of fuel that the appliance manufacturer chose for the appliance certification test and the manufacturer specifies in their owner's manual for the operator to use. As discussed above, use of inferior grades would cause heater operational problems and increase emissions. The overall intent of the certification process is to increase the consistency and quality of pelletized fuel throughout the industry, and, thus, reducing appliance operational problems and helping certified appliances perform at the emission levels to which they are certified. Heater manufacturers have indicated to us that market competition will compel them to specify the widest range of grades for

which their heaters will properly perform.

The PFI is also implementing a quality assurance program to ensure that manufacturers reliably produce graded fuels. We propose to require adherence to this program (or equivalent) as a condition of producing graded pellet fuels to be used in obtaining certification under the NSPS. Similar to the NSPS quality assurance program, the PFI quality assurance program relies on use of accreditation and auditing bodies that:

- Accredit auditing agencies and testing laboratories
- Implement and enforce the program, including testing that the pellet fuels meet the grading specifications
- Maintain the enforcement regulations
- Administer a laboratory proficiency program
- Pursue product complaints

In addition, accredited auditing agencies perform the following tasks:

- Certify the production of densified fuel manufacturers
- Authorize production facilities to use PFI's "grading mark"
- Conduct regular audits and extracts samples for third party verification
- Revoke authority to use the PFI mark, if necessary

Accredited testing laboratories perform the following activities:

- Provide QA/QC testing for fuel producers—"as needed"

- Provide testing for samples collected by auditing agencies
- Participate in the accreditation body's proficiency testing program

Finally, the densified fuel producers perform the following activities:

- Develop an in-house QA/QC program based on the PFI QA/QC handbook and the PFI standard specification
- Select an auditing agency and test lab
- Demonstrate compliance with grading system component
- Maintain compliance through periodic audits, inspection and testing

As noted earlier, we have reviewed the PFI program and believe it is a good program that obviates the need for the EPA to develop our own program at this time. We ask for specific comments on this decision and the PFI program.

d. Prohibited Fuel Types

As regulated in the current 1988 subpart AAA standards for residential wood heaters/stoves, operation according to the owner's manual requires operation with the appropriate fuels because the choice of fuels to burn in any appliance can have a major impact on emissions and efficient operation of the appliance. For clarity, we are proposing a list of prohibited fuel types (e.g., trash, plastics, yard waste) to emphasize the responsibility of owners and operators to use appropriate fuels that will result in the performance of the unit as certified, to avoid the creation of possibly hazardous fumes from burning inappropriate

materials, and to ensure that appliance continues to operate as designed. Even with burning clean wood, one of the key factors affecting emissions is the moisture content. Some advocates have suggested that we only allow use of wood certified to a certain moisture level and that we include visible emission limits as a tool to help with practical enforceability of the requirements for proper operation and maintenance. Manufacturers typically include in their owner's manuals information on proper maintenance and operation and state that the wood must be properly seasoned so that the moisture content is not too high for proper operation. Some manufacturers include moisture meters for the operators. We are proposing to require commercial owners (direct distribution manufacturers and retailers) to provide a moisture meter with the wood heater at the time of sale, along with the owner's manual and a copy of the warranty. We request specific comments on whether we should include more specific requirements on proper operations, such as the moisture content of the wood and visible emission limitations.

C. How did we establish the proposed compliance timelines?

The following table summarizes the proposed compliance timelines for the appliances covered by the three subparts.

TABLE 13—SUMMARY OF PROPOSED COMPLIANCE DATES

Appliance type	Compliance date
Adjustable Rate Wood Heaters or Pellet Heaters/Stoves with Current EPA Certification Issued Prior to the Effective Date of the Final Rule.	1988 requirements remain in effect for these heaters/stoves through the later of the effective date of the final revised rule or expiration of current certification (maximum of 5 years after certification and no renewal).
All Other Adjustable Rate Wood Heaters or Pellet Heaters/Stoves (includes currently certified heaters after the certification expires).	Step 1: upon the effective date of the final rule. Step 2: 5 years after the effective date of the final rule.
Single Burn Rate Heaters	Step 1: Upon the effective date of the final rule. Step 2: 5 years after the effective date of the final rule.
Hydronic Heaters	Step 1: Upon the effective date of the final rule. Step 2: 5 years after the effective date of the final rule.
Forced-Air Furnaces	Step 1: Upon the effective date of the final rule. Step 2: 5 years after the effective date of the final rule.
Masonry Heaters	Large manufacturers: Upon the effective date of the final rule for large manufacturers. Small manufacturers: 5 years after the effective date of the final rule.

The proposed compliance dates are tied to the effective date of the final standards. As stated earlier, an element of the BSER determination includes reasonable lead time for R&D to develop and certify cleaner units. We think limited or no R&D is needed to comply with the proposed Step 1 BSER standards. This allows manufacturers

approximately 1 year between the date of this proposal and the date of the final rule to meet proposed compliance standards and limits. This 1-year period is in addition to the time that manufacturers have had leading up to this proposed rule.

We allowed small producers of masonry heaters that do not have a

history of federal or extensive state regulation, or experience with voluntary partnership programs, 5 years after the effective date of the final rule to come into compliance with the same emission standards as larger masonry heater manufacturers in order to ensure a reasonable lead-time.

Finally, we think our proposal for a 6-year lead time before the Step 2 BSEER limits (*i.e.*, 5 years after the effective date of the final rule) would allow manufacturers a reasonable time to develop complying models, access the necessary capital to develop them, and complete the certification process.

We are proposing a 6-month "sold at retail" provision for adjustable burn rate wood heaters, single burn rate heaters/stoves, and pellet heaters/stoves that were manufactured prior to the effective date of the final rule, but not yet sold. This "sold at retail" provision is similar to that provided in the current subpart AAA, and provides a reasonable transition for manufacturers to recoup their investment in their stock on hand. We believe this provision would have a nominal impact on air quality, because the majority of these appliances are already expected to achieve the Step 1 emission limits. For small producers of masonry heaters, we are proposing an additional 5-year lead-time. We are not proposing to apply these extensions to other sources regulated by this proposal. We do not believe that an additional "sold at retail" provision is needed for outdoor and indoor hydronic heaters and forced-air furnaces. In the case of hydronic heaters, we believe that any delay of the compliance deadline for sales would also result in the sale and long-term use of non-complying units, with a potentially adverse quality impact. We request specific comments on whether there are other factors we should consider regarding this "sold at retail" window and what length of time might be considered appropriate in specific circumstances.

While the original subpart AAA created a 1-year compliance extension for wood heater manufacturers producing less than 2,000 heaters per year, this proposed rule does not include a compliance extension provision for single burn rate heaters. The purpose of the original NSPS compliance date extension was to reduce the potential for a testing logjam and to provide small manufacturers additional time to conduct R&D, obtain financing, or purchase complying designs likely to meet the proposed standards. We believe that manufacturers and testing facilities have now had sufficient time and have gained the expertise necessary to meet these standards as proposed and that meeting the proposed compliance dates will impose no undue imposition on manufacturers or testing facilities. We request comment on the need for such a compliance extension and the number of models that might qualify as a small single burn rate heater manufacturer.

As stated above, we are proposing a 5-year compliance date extension for masonry heater manufacturers that sell fewer than 15 units per year. We also seek comments on whether we should have a cap on the total units sold in the 5 years, perhaps 50 units. Most of these manufacturers are very small companies. There are only a few major producers. According to one manufacturer, the Finnish firm, Tulikivi, manufactures and supplies about one-half of the U.S. masonry heater units installed yearly through its network of installing distributors. The second largest producer is a Canadian firm, Temp-Cast, which manufactures and exports a large percentage of the remainder as internal core components only to U.S. dealer/installers and homeowners. This manufacturer states that the remainder of the industry is dozens of small producers and installers who produce only a few units, most of which are custom and individually designed. This manufacturer also stated that over 80 percent of U.S. masonry heater installations use manufactured core product installation and are not custom site built (brick-by-brick).

Because of the resources required to develop, test, and certify masonry heaters (estimated by industry to be approximately \$250,000 per model, although our cost analysis used a larger estimate), we have concluded that a manufacturer of a small number of custom site-built model(s) of masonry heaters would likely be unable to recover the total cost of R&D and certification testing costs in a reasonable timeframe. Similarly, a company that makes core components or sells design kits would be unable to recover total costs if only a few such components or kits are sold per year. We estimated that the annualized cost for developing, testing and certifying a single model is approximately \$60,000, most of which is the cost of R&D. If a seller makes \$5,000 of profit on each model sold, he or she would need to sell 12 units per year to break even. The masonry heater industry recognized concerns about these costs, and it has developed an alternative compliance method based on computer simulations. The industry expects that this alternative will allow sharing licensing of cleaner designs such that the initial software purchase would cost approximately \$1,500 but ongoing annual licensing cost will be approximately \$450 per manufacturer. We believe the 5-year compliance date extension discussed above for masonry heater manufacturers that sell fewer than 15 units per year will allow sufficient time for manufacturers to

become comfortable with this alternative, and use it to demonstrate compliance.

We considered proposing a compliance exemption for small manufacturers of masonry heaters because of the overall small size of the market. However, we were concerned that this might encourage installation of cheaper, low-performing models, which would place complying models at a potential disadvantage. We request comment on the need for either a compliance date extension or a compliance date exemption for masonry heaters and the length of time that we should allow.

We are not proposing any extensions or exemptions for small manufacturers of adjustable burn rate wood heaters or pellet heaters/stoves. Adjustable burn rate wood heaters are already subject to the NSPS, and we have estimated that they should not face any R&D expenses to comply with the Step 1 standards. To reduce unnecessary certification costs, we are proposing to allow a one-time waiver from performance testing for the first certification period for any manufacturer that has previously conducted a valid certification test that demonstrates the wood heaters in the model line meet the proposed standards. We also believe that pellet heaters/stoves would not face any R&D costs to comply with the proposed Step 1 standards, and we estimate that certification costs will only pose a minor impact. We request comment on whether there are other factors we should consider regarding a small manufacturer compliance extension for these appliances.

We also are not proposing a small manufacturer compliance extension for the Step 1 standards for new residential hydronic heaters or forced-air furnaces. There are currently 36 hydronic heater models built by 17 U.S. manufacturers that have already been qualified to meet the Phase 2 voluntary partnership program level of 0.32 lb/MM BTU. Manufacturers of hydronic heaters and forced-air furnaces have known for several years that we were drafting this proposal and that the states have been very concerned about emissions from the models that may not meet the proposed standards; and we do not want to perpetuate sales and use of models unless they demonstrate they do meet the standards. Once again, we request comment on whether there are other factors we should consider regarding a small manufacturer compliance extension for these appliances and what number of appliances sold would constitute a small volume manufacturer.

As discussed above, we recognize there is some concern, as there was with the initial NSPS compliance dates, that testing laboratories capacity may not be able to meet the demand for certification tests in the first few years. However, we believe that the steps we have already proposed, the availability of additional ISO-accredited labs, the advance notice that industry has had concerning the NSPS prior to this proposal, and the time between this proposal and the proposed compliance date of the final rule, should ensure that adequate compliance certification resources are available. The logjam provisions of the current 1988 NSPS were never invoked, and we do not think they are needed at this time. However, we are taking comment on this issue. We also request comment on whether these compliance timelines strike the right balance between avoiding undue economic burdens and the need to get better performing models on the market as soon as possible to reduce emissions, and whether other compliance dates would be appropriate.

*D. How are we proposing to streamline the requirements for certification, quality assurance and laboratory accreditation?*

As part of the NSPS review process, several stakeholders stated the need to improve the current certification and quality assurance requirements. For example, some pellet heaters/stove manufacturers said one reason they avoid certifying their heaters/stoves is because they are concerned that the current process is a barrier to rapid product development and making changes to respond to market demand. Many manufacturers were also concerned that, as the scope of the NSPS program expands to include multiple appliance types, the certification program would act as a logjam. Some states are concerned, however, that moving away from the EPA certification might result in less effective oversight. At the EPA, we are also looking for ways to use our enforcement resources more effectively.

We believe that the proposed changes, described in section III.A regarding a third-party certification program by an ISO-accredited certifying body and testing at ISO-accredited labs, will facilitate the development of improved designs by providing a faster approval process and reducing redundancies in quality assurance for emissions testing and safety testing, and will improve enforcement by providing for more frequent on-site inspections of manufacturing facilities and laboratories. For example, safety

certification audits take place quarterly and include the random inspection of manufactured units for compliance with design and safety factors. The experience of the voluntary partnership programs' ISO process has shown that the third-party approach can work.

We also reviewed the list of design changes (the "k" list; See 40 CFR, subpart AAA, § 60.633(k)) that would result in a need to recertify a model line when certain tolerances are exceeded. We reviewed this list based on the experience we have to date on the types of changes that are significant and knowledge about current manufacturing processes that help prevent these changes from occurring. The resulting list focuses on the following key tolerances:

- Firebox dimensions
- Air introduction systems
- Dimensions and locations of the baffle, catalyst, refractory/insulation, flue gas exit, and the outer shielding and covering
- Dimensions and fit of the gaskets for the door and catalyst bypass
- Fuel feed system
- Forced air combustion system

We believe these changes will focus resources on the significant changes that could affect emissions performance of the model in question. We ask for specific comments on this list and the level of appropriate tolerances.

We propose to revise the requirement for manufacturers to conduct quality assurance emission tests once a specified number of units are sold. Instead, we propose to replace this numerical trigger with a requirement to retest when manufacturer-specific quality assurance criteria (e.g., multiple errors in safety tests) are exceeded. We believe that development of a manufacturer-specific quality assurance plan with specific criteria and approval by an ISO-accredited certifying body (or EPA-approved equivalent) and required follow-up by that certifying body is a more direct measure of possible performance issues, but we request comment on the exact event(s) that should be used as the trigger(s) to retest and whether the triggering event(s) should vary by appliance type.

We are proposing to retain final EPA approval of the certification, and we also propose to require the manufacturer to submit with the application for certification a statement signed by a responsible official that the manufacturer has complied with all requirements of the subpart and that the manufacturer understands that he or she remains responsible for compliance regardless of noncompliance by the

certifying body. We believe this combination of requirements would provide meaningful EPA oversight, assign clear lines of responsibility, and free up resources to do more on-site inspections and other quality assurance activities, such as addressing issues of counterfeit certificates or absence of certificates.

The current random compliance audit testing of the certification testing program is considered underused by many. The EPA recognized this and has recently initiated such testing.

A key element of the current 1988 NSPS laboratory audit program is the "round robin" test program. In this program, the EPA purchases a wood heater and sends it to each of the accredited laboratories to conduct emissions tests (two runs at each burn rate for a total of eight runs). The EPA then compares the results to determine inter-laboratory performance. The EPA recognizes that we have not given this program as much attention as was envisioned in 1988. Thus, we propose to strengthen this program by specifying that every laboratory conducting certification tests under the NSPS must participate in the round robin tests every other year. If a lab's results are not within  $\pm 10$  percent of the value at which the heater was certified, then the lab must conduct another 8 runs. Also, we will remind the manufacturers that, as always, the EPA may potentially use this information to help determine the need for manufacturer audits and potential enforcement actions. We think that these requirements and reminders, combined with the proposed changes in test methods (described in greater detail in the test methods discussion in this preamble) and implementation of the ISO process will help improve inter-laboratory repeatability and reproducibility.

*E. What changes and additions to the allowed test methods are we proposing?*

As described earlier in this preamble, we are proposing changes to the test methods required by subpart AAA. We are also proposing test methods for the new subparts QQQQ and RRRR (as described earlier). In addition, we are proposing new requirements for testing and ultimately certifying using cord wood, which is what the consumer burns. All affected devices required to be tested using Method 28 or Method 28 WHH would now be required to conduct such tests using crib wood and cord wood. Under Proposed Step 1, manufacturers would have the option of selecting which of these test results to use to show compliance with the emissions standards. In other words, we

are proposing to require manufacturers to conduct two separate tests, one with crib wood and one with cord wood. We are also proposing that manufacturers be required to report the results of both tests to the EPA, but manufacturers can choose to certify with either crib or cord wood under Proposed Step 1. Under Proposed Step 2, manufacturers would be required to show compliance testing with cord wood.

We are also proposing to revise the test methods to require the addition of 1-hour filters for each test run to gather data regarding startup and anticipated peaks. Further, we are proposing new compliance requirements for Step 2 with emissions limits at the lowest burn rate (Category 1) and the maximum burn rate (Category 4), not a weighted average of the four burn rates, as in the current 1988 NSPS.

Based on the extensive consensus development process, history of the subpart AAA NSPS and hydronic heater voluntary partnership program emission test experience, and review of similar international standards, we believe the proposed methods reflect state-of-the-art test methods. However, we request specific comment on test method related issues and any data supporting such issues or concerns.

*F. What other changes and additions to the administrative requirements are we proposing?*

Consistent with Executive Order 13563: Improving Regulation and Regulatory Relief, we reviewed the entire current subpart AAA to identify information that is no longer relevant or useful and removed associated reporting and recordkeeping requirements. For example, because of the changes in the audit procedures, we do not believe it is necessary for manufacturers to keep records of the number of affected appliances that are sold each year, by certified model lines, for purposes of these subparts.

The prohibitions section in each of the proposed subparts (§§ 60.538, 60.5480, 60.5492) is based substantially on the current prohibitions section in subpart AAA. Similarly, the delegation section in each proposed subpart (§§ 60.539a, 60.5482, 60.5494) is based primarily on the current delegation section in subpart AAA. In general, we believe these delegations have worked well and are still appropriate with some clarifications and additions. The intent of the prohibitions section is to clarify the responsibility of owners and operators and manufacturers to comply with the proposed subparts. Key provisions for owners and operators emphasize that appliances must be

operated in accordance with the owner's manual and the appliances must not be altered in any way to circumvent the design and operation of a certified appliance. Key provisions for manufacturers emphasize the importance of complying with the label requirements and the need to maintain current certification for all heaters that are offered for sale. The intent of the delegation section is to clarify the regulatory provisions for which the EPA has retained sole enforcement authority (definitions, compliance and certification, test methods and procedures, laboratory accreditation, reporting and recordkeeping, revocation of certification, and hearings and appeals procedures). However, we have proposed to include the ability to delegate provisions to state, local or tribal agencies where local enforcement is essential, such as enforcement of permanent labels and owner's manual content, and presentation of false or misleading information. Note that when the EPA "delegates" enforcement authority, we retain our authority to enforce while allowing the delegates also to be able to enforce the delegated provisions. Also note that the delegations are upon request, not a requirement by the EPA.

We are proposing to replace the current subpart AAA hearing and appeal procedures with a streamlined Petition for Review process and also use this process in subparts QQQQ and RRRR. This process would allow accredited laboratories and manufacturers to contest audit test findings, laboratory accreditations, certification denials, and certification revocations by submitting a written request and supporting documentation to the EPA. This process would allow for expedited review and resolution. We request specific comments on this proposed process and other ways to improve or streamline procedures while preserving the integrity of the program.

**VI. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Under Section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or

state, local, or tribal governments or communities. The \$100 million threshold can be triggered by either costs or benefits, or a combination of them. Accordingly, the EPA submitted this action to OMB for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, the EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the RIA for this proposed rule. A copy of the analysis is available in the docket for this action.

A summary of the monetized benefits and net benefits for the proposed rule at discount rates of 3 percent and 7 percent is in Table 8 of this preamble, and a more detailed discussion of the benefits is found in section IV.B of this preamble. For more information on the benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

*B. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to OMB under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Information Collection Request (ICR) documents have been prepared for each proposed subpart. The subpart AAA ICR has been assigned the EPA ICR number 1176.10, which is a revision of the currently approved ICR number 1176.09. The subpart QQQQ ICR is a new collection, which has been assigned the EPA ICR number 2442.01. The subpart RRRR ICR also is a new collection, which has been assigned the EPA ICR number 2443.01. The new information collection requirements are not enforceable until OMB approves them.

The proposed rules would require manufacturers of new residential wood heating devices to submit applications for certification of model lines, to submit results of emissions tests conducted to demonstrate that the model lines would comply with the standards and produce certified units according to a quality control plan approved by an independent certifying body. Manufacturers must submit a notification of the initial test and biennial reports that each certified model line remains unchanged. They must also maintain records of all certification data, maintain results of quality assurance program inspections and emissions test data, and seal and store the tested appliance.

Consistent with the current ICR for subpart AAA, we have included costs to manufacture and apply permanent labels (for all models) on each applicable unit prior to sale. These labels provide important compliance information to enforcement officials.

Test laboratories that want to conduct NSPS certification testing would need to apply for accreditation, conduct initial and biennial proficiency testing and report the results of all such testing. Accredited test laboratories would also be required to participate in an audit compliance program. Finally, the accredited laboratories must maintain records of all certification tests, proficiency tests and compliance audit test data.

The required notifications are used to inform the agency when a new model line is expected to be tested. The EPA may then observe the testing operation, if desired. Emissions test reports are needed as these are the agency's record of a model line's initial capability to comply with the emission standard, and serve as a record of the operating conditions under which compliance was achieved.

Adequate recordkeeping and reporting are necessary to ensure compliance with these standards as required by the CAA. The information collected from recordkeeping and reporting requirements is also used for targeting inspections and is of sufficient quality to be used as evidence in court. As discussed earlier, we have reviewed all the current requirements and are proposing to remove the portions of the recordkeeping that are not necessary.

The estimated burden for proposed subpart AAA is based on an estimated 72 respondents (66 manufacturers and 6 testing laboratories) that would be subject to the rule. The number of total annual responses for subpart AAA is estimated at 265. The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to be a total of 6,489 labor hours per year at a total labor cost of \$516,188 per year. The ICR estimates that capital and the associated operation and maintenance (O&M) costs for these systems would be \$1,452,177 per year. The average annual labor burden per response is 24 hours.

The estimated burden for proposed subpart QQQQ is based on an estimated 41 respondents (37 manufacturers and 4 testing laboratories) that would be subject to the rule. The number of total annual responses for subpart QQQQ is estimated at 67. The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to be a total of 2,134 labor

hours per year at a total labor cost of \$169,745 per year. The ICR estimates that capital and operation and maintenance (O&M) costs would be \$715,796 per year. The average annual labor burden per response is 32 hours.

The estimated burden for proposed subpart RRRR is based on an estimated 48 respondents (45 manufacturers and 3 testing laboratories) that would be subject to the rule. The number of total annual responses for subpart RRRR is estimated at 108. The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to be a total of 2,044 labor hours per year at a total labor cost of \$162,589 per year. The ICR estimates that capital and operation and maintenance (O&M) costs would be \$89,037 per year. The average annual labor burden per response is 19 hours. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA-HQ-OAR-2009-0734. Submit any comments related to the ICR to the EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to the EPA. Send ICR-related comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after February 3, 2014, a comment to OMB is best assured of having its full effect if OMB receives it by March 5, 2014. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities

include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business that is primarily engaged in manufacturing heating equipment (except electric and warm air furnaces), such as heating boilers (heaters), heating stoves, floor and wall furnaces, and wall and baseboard heating units, as defined by NAICS code 333414 with fewer than 500 employees, or is primarily engaged in manufacturing air-conditioning and warm air heating equipment as defined by NAICS code 333415 with fewer than 750 employees, or is primarily engaged in masonry contracting, as defined by NAICS code 238140 with annual receipts less than 14 million dollars (based on Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Pursuant to section 603 of the RFA, the EPA prepared an initial regulatory flexibility analysis (IRFA) that examines the impact of the proposed rule on small entities along with regulatory alternatives that could reduce that impact. The IRFA contained within the RIA for this proposed rule is available for review in the docket and is summarized below:

- Reason Why Action Is Being Considered. As discussed earlier in this preamble, this proposal was developed following CAA section 111(b)(1)(B) review of the existing residential wood heater NSPS.

- Statement of Objectives and Legal Basis of Proposed Rule. As discussed earlier in this preamble, the EPA is proposing to amend Standards of Performance for New Residential Wood Heaters and to add two new subparts: Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces and Standards of Performance for New Residential Masonry Heaters. This proposal would achieve several objectives, including applying updated emission limits that reflect BSEI; improving coverage of the broad suite of residential wood heaters; improving the test methods; and streamlining the certification process. This proposal does not include any requirements on heaters that are solely fired by gas or oil. This proposal does not affect existing heaters. This proposal

was developed under the authority of CAA section 111.

- Description and Estimate of the Number of Small Entities. As discussed earlier in this preamble, small entities that the EPA anticipates being affected by this proposal would include almost all manufacturers of residential wood heaters. We estimate that roughly 250–300 U.S. companies manufacture residential wood heaters. We believe that approximately 90 percent of these manufacturers meet the SBA small-entity definition of having fewer than 500 employees.

- Description of reporting, recordkeeping and other compliance requirements. The reporting and recordkeeping requirements are described in the section immediately above (*B. Paperwork Reduction Act*). As discussed there, the information collection requirements (ICR), including reporting and recordkeeping, in this proposed rule have been submitted for approval to OMB under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* For subpart AAA, we estimated the potential annual burden averaged over the first 3 years of the ICR to be a total of 6,489 labor hours per year at a total labor cost of \$516,188 per year and an average annual labor burden per response of 24 hours. For subpart QQQQ, we estimated 2,134 labor hours per year at a total labor cost of \$169,745 per year and an average annual labor burden per response of 32 hours. For subpart RRRR, we estimated 2,044 labor hours per year at a total labor cost of \$162,589 per year and an average annual labor burden per response of 19 hours.

- Description of other compliance requirements. As described earlier in this preamble, this proposal would apply updated emission limits that reflect the current best systems of emission reduction and improve the coverage of the expanded variety of types of residential wood heaters. We estimate the proposed NSPS's total annualized average nationwide costs would be \$15.7 million (2010\$) over the 2014 through 2022 period. The economic impacts for industries affected by this proposed rule over this same period range from 4.3 percent for manufacture of wood heater/stove models to as much as an 6.4 percent compliance cost-to-sales estimate for manufacture of single burn rate wood heater models. These impacts do not presume any pass-through of impacts to consumers. With pass-through to consumers, these impact estimates to manufacturers will decline proportionate to the degree of pass-through. We estimate that small entities

will have annualized costs of greater than 1 percent of their sales in all industries except NAICS 332510, 333414 and 423720 with fewer than 20 employees, and NAICS 236115, 238140 and 442299 with receipts less than \$10 million. Those establishments in NAICS 332510, 333414 and 423720 with cost-to-receipt ratios higher than 1 percent account for 80 percent of small entities affected in these industries. Establishments in NAICS 236115, 238140 and 442299 with cost-to-receipt ratios higher than 1 percent account for 99 percent of small entities affected in these industries.

- Relevant federal rules that may overlap or conflict with this proposal. There are no other relevant federal rules.

- Significant alternatives. The significant alternatives to this proposal, especially those that might minimize potential impacts on small entities, are presented in the remainder of this section.

As required by section 609(b) of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), the EPA also convened a Small Business Advocacy Review Panel (Panel) to obtain advice and recommendations of representatives of the small entities that potentially would be subject to the rule's requirements. The following paragraphs describe the process, the type of small entity representatives, the outreach efforts and the Panel members.

Well before beginning the formal SBREFA process, the EPA actively engaged in outreach with HPBA, the Masonry Heater Association (MHA) and PFI and many of their member companies to discuss the rule under development and to provide these contacts with an early opportunity to ask questions and discuss their concerns.<sup>67</sup> The EPA provided each small business with general information on the SBREFA process and background information on the NSPS rulemaking process and current schedule.

Based on consultations with the Small Business Administration, and resulting from solicited self-nominations, we prepared a list of 30 potential Small Entity Representatives (SERs), from residential wood heating appliance manufacturers (wood heaters, pellet heaters/stoves, hydronic heaters, forced-air furnaces and masonry heaters), other

wood-burning appliance manufacturers (fireplaces, cook stoves), equipment suppliers, chimney sweeps, test laboratories, masons and trade associations. Once the official pre-Panel process began and potential SERs were identified, the EPA held an outreach meeting with the potential SERs and invited representatives from the Office of Advocacy of the Small Business Administration (OA/SBA) and the Office of Information and Regulatory Affairs within the Office of Management and Budget (OIRA/OMB) on June 29, 2010, to solicit their feedback on the upcoming proposed rulemaking. Representatives from 26 of the 30 companies and organizations that we selected as potential SERs for this SBREFA process participated in the meeting (in person and by phone). At that meeting, the EPA solicited written comments from the potential SERs, which were later summarized and shared with the Panel as part of the convening document.

The SBAR Panel convened on August 4, 2010. The Panel consisted of representatives of the EPA, OA/SBA and OIRA/OMB. The Panel held a formal outreach meeting/teleconference with the SERs on August 25, 2010. To help the SERs prepare for this meeting, on August 11, 2010, the Panel sent a list of questions, preliminary cost information and other materials to each of the SERs via email. Additional materials were emailed to the SERs on August 19, 2010. The Panel provided the opportunity for questions and comment during the meeting on various aspects of the proposal being developed, including the expanded scope of the rule, changes to the current requirements under consideration, preliminary cost information and follow up from the June 29, 2010, meeting on the SERs' ideas for regulatory flexibility. During the August 25 meeting, SERs voiced general support for the planned proposed rule and shared specific concerns with the Panel members. As a result of this meeting, the EPA received many useful verbal comments, and the EPA received many helpful written comments by September 10, 2010.

Consistent with the RFA/SBREFA requirements, the Panel evaluated the assembled materials and small-entity comments on issues related to elements of the IRFA. A copy of the Panel final report is included in the docket for this proposed rule. We invite comments on the report. A summary of the Panel recommendations is presented below. We have attempted to follow the Panel's recommendations to the degree we can while also ensuring that the options are practicable, enforceable,

<sup>67</sup> Also, as noted in this preamble in the discussion of development of the hydronic heater emission limits, the EPA worked with the hydronic heater industry in 2006 to develop a voluntary partnership program to encourage manufacture of cleaner models, [www.epa.gov/burnwise/participation](http://www.epa.gov/burnwise/participation).

environmentally sound and consistent with the CAA. For those recommendations not adopted by the EPA, we have included an explanation for why we rejected them.

Many of the SERs and the Panel had concerns about the breadth of this rulemaking and the challenges the EPA faces in conducting rulemaking for all of these source categories at one time and the challenges that the small businesses will face in having to comply with standards for all of these source categories at one time. The Panel recommended that the EPA should consider focusing efforts first on emissions sources that have the greatest potential to impact public health through the magnitude of emissions and population exposure. We have focused our efforts. The Panel noted the adverse effects of the 1988 NSPS on numerous wood heater/stove manufacturers, and the need to carefully develop a rule that will minimize business closures, while still achieving significant emission reductions. All Panel members believed that the EPA had adequate information to move forward with developing revisions that apply to the residential wood heater categories that are already regulated by the 1988 NSPS. However, two Panel members recommended that the EPA Administrator consider taking more time to collect additional information to better determine BSE for the certified wood heater category. They concluded that the EPA did present to the Panel enough information to justify regulation of this subcategory, but the EPA did not adequately inform the SERs about the other categories. These two Panel members believed it was unclear whether adoption of a more stringent standard for new sources would slow the adoption of new, cleaner burning heaters, potentially delaying improvements in air quality. The two Panel members further believed, based on the information available from the EPA and the SERs at that time, that they could not conclude that a nationwide NSPS limit on the other categories would be the preferred approach for reducing wood heater emissions.

Following the Panel's convening on August 4, 2010, the EPA collected additional information, and we refined the economic and technical analyses based, in part, on input from the SERs as the basis for this proposal. The Panel recommended that the EPA Administrator consider assessing the availability of data to better characterize each source category prior to considering proposal of standards. In particular, the Panel recommended that the EPA consider characterizing the

emissions per unit, operating hours per year, and the distribution of emissions across the unit types within each category under discussion at that time to better understand the magnitude of emissions reductions that may or may not be reduced through alternative regulatory and non-regulatory mechanisms. As discussed earlier, the EPA has considered such characterizations and alternatives.

The following is a list of Panel recommendations and how we incorporated them into this proposal:

- The Panel recommended that the EPA should consider focusing efforts first on emissions sources that have the greatest potential to impact public health through the magnitude of emissions and population exposure. *This proposal focuses on those sources.*

- The Panel encouraged the EPA to consider flexibilities that will most directly minimize the small business burdens, for example delayed compliance dates for low volume production. The delayed compliance approach was predicated on the concept that it will take a number of years for manufacturers to recover the costs of the R&D investment in order to achieve compliance. *This proposal has incorporated a stepped approach for emission limits and asks for comments on other alternative approaches.*

- The Panel recommended that the EPA consider the availability and feasibility of certification, testing labs, testing standards and other requirements. In particular, the Panel recommended that the EPA consider ways to streamline compliance certification, identifying flexible approaches and procedures that will reduce the burden and time for manufacturers to complete the application, testing and approval process for new model lines. For example, the Panel recommended that the EPA consider allowing the use of International Standards Organization (ISO)-accredited laboratories and certifying bodies to expand the number of facilities that would be required for testing and certification of the new residential solid biomass combustion appliances. Additionally, the Panel recommended that the EPA consider different compliance time frames for different product categories to reduce the potential for logjams at test labs and the overall impact on companies that manufacture multiple categories. *This proposal includes stepped emission limits for different categories and adds ISO-accredited laboratories and ISO-accredited certifying bodies to increase the availability of laboratories and*

*certifiers. Further, this proposal asks for specific comments on the schedules.*

- The Panel recommended that the EPA continue to allow manufacturers to test a representative unit for a model line rather than testing and reporting results for each individual unit. *This proposal continues to allow that.*

- The Panel recommended that the EPA consider emphasizing that the NSPS will address only new units. *This proposal emphasizes that it does not affect existing units.*

- In the Panel Report, SBA and OMB recommended that the EPA not move forward with proposed emission limits for pellet stoves, indoor hydronic heaters, biomass pellet stoves, masonry heaters, masonry fireplace kits, site-built masonry fireplaces, coal stoves, cook stoves, bake ovens (including Native American Traditional Bake Ovens), camp stoves, outdoor fireplaces and chimineas. *This proposal establishes emission limits for pellet stoves/heaters, which compete with adjustable burn rate wood stoves/heaters in the "room heaters" consumer marketplace. There is confusion in the marketplace as to why some pellet stoves are regulated and why some are not. As discussed earlier in this preamble, the potential exclusion of pellet stoves with greater than 35-to-1 air-to-fuel ratio is an unintended consequence of the 1988 actual intention of not setting emission limits for open fireplaces with high excess combustion air that do not operate as effective heaters. We believe that not moving forward on pellet stoves now would contribute to further confusion and an uneven playing field in the marketplace. Further, the emission levels we are proposing for pellet stoves/heaters are at the same level as the proposed wood stove/heater standards and are already achieved by most pellet stove/heater models and thus do not impose substantial compliance costs. Similarly, masonry heaters compete in the residential wood heaters consumer marketplace and there is confusion as to why they are regulated by some states, but not the EPA, and are even banned by some air districts because masonry heaters are not EPA-certified. Most masonry heaters are effective heaters and relatively clean and efficient, especially compared to pre-NSPS wood stoves. Requiring valid certification testing and reporting and providing that information to regulators and consumers and the public will help inform all as they strive to make appropriate choices on wood heating and air quality. That is, the masonry heaters can be an excellent emission reduction choice for replacing higher emission pre-NSPS wood stoves and*

should be encouraged over old wood stoves in most air sheds. Further, the emission levels we are proposing are already achieved by most masonry heater designs and we allow extra time for small manufacturers. This proposal addresses indoor hydronic heaters because they compete with outdoor hydronic heaters and forced-air furnaces in the “central heaters” consumer marketplace and there already is confusion as to why some are regulated by some states and some are not. Further, the magnitude of their emissions is of great concern and BSER controls are highly justified on cost-benefit grounds. The remainder of the appliances listed above are not included in this proposal.

- In the Panel report, SBA and OMB recommended that “where EPA estimates that the nationwide emissions are less than 300 tons per year (or some other value) . . . the EPA Administrator should consider options of not issuing an NSPS but rather consider allowing Regions and States to control such sources and consider other efforts, including voluntary standards to lower emissions.” We considered this recommendation but we could not find a legal or policy justification for an arbitrary cutoff and it is not included in this proposal. Also, we note that many states are prohibited from setting control requirements more stringent than the EPA requirements and all states have concerns about the lack of resources necessary to develop and adopt and implement state standards or voluntary programs, especially when most believe it is the EPA’s responsibility, and some have sued the EPA for failure to review and promulgate national standards on time as statutorily required. Further, the EPA does not agree with this recommendation, especially considering the strong recommendations by many states that the EPA regulate all residential wood heaters as soon as possible to provide another tool to help them with their efforts to reduce wood smoke emissions. As stated elsewhere in this proposal, the EPA is not proposing standards at this time for biomass pellet heater/stoves that are designed to only combust biomass other than wood, bake ovens, fireplaces, coal-only stoves, chimineas, ceremonial fires and commercial pizza ovens.

- Two Panel members recommended that if the EPA decides to later pursue regulation of categories other than certified wood heaters, the EPA should convene another Panel to address those subcategories at the appropriate time. The EPA does not agree with this recommendation for residential wood

heaters because the EPA believes that the SERs already have had multiple opportunities to address those subcategories. Furthermore, the EPA has conducted numerous meetings after the Panel process was completed to provide much additional information (e.g., technical discussions of refined alternatives) and updates to stakeholders including the SERs and other small businesses and other interested parties. We emphasize that this proposal is not a final rule but rather it is a proposal for public review and comment. We welcome comments and data on all aspects of this proposal that will help us prepare the final rulemaking.

As noted earlier, a copy of the Panel final full report is included in the docket for this proposed rule. We invite comments on the report and on all aspects of the proposal and its impacts on small entities.

#### *D. Unfunded Mandates Reform Act*

This proposed rule contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 that may result in expenditures of \$100 million or more for state, local or tribal governments, in the aggregate, or to the private sector in any 1 year. This proposed action imposes no enforceable duty on any state, local or tribal governments. The nationwide annualized average compliance cost of this proposed rule for directly affected appliances is \$15.7 million/yr in the 2014–2022 timeframe (2010\$). Therefore, this proposed rule would not be subject to the requirements of sections 202 or 205 of the UMRA.

This proposed rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The proposed rule would not apply to such governments and would impose no obligations upon them.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132 (64 FR 43255, August 10, 1999) requires the EPA to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the states, on the relationship between the national government and the states, or on the

distribution of power and responsibilities among the various levels of government.”

This proposed rule does not have federalism implications. It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed rule would not impose any requirements on state and local governments. Thus, Executive Order 13132 does not apply to this proposed rule. Although section 6 of Executive Order 13132 does not apply to this proposed action, the EPA did consult with representatives of state and local governments in developing this action. In the spirit of Executive Order 13132 and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This proposed action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule would not impose any requirements on tribal governments; thus, Executive Order 13175 does not apply to this action. Although Executive Order 13175 does not apply to this action, we recognize that the air quality and public health benefits to be achieved by this rule would benefit tribes, and we conducted outreach to tribal environmental staff and consulted with representatives of tribal officials in developing this action.

During the development of this proposed rulemaking, the EPA conducted outreach with numerous tribal representatives to provide opportunities for input prior to development of the proposed rule. We provided information at the July 2010, National Tribal Forum/National Tribal Air Association (NTAA) meeting in Albuquerque, New Mexico, and the November 2010, EPA Region 10 Tribal Leaders Summit in Juneau, Alaska. We also presented information on this proposed rulemaking in the April 2010, issue of Tribal Air News and during the EPA/NTAA tribal workgroup conference calls (April 2010, July 2010, August 2010, and May 2013). Specifically, we received input from the EPA/NTAA tribal workgroup members on culturally relevant exclusions from the proposed

standards. We agreed with their input, clarified that we do not intend to regulate ceremonial fires, and added a definition to the rule to exclude traditional Native American bake ovens.

On February 18, 2011, the EPA mailed letters to about 600 elected tribal leaders in the U.S. offering an opportunity for consultation on this proposal. We received requests from six tribes. These tribes agreed to discuss this proposal with us in a conference call held on March 22, 2011. The tribes were very supportive of this proposal and provided some helpful clarifications of definitions (e.g., Native American bake ovens) that we have incorporated in this proposal.

We plan to continue to provide updates on the rule on the EPA/NTAA conference calls and to offer opportunities to tribal leaders for consultation. The EPA specifically solicits additional comment on this proposed action from tribal officials.

#### *G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant,” as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. The report, “Analysis of Exposure to Residential Wood Combustion Emissions for Different Socio-Economic Groups,”<sup>68</sup> shows that on a nationwide basis, cancer risks due to residential wood smoke emissions among disadvantaged population groups generally are lower than the risks for the

general population due to residential wood smoke emissions. One of the demographic variables examined for this report was that of children 18 years and younger.

This proposed rule is expected to reduce environmental impacts for everyone, including children. This action proposes emissions limits at the levels based on BSER, as required by the CAA. Based on our analysis, we believe this rule would not have a disproportionate impact on children, and, in fact, will result in improvements to children’s health.

The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to smoke from residential wood heaters.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any significant adverse energy effects. In general, we expect the NSPS to improve technology, including energy efficiency. Reducing emissions and increasing efficiency might increase the use of wood fuel, which would relieve pressure on traditional coal or petroleum based energy sources. However, as described in section IV.E, it is difficult to determine the precise energy impacts that might result from this rule. This is because wood-fueled appliances compete with other biomass forms as well as more traditional oil, electricity and natural gas. We have not determined the potential conversion to other types of fuels and their associated appliances if the consumer costs of wood-fueled appliances increase and at what level that increase would drive consumer choice.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113 (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that

are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking involves technical standards. The EPA proposes to use several VCS test methods, in full or in part, including the following methods available for review at the ASTM Web site [www.astm.org/EPA-review](http://www.astm.org/EPA-review): E2515–10 “Standard Test Method for Determination of Particulate Matter Emissions Collected by a Dilution Tunnel” (See also ASTM WK20442 proposed revision and ASTM WK31433 proposed revision); E2779–10 “Standard Test Method for Determining Particulate Matter Emissions from Pellet Heaters;” E2780–10 “Standard Test Method for Determining Particulate Matter Emissions from Wood Heaters;” E2618–13 “Standard Test Method for Measurement of Particulate Matter Emissions and Heating Efficiency of Outdoor Solid Fuel-Fired Hydronic Heating Appliances;” ASTM E2817–11 “Standard Test Method for Test Fueling Masonry Heaters;” ASTM WK26558 “Specification for Calculation Method for Custom Designed, Site Built Masonry Heaters.” Also, we propose to use, in part, the following test method available for review at the CSA Web site <http://shop.csa.ca/en/canada/fuel-burning-equipment/b4151-10/inv/27013322010/>: CSA B415.1–10 “Performance Testing of Solid-fuel-burning Heating Appliances.” Finally, we propose to use, in part, the following test method prepared by the European Union: EN 303–5 “Heating boilers for solid fuels, hand and automatically stoked nominal heat output of up to 1025 MBtu—Terminology, requirements, testing, and marketing.” We believe that all the methods listed above have some positive aspects that can help stakeholders determine emissions under various operation conditions. For more details on each method, please refer to the discussions in Section III of this preamble.

In addition, we determined that the VCS ASTM E871–82 (2006), “Standard Test Method for Moisture Analysis of Particulate Wood Fuels” is acceptable as an alternative to Methods 5H and 28.

The search identified five other VCS that were potentially applicable for this rule in lieu of the EPA reference methods. However, the EPA determined that the five candidate VCS would not be practical due to lack of equivalency, documentation, validation data and other important technical and policy considerations. The five VCS and other information and conclusion, including

<sup>68</sup> “Analysis of Exposure to Residential Wood Combustion Emissions for Different Socio-Economic Groups, Revised Draft Report.” Prepared for Gil Wood, U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, NC. Prepared by EC/R Inc., EPA Contract No. EP–D–05–085, Work Assignment No. 4–3. April 22, 2010.

the search and review results, are in the docket for this proposed rule. The EPA welcomes comments on this aspect of the proposed rulemaking. Specifically, we invite the public to identify potentially applicable voluntary consensus standards and to explain why such standards, in whole or in part, should or should not be used in this regulation.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the U.S. The EPA defines "Environmental Justice" to include meaning involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

As discussed earlier, the report, "Analysis of Exposure to Residential Wood Combustion Emissions for Different Socio-Economic Groups," shows that on a nationwide basis, cancer risks due to residential wood smoke emissions among disadvantaged population groups generally are lower than the risks for the general population due to residential wood smoke emissions. Thus, we have determined that this proposed rule would not have disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority low-income or indigenous population.<sup>69</sup> This proposed rule establishes national standards that would reduce primarily PM emissions

<sup>69</sup> "Analysis of Exposure to Residential Wood Combustion Emissions for Different Socio-Economic Groups, Revised Draft Report." Prepared for Gil Wood, U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, NC. Prepared by EC/R Inc., EPA Contract No. EP-D-05-085, Work Assignment No. 4-3. April 22, 2010.

from new residential wood heaters and, thus, would decrease the amount of these emissions to which all affected populations are exposed.

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Hazardous substances, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: January 3, 2014.

**Gina McCarthy,**  
*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

**PART 60—STANDARDS OF PERFORMANCE FOR NEW SOURCES**

- 1. The authority citation for part 60 continues to read as follows:

**Authority:** 42 U.S.C. 7401-7671q.

**Subpart A—GENERAL PROVISIONS**

- 2. Section 60.17 is amended by:
  - a. Adding paragraphs (a)(109) through (a)(115); and
  - b. Adding paragraph (p) to read as follows:

**§ 60.17 Incorporations by reference.**

\* \* \* \* \*

(a) \* \* \*

(109) ASTM E871-82 (2006), Standard Test Methods for Moisture Analysis of Particulate Wood Fuels, IBR approved for appendix A: Method 5H and Method 28.

(110) ASTM E2515-10, Standard Test Method for Determination of Particulate Matter Emissions Collected by a Dilution Tunnel, IBR approved for § 60.534(c), § 60.5476(b) and § 60.5488(b).

(111) ASTM E2779-10, Standard Test Method for Determining Particulate Matter Emissions from Pellet Heaters, IBR approved for § 60.534(a)(2).

(112) ASTM E2618-13 Standard Test Method for Measurement of Particulate Matter Emissions and Heating Efficiency of Outdoor Solid Fuel-Fired Hydronic Heating Appliances, IBR approved for § 60.5476(a)(2).

(113) ASTM E2780-10, Standard Test Method for Determining Particulate Matter Emissions from Wood Heaters, IBR approved for § 60.534(a)(2).

(114) ASTM E2817-11, Standard Test Method for Test Fueling Masonry Heaters, IBR approved for § 60.5488(a).

(115) ASTM WK26558, New Specification for Calculation Method for

Custom Designed, Site Built Masonry Heaters, IBR approved for § 60.5488(c)(1).

\* \* \* \* \*

(p) This material is available for purchase from the Canadian Standards Association (CSA) at <http://shop.csa.ca/en/canada/fuel-burning-equipment/b4151-10/inv/27013322010/>.

(1) CSA B415.1-10, Performance Testing of Solid-fuel-burning Heating Appliances, IBR approved for § 60.534(d) and § 60.5476(c) and (d).

(2) [Reserved]

- 3. Revise subpart AAA to read as follows:

**Subpart AAA—Standards of Performance for New Residential Wood Heaters**

Sec.

- 60.530 Am I subject to this subpart?
- 60.531 What definitions must I know?
- 60.532 What standards and associated requirements must I meet and by when?
- 60.533 What compliance and certification requirements must I meet and by when?
- 60.534 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?
- 60.535 What procedures must I use for laboratory accreditation or certifying body accreditation?
- 60.536 What requirements must I meet for permanent labels and owner's manuals?
- 60.537 What records must I keep and what reports must I submit?
- 60.538 What activities are prohibited under this subpart?
- 60.539 What Petition for Review procedures apply to me?
- 60.539a Who implements and enforces this subpart?
- 60.539b What parts of the General Provisions do not apply?

**Subpart AAA—Standards of Performance for New Residential Wood Heaters**

**§ 60.530 Am I subject to this subpart?**

(a) You are subject to this subpart if you operate, manufacture, sell, offer for sale, import for sale, distribute, offer to distribute, introduce, or deliver for introduction, into commerce in the United States, an affected wood heater specified in paragraphs (a)(1) or (a)(2) of this section:

(1) Each adjustable burn rate wood heater with a current EPA certificate of compliance, single burn rate wood heaters with a current EPA certificate of compliance, and each pellet stove with a current EPA certificate of compliance issued prior to [EFFECTIVE DATE OF FINAL RULE] according to the certification procedures in effect in this subpart at the time of certification that are manufactured on or after July 1, 1988 are affected wood heaters.

(2) All other residential wood heaters under this subpart manufactured or sold on or after [EFFECTIVE DATE OF FINAL RULE] are affected wood heaters.

(b) Each affected wood heater must comply with the provisions of this subpart unless exempted under paragraphs (b)(1) through (b)(6) of this section.

(1) Affected wood heaters manufactured in the United States for export are exempt from the applicable emission limits of § 60.532 and the requirements of § 60.533.

(2) Affected wood heaters used for research and development purposes that are never offered for sale or sold and that are not used for the purpose of providing heat are exempt from the applicable emission limits of § 60.532 and the requirements of § 60.533. No more than 50 wood heaters manufactured per model line can be exempted for this purpose.

(3) Appliances that do not burn wood or wood pellets (such as coal-only heaters that meet the definition in § 60.531 or corn-only pellet stoves) are exempt from the applicable emission limits of § 60.532 and the requirements of § 60.533.

(4) Cook stoves that meet the definition in § 60.531 are exempt from the applicable emission limits of § 60.532 and the requirements of § 60.533.

(5) Camp stoves that meet the definition in § 60.531 are exempt from the applicable emission limits of § 60.532 and the requirements of § 60.533.

(6) Modification or reconstruction, as defined in § 60.14 and § 60.15 of Subpart A will not, by itself, make a wood heater an affected facility under this subpart.

(c) The following are not affected wood heaters and are not subject to this subpart:

(1) Residential hydronic heaters and residential forced-air furnaces subject to subpart QQQQ of this part.

(2) Residential masonry heaters subject to subpart RRRR of this part.

(3) Appliances that are not residential heating devices (for example, manufactured or site-built masonry fireplaces).

(4) Traditional Native American bake ovens that meet the definition in § 60.531.

#### § 60.531 What definitions must I know?

As used in this subpart, all terms not defined herein have the meaning given them in the Clean Air Act and subpart A of this part.

*Adjustable burn rate wood heater* means an enclosed, wood-burning

appliance capable of and intended for residential space heating or domestic water heating that is equipped with or installed with a damper or other mechanism to allow the operator to vary burn rate conditions, regardless of whether it is internal or external to the appliance. This definition does not distinguish between heaters that are free standing or fireplace inserts.

*Accredited test laboratory* means a test laboratory that is accredited for wood heater certification testing under § 60.535 or is an independent third-party test laboratory that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17025 to perform testing using the test methods specified in § 60.534 and approved by the EPA for conducting testing under this subpart.

*At retail* means the sale by a commercial owner of a wood heater to the ultimate purchaser.

*Camp stove* (sometimes also called cylinder stove or wall tent stove) means a portable stove equipped with a pipe or chimney exhaust capable of burning wood or coal intended for use in a tent or other temporary structure used for hunting, camping, fishing, or other outdoor recreation. The primary purpose of the stove is to provide space heating, although cooking and heating water may be additional functions.

*Catalytic combustor* means a device coated with a noble metal used in a wood heater to lower the temperature required for combustion.

*Certifying entity* means an independent third party that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17020 to perform certifications, inspections and audits under ISO-IEC Guide 17065 and approved by the EPA for conducting certifications, inspections and audits under this subpart.

*Coal-only heater* means an enclosed, coal-burning appliance capable of space heating, or domestic water heating, which has all of the following characteristics:

(1) An opening for emptying ash that is located near the bottom or the side of the appliance;

(2) A system that admits air primarily up and through the fuel bed;

(3) A grate or other similar device for shaking or disturbing the fuel bed or power-driven mechanical stoker;

(4) Installation instructions that state that the use of wood in the stove, except for coal ignition purposes, is prohibited by law; and

(5) The model is listed by a nationally recognized safety-testing laboratory for

use of coal only, except for coal ignition purposes.

*Commercial owner* means any person who owns or controls a wood heater in the course of the business of the manufacture, importation, distribution (including shipping and storage), or sale of the wood heater.

*Cookstove* means a wood-fired appliance that is designed primarily for cooking food and that has the following characteristics:

(1) An oven, with volume of 0.028 cubic meters (1 cubic foot) or greater, and an oven rack;

(2) A device for measuring oven temperatures;

(3) A flame path that is routed around the oven;

(4) An ash pan;

(5) An ash clean-out door below the oven;

(6) The absence of a fan or heat channels to dissipate heat from the appliance;

(7) A cooking surface measured in square inches or square feet that is 1.5 times greater than the firebox, which is measured in cubic inches or cubic feet. Example: A firebox of 2 cubic feet would have a cooking surface of at least 3 square feet;

(8) A portion of at least four sides of the oven is exposed to the flame path during the heating cycle of the oven. A flue gas bypass may exist for temperature control.

*Manufactured* means completed and ready for shipment (whether or not packaged).

*Manufacturer* means any person who constructs or imports into the United States a wood heater.

*Model line* means all wood heaters offered for sale by a single manufacturer that are similar in all material respects.

*Particulate matter (PM)* means total particulate matter including coarse PM (PM<sub>10</sub>) and fine PM (PM<sub>2.5</sub>).

*Pellet stove* means an enclosed, solid fuel burning device capable of and intended for residential space heating or domestic water heating that is designed specifically to burn wood pellet fuel that incorporates induced air flow, is installed with an automatic pellet feeder, and is a free standing room heater or fireplace insert.

*Representative affected wood heater* means an individual wood heater that is similar in all material respects to other wood heaters within the model line it represents.

*Room heater* means an enclosed, wood-burning appliance capable of and intended for residential space heating. Unless otherwise specified, these devices include adjustable burn rate wood heaters, single burn rate wood heaters and pellet stoves.

*Sale* means the transfer of ownership or control, except that a transfer of control of an affected wood heater for research and development purposes within the scope of § 60.530(b)(2) is not a sale.

*Seasoned wood* means wood with a moisture content of 20 percent or less.

*Similar in all material respects* means that the construction materials, exhaust and inlet air system, and other design features are within the allowed tolerances for components identified in § 60.533(k).

*Single burn rate wood heater* means an enclosed, wood-burning appliance capable of and intended for residential space heating or domestic water heating that is not equipped with or installed with a damper to allow the operator to vary burn rate conditions.

*Traditional Native American bake oven* means a wood or other solid fuel burning appliance that is designed primarily for use by Native Americans for food preparation, cooking, warming, or for instructional, recreational, cultural or ceremonial purposes.

*Valid certification test* means a test that meets the following criteria:

(1) The Administrator was notified about the test in accordance with § 60.534(f);

(2) The test was conducted by an accredited test laboratory;

(3) The test was conducted on a wood heater similar in all material respects to other wood heaters of the model line that is to be certified; and

(4) The test was conducted in accordance with the test methods and procedures specified in § 60.534.

*Wood heater* means an enclosed, wood burning-appliance capable of and intended for residential space heating or domestic water heating. Unless otherwise specified, these devices include adjustable burn rate wood heaters, single burn rate wood heaters and pellet stoves.

*Wood pellet fuel* means refined and densified wood shaped into small pellets or briquettes that are uniform in size, shape, moisture, density and energy content.

**§ 60.532 What standards and associated requirements must I meet and by when?**

(a) *1990 Particulate Matter Standards.* Unless exempted under § 60.530, each adjustable burn rate wood heater and pellet stove with a current EPA certification issued prior to [EFFECTIVE DATE OF FINAL RULE], according to the certification procedures in effect in this subpart at the time of certification, must comply with the following particulate matter emission limits as determined by the applicable test

methods and procedures in § 60.534(a) through (c) until the current certification expires as specified in § 60.533(h)(1), or it is revoked by the Administrator as specified in § 60.533(l), whichever is first. After the certificate expires or is revoked, individual wood heaters in that model line can no longer be manufactured or sold unless the manufacturer receives a new certificate of compliance from the Administrator.

(1) An affected wood heater equipped with a catalytic combustor must not discharge into the atmosphere any gases that contain particulate matter in excess of a weighted average of 4.1 g/hr (0.009 lb/hr) as specified in the applicable test method. Particulate matter emissions during any test run at any burn rate that is required to be used in the weighted average as specified in the applicable test method must not exceed the value calculated for "C" (rounded to 2 significant figures) calculated using the following equation:

(i) At burn rates less than or equal to 2.82 kg/hr (6.2 lb/hr),  
 $C = K_1 BR + K_2$

Where:

BR = Burn rate in kg/hr (lb/hr)

C = Actual particulate matter emission rate in g/hr (lb/hr) per burn rate in a given test run

$K_1 = 3.55 \text{ g/kg (0.00355 lb/lb)}$

$K_2 = 4.98 \text{ g/hr (0.011 lb/hr)}$

(ii) At burn rates greater than 2.82 kg/hr (6.2 lb/hr),  $C = 15 \text{ g/hr (0.033 lb/hr)}$ .

(2) An affected wood heater not equipped with a catalytic combustor must not discharge into the atmosphere any gases that contain particulate matter in excess of a weighted average of 7.5 g/hr (0.017 lb/hr) as specified in the applicable test method. Particulate matter emissions must not exceed 15 g/hr (0.033 lb/hr) during any test run at a burn rate less than or equal to 1.5 kg/hr (3.3 lb/hr) that is required to be used in the weighted average as specified in the applicable test method and particulate matter emissions must not exceed 18 g/hr (0.040 lb/hr) during any test run at a burn rate greater than 1.5 kg/hr (3.3 lb/hr) that is required to be used in the weighted average as specified in the applicable test method.

(3) As an alternative, an affected wood heater subject to paragraph (a) of this section may elect to comply with the requirements in paragraph (b) of this section.

(b) *2015 Particulate Matter Standards.* Unless exempted under § 60.530 or subject to the standards specified in paragraph (a) of this section, each adjustable burn rate wood heater or pellet stove manufactured on or after

[EFFECTIVE DATE OF FINAL RULE] or sold at retail for use in the United States on or after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] must comply with the emission limits specified in paragraphs (b)(1) or (b)(2) of this section, as applicable. Unless exempted under § 60.530, each single burn rate wood heater manufactured on or after [EFFECTIVE DATE OF FINAL RULE] or sold at retail on or after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] must comply with the emission limit specified in paragraph (b)(3) of this section. Compliance for all sources must be determined by the test methods and procedures in § 60.534.

(1) An adjustable burn rate wood heater or pellet stove that is an affected wood heater equipped with a catalytic combustor must not discharge into the atmosphere any gases that contain particulate matter in excess of a weighted average of 4.5 g/hr (0.01 lb/hr).

(2) An adjustable burn rate wood heater or pellet stove that is an affected wood heater not equipped with a catalytic combustor and capable of making burn rate adjustments must not discharge into the atmosphere any gases that contain particulate matter in excess of a weighted average of 4.5 g/hr (0.01 lb/hr).

(3) A single burn rate wood heater that is an affected wood heater must not discharge into the atmosphere any gases that contain particulate matter in excess of 4.5 g/hr (0.01 lb/hr).

(c) *2020 Particulate Matter Standards.* Unless exempted under § 60.530 or subject to the standards specified in paragraph (a) of this section, each adjustable burn rate wood heater, pellet stove or single burn rate wood heater manufactured or sold at retail for use in the United States on or after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] must not discharge into the atmosphere any gases that contain particulate matter in excess of 1.3 g/hr (0.003 lb/hr) for any burn rate. Compliance for all sources must be determined by the test methods and procedures in § 60.534.

(d) [Reserved]

(e) *Pellet Fuel Requirements.* Operators of wood heaters that are certified to burn pellet fuels may only burn pellets that have been produced under a licensing agreement with the Pellet Fuels Institute or an equivalent organization approved by the EPA. The pellet fuel must meet the following minimum requirements:

(1) Density: consistent hardness and energy content with a minimum density of 38 pounds/cubic foot;

(2) Dimensions: maximum length of 1.5 inches and diameter between 0.230 and 0.285 inches;

(3) Inorganic fines: less than or equal to 1 percent;

(4) Chlorides: less than or equal to 300 parts per million by weight;

(5) Ash content: no more than 2 percent; and

(6) A quality assurance process licensed by the Pellet Fuels Institute or equivalent organization approved by EPA.

(f) *Prohibited Fuel Types.* No person is permitted to burn any of the following materials in an affected wood heater:

(1) Residential or commercial garbage;

(2) Lawn clippings or yard waste;

(3) Materials containing rubber, including tires;

(4) Materials containing plastic;

(5) Waste petroleum products, paints or paint thinners, or asphalt products;

(6) Materials containing asbestos;

(7) Construction or demolition debris;

(8) Paper products, cardboard, plywood, or particleboard. The prohibition against burning these materials does not prohibit the use of fire starters made from paper, cardboard, saw dust, wax and similar substances for the purpose of starting a fire in an affected wood heater;

(9) Railroad ties or pressure treated wood;

(10) Manure or animal remains; or

(11) Salt water driftwood or other previously salt water saturated materials.

(g) *Owner's Manual.* A person must not operate an affected residential wood heater in a manner inconsistent with the owner's manual. The owner's manual must clearly specify that operation in a manner inconsistent with the owner's manual would violate the warranty.

(h) *Temperature Sensor Requirement.* An affected wood heater equipped with a catalytic combustor must be equipped with a temperature sensor that can monitor combustor gas stream temperatures within or immediately downstream [within 2.54 centimeters (1 inch)] of the catalytic combustor surface.

#### **§ 60.533 What compliance and certification requirements must I meet and by when?**

(a) *Certification Requirement.* Each affected wood heater must be certified to be in compliance with the applicable emission standards and other requirements of this subpart. For each model line manufactured or sold by a single entity, e.g., company or manufacturer, compliance with applicable emission standards of § 60.532 may be determined based on testing of representative affected wood

heaters within the model line. If one entity, licenses a model line to another entity, each entity's model line must be certified. If an entity changes the name of the entity or the name of the model, the manufacturer must apply for a new certification.

(1) Prior to [EFFECTIVE DATE OF FINAL RULE], the manufacturer must submit to the EPA the information required in paragraph (b) of this section and follow either the certification process in paragraphs (b) through (e) of this section or the certifying entity based application process specified in paragraph (f) of this section.

(2) On or after [EFFECTIVE DATE OF FINAL RULE], the manufacturer must submit the information required in paragraph (b) of this section and follow the certifying entity based application process specified in paragraph (f) of this section.

(b) *Application for Certificate of Compliance.* Any manufacturer of an affected wood heater must apply to the Administrator for a certificate of compliance for each model line. The application must be submitted to: Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program). The application must be signed by a responsible representative of the manufacturer or an authorized representative and must contain the following:

(1) The model name and/or design number and responsible contact information for the manufacturer and all authorized representatives, including name, affiliation, physical address, telephone number, and email address.

(2) Engineering drawings and specifications of components that may affect emissions (including specifications for each component listed in paragraph (k) of this section). Manufacturers may use complete assembly or design drawings that have been prepared for other purposes, but must designate on the drawings the dimensions of each component listed in paragraph (k) of this section.

Manufacturers must identify tolerances of components of the tested unit listed in paragraph (k)(2) of this section that are different from those specified in that paragraph, and show that such tolerances may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits. The drawings must identify how the emission critical parts, such as air tubes and catalyst, can be readily inspected and replaced. The drawings may be submitted either in hard copy or electronic format.

(3) A statement whether the firebox or any firebox component (including the

materials listed in paragraph (k)(3) of this section) will be composed of material different from the material used for the firebox or firebox component in the wood heater on which certification testing was performed and a description of any such differences.

(4) Clear identification of any confidential business information. Submit such information under separate cover to the EPA CBI Office; Attn: Residential Wood Heater Compliance Program. Note that emissions data, including information necessary to determine emission rates in the format of the standard, cannot be claimed as confidential business information.

(5) All documentation pertaining to a valid certification test, including the complete test report and, for all test runs: raw data sheets, laboratory technician notes, calculations, and test results. Documentation must include the items specified in the applicable test methods. The test report must include a summary table that clearly presents the individual and overall emission rates, efficiencies, and heat output range. Submit the test report and all associated required information according to the procedures for electronic reporting specified in § 60.537(f).

(6) A copy of the warranties for the model line, including a statement that the warranties are void if the unit is used to burn materials for which the unit is not certified by the EPA.

(7) A statement that the manufacturer or certifying entity will conduct a quality assurance program for the model line that satisfies the requirements of paragraph (m) of this section.

(8) A statement describing how the tested unit was sealed by the laboratory after the completion of certification testing and that such unit will be stored by the manufacturer in the sealed state until 1 year after the certification expires.

(9) Statements that the wood heaters manufactured under this certificate will be—

(i) Similar in all material respects as defined in this subpart to the wood heater submitted for certification testing, and

(ii) Labeled as prescribed in § 60.536.

(iii) Accompanied by an owner's manual that meets the requirements in § 60.536. In addition, a copy of the owner's manual must be submitted to the EPA and be available on the manufacturer's Web site.

(10) A statement that the manufacturer has entered into a contract with an accredited laboratory that satisfies the requirements of paragraph (e) of this section.

(11) A statement that the accredited certifying body is allowed to submit information on behalf of the manufacturer.

(c)(1) *Administrator Approval Process.* The Administrator will electronically issue a certificate of compliance for a model line if the Administrator determines, based on all information submitted by the applicant and any other relevant information available, that:

(i) A valid certification test demonstrates that the representative affected wood heater complies with the applicable emission standards in § 60.532,

(ii) Any tolerances for components listed in paragraph (k)(2) of this section that are different from those specified in those paragraphs may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits; and

(iii) The requirements of paragraph (b) of this section have been met.

(2) The Administrator will deny certification if the Administrator determines that the criteria in paragraph (c)(1) of this section have not been satisfied. Upon denying certification under this paragraph, the Administrator will give written notice to the manufacturer setting forth the basis for this determination.

(d) Prior to [EFFECTIVE DATE OF THE FINAL RULE], the Administrator will issue the certificate for the most stringent particulate matter emission standard that the unit meets under § 60.532(a) or (b), as applicable.

(e) To receive EPA certification, a manufacturer must enter into a contract with the accredited laboratory that performed the certification test, under which the laboratory will:

(1) Conduct the compliance audit test at no additional cost to the manufacturer if the EPA selects that laboratory to conduct the test; or

(2) Pay the manufacturer the cost of a compliance audit test (as determined by the EPA) if the EPA selects any other laboratory to conduct the test.

(f) *Certifying Entity-Based Application Process.*

(1) Any manufacturer of an affected wood heater must apply to the Administrator for a certificate of compliance for each model line. The manufacturer must meet the following requirements:

(i) The manufacturer must contract with a certifying entity for certification services.

(ii) The manufacturer must submit the materials specified in paragraph (b) of this section and a quality control plan that meets the requirements of

paragraph (m)(4) of this section to the certifying entity. The quality control plan must ensure that units within a model line accurately reflect emission-critical components of the model line design, and it must include design drawings for the model line.

(iii) The manufacturer must apply to the certifying entity for a certification of conformity with the applicable requirements of this subpart for the model line.

(A) After testing by an accredited test laboratory is complete, certification of conformity with the emission standards in § 60.532 must be performed by the manufacturer's contracted certifying entity.

(B) The certifying entity can certify conformity if the emission tests have been conducted per the appropriate guidelines and the test report is complete and accurate and the instrumentation is properly calibrated and the test report shows that the representative affected wood heater meets the applicable emission limits specified in § 60.532 and the quality control plan is adequate to ensure that units within the model line will be similar in all material respects to the wood heater submitted for certification testing.

(iv) The manufacturer must then request that the certifying entity electronically submit, on behalf of the manufacturer, an application for EPA certification that includes the certification of conformity, quality control plan, test report and supporting documentation.

(v) The submission must include a statement signed by a responsible official of the manufacturer that the manufacturer has complied with all requirements of this subpart and that the manufacturer remains responsible for compliance regardless of any error by the certifying entity.

(2) The Administrator will electronically issue to the manufacturer a certificate of compliance for a model line if it is determined, based on all of the information submitted in the application for certification and any other relevant information, that:

(i) A valid certification of conformity has demonstrated that the representative affected wood heater complies with the applicable emission standards in § 60.532; and

(ii) Any tolerances or materials for components listed in paragraph (k)(2) or (3) of this section that are different from those specified in those paragraphs may not be reasonably anticipated to cause wood heaters in the model line to exceed the applicable emission limits.

(iii) The requirements of paragraphs (b) of this section have been met.

(iv) A valid certificate of conformity for the model line has been prepared and submitted.

(3) The Administrator will deny certification if the Administrator determines that the criteria in paragraph (f)(2) of this section have not been satisfied. Upon denying certification under this paragraph, the Administrator will give written notice to the manufacturer setting forth the basis for the determination.

(g) *Waiver from Submitting Test Results.* An applicant for certification may apply for a potential waiver of the requirement to submit the results of a certification test pursuant to paragraph (b)(3) of this section, if the wood heater meets either of the following conditions:

(1) The wood heaters of the model line are similar in all material respects, as defined in this subpart, to another model line that has already been issued a certificate of compliance. A manufacturer that seeks a waiver of certification testing must identify the model line that has been certified, and must submit a copy of an agreement with the owner of the design permitting the applicant to produce wood heaters of that design.

(2) The manufacturer has previously conducted a valid certification test to demonstrate that the wood heaters of the model line meet the applicable standard specified in § 60.532(a), and that test also demonstrates that the wood heaters of the model line meet the applicable standard specified in § 60.532(b). This option is only potentially available a maximum of one time per model line.

(h) *Certification Period.* Unless revoked sooner by the Administrator, a certificate of compliance will be valid for the following periods as applicable:

(1) For a model line certified as meeting the emission standards in § 60.532(a), a certificate of compliance will be valid for 5 years from the date of issuance.

(2) For a model line certified as meeting emission standards in § 60.532(b), a certificate of compliance will be valid for 5 years from the date of issuance.

(3) For a model line certified as meeting emission standards in § 60.532(c), a certificate of compliance will be valid for 5 years from the date of issuance.

(i) *Renewal of Certification.*

(1) The certificate must be recertified or renewed every 5 years or the manufacture may choose to no longer manufacture or sell that model. If the manufacturer chooses to no longer

manufacture or sell that model, then the manufacturer must submit a statement to EPA for that model. A manufacturer of an affected wood heater may apply to the Administrator for potential renewal of their certificate by submitting the material specified in § 60.533(b) and following the procedures specified in § 60.533(f) or by affirming in writing that the wood heater has been subject to no changes that would impact emissions and requesting a potential waiver from certification testing.

(2) If the Administrator grants a renewal of certification, the Administrator will give written notice to the manufacturer setting forth the basis for the determination and issue a certification renewal.

(3) If the Administrator denies the request for a renewal of certification, the Administrator will give written notice to the manufacturer setting forth the basis for the determination.

(j) *[Reserved]*

(k) *Recertification.*

(1) The manufacturer must recertify a model line whenever any change is made in the design submitted pursuant to paragraph (b)(2) of this section that is presumed to affect the particulate matter emission rate for that model line. The manufacturer of an affected wood heater must apply to the Administrator for potential recertification by submitting the material specified in § 60.533(b) and following the procedures specified in § 60.533(f) or by affirming in writing that the wood heater has been subject to no changes that would impact emissions and requesting a potential waiver from certification testing. The Administrator may potentially waive this requirement upon written request by the manufacturer, if it is determined that the change may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits. The granting of such a waiver does not relieve the manufacturer of any compliance obligations under this subpart.

(2) Any change in the design tolerances of any of the following components (where such components are applicable) is presumed to affect particulate matter and carbon monoxide emissions and efficiency if that change exceeds  $\pm 0.64$  cm ( $\pm 1/4$  inch) for any linear dimension and  $\pm 5$  percent for any cross-sectional area relating to air introduction systems and catalyst bypass gaps unless other dimensions and cross-sectional areas are previously approved by the Administrator under paragraph (c)(1)(ii) of this section:

(i) Firebox: Dimensions;

(ii) Air introduction systems: Cross-sectional area of restrictive air inlets and outlets, location and method of control;

(iii) Baffles: Dimensions and locations;

(iv) Refractory/insulation: Dimensions and location;

(v) Catalyst: Dimensions and location;

(vi) Catalyst bypass mechanism and catalyst bypass gap tolerances (when bypass mechanism is in closed position): Dimensions, cross-sectional area, and location;

(vii) Flue gas exit: Dimensions and location;

(viii) Door and catalyst bypass gaskets: Dimensions and fit;

(ix) Outer shielding and coverings: Dimensions and location;

(x) Fuel feed system: For wood heaters that are designed primarily to burn wood pellets and other wood heaters equipped with a fuel feed system, the fuel feed rate, auger motor design and power rating, and the angle of the auger to the firebox; and

(xi) Forced air combustion system: For wood heaters so equipped, the location and horsepower of blower motors and the fan blade size.

(3) Any change in the materials used for the following components is presumed to affect particulate matter emissions and efficiency:

(i) Refractory/insulation; or

(ii) Door and catalyst bypass gaskets.

(4) A change in the make, model, or composition of a catalyst is presumed to affect particulate matter and carbon monoxide emissions and efficiency, unless the change has been approved in advance by the Administrator, based on test data in the same model stove that demonstrate that the replacement catalyst is equivalent to or better than the original catalyst in terms of particulate matter emission reduction.

(l) *Criteria for Revocation of Certification.*

(1) The Administrator may revoke certification if it is determined that the wood heaters being manufactured or sold in that model line do not comply with the requirements of this subpart. Such a determination will be based on all available evidence, including but not limited to:

(i) Test data from a retesting of the original unit on which the certification test was conducted or a similar unit;

(ii) A finding that the certification test was not valid. (iii) A finding that the labeling of the wood heater model line or the owner's manual or marketing information does not comply with the requirements of § 60.536;

(iii) Failure by the manufacturer to comply with reporting and recordkeeping requirements under § 60.537;

(iv) Physical examination showing that a significant percentage (as defined in the quality assurance plan, but no larger than 1 percent) of production units inspected is not similar in all material respects to the representative affected wood heater submitted for testing; or

(v) Failure of the manufacturer to conduct a quality assurance program in conformity with paragraph (m) of this section.

(2) Revocation of certification under this paragraph will not take effect until the manufacturer concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity to request a review under § 60.539.

(m) *Quality Assurance Program.*

(1) On or after [EFFECTIVE DATE OF FINAL RULE], for each certified model line, the manufacturer must conduct a quality assurance program that satisfies the requirements of this section. The quality assurance program requirements of this section supersede the quality assurance plan requirements specified in § 60.533(o) of the 1988 rule. By [60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], for model lines that had a valid EPA certification on [60 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], manufacturers must submit the quality assurance plan to the EPA Administrator for review and approval.

(i) The manufacturer must prepare and operate according to a quality assurance plan for each certified model line that has specific inspection and testing requirements for ensuring that units within a model line accurately reflect emission-critical components of the model line design and meet the emissions standards in § 60.532.

(ii) The quality assurance plan must be approved within 30 days by the certifying entity as part of the certification of conformity process specified in paragraph (f) of this section.

(iii) Within 30 days after approval by the certifying entity, the quality control plan must also be submitted to EPA for review and approval.

(iv) The certifying entity must conduct quarterly unannounced audits under ISO-IEC Guide 17065 and ISO-IEC Standard 17020 to ensure that the manufacturer's quality control plan is being implemented.

(v) The certifying entity must prepare a report for each audit under ISO-IEC Guide 17065 and ISO-IEC Standard 17020 that fully documents the results of the audit, and the manufacturer must include in their contract with the certifying entity the authorization and requirement to submit all such reports

to the EPA within 30 days. In the audit report, the certifying entity must identify deviations from the manufacturer's quality control plan and specify the corrective actions that need to be taken to address each identified deficiency.

(vi) The manufacturer must report within 30 days to the certifying entity and to the EPA its responses to any deficiencies identified in an audit report.

(n) *EPA Compliance Audit Testing.*

(1)(i) The Administrator may select by written notice wood heaters for compliance audit testing to determine compliance with the emission standards in § 60.532.

(ii) The written notification shall be forwarded to the manufacturer by the Administrator and shall include the name and address of the laboratory selected to perform the audit test and the model name and serial number of the wood heater(s) selected to undergo audit testing.

(2)(i) The Administrator may test, or direct the manufacturer to have tested, the wood heater(s) selected under paragraph (n)(1)(i) of this section in a laboratory accredited under § 60.535 that is selected pursuant to paragraph (n)(3) of this section.

(ii) The expense of the compliance audit test is the responsibility of the wood heater manufacturer. A manufacturer may require the laboratory that performed the certification test to bear the expense of an audit test by means of the contract required under paragraph (e) of this section. The manufacturer will bear the cost of audit testing if the laboratory with which the manufacturer had a contract has ceased business or is otherwise legally unable to honor the contract. The manufacturer will also bear the cost of audit testing if the manufacturer has not entered into contract with an accredited test laboratory to perform audit testing.

(iii) The test must be conducted using the same test method and procedure used to obtain certification or a new test method approved by the EPA Administrator. If the certification test consisted of more than one particulate matter sampling test method, the Administrator may direct the test laboratory as to which of these methods to use for the purpose of audit testing. The Administrator will notify the manufacturer at least 1 week prior to any test under this paragraph, and allow the manufacturer and/or his authorized representatives to observe the test.

(3) The Administrator may select any accredited test laboratory or federal laboratory for audit testing.

(4) *Revocation of Certification.*

(i) If emissions from a wood heater tested under paragraph (n)(2) of this section exceed the certification emission values limit by more than 50 percent, the Administrator will notify the manufacturer that certification for that model line is suspended effective 72 hours from the receipt of the notice, unless the suspension notice is withdrawn by the Administrator. The suspension will remain in effect until withdrawn by the Administrator, or 30 days from its effective date (if a revocation notice under paragraph (n)(5)(ii) of this section is not issued within that period), or the date of final agency action on revocation, whichever occurs earlier.

(ii)(A) If emissions from a wood heater tested under paragraph (n)(2) of this section exceed the applicable emission limit, the Administrator will notify the manufacturer that certification is revoked for that model line.

(B) A suspension under paragraph (n)(4)(i) or a revocation notice under paragraph (n)(4)(ii)(A) of this section will become final and effective 60 days after receipt by the manufacturer, unless it is withdrawn, a supplemental review is requested under § 60.539, or the deadline for requesting a supplemental review is extended.

(C) The Administrator may extend the deadline for requesting a supplemental review for up to 60 days for good cause.

(D) A manufacturer may extend the deadline for requesting a supplemental review for up to 6 months, by agreeing to a voluntary suspension of certification.

(iii) Any notification under paragraph (n)(4)(i) or (n)(4)(ii) of this section will include a copy of a preliminary test report from the accredited test laboratory or federal test laboratory. The test laboratory must provide a preliminary test report to the Administrator within 10 days of the completion of testing, if a wood heater exceeds the applicable emission limit in § 60.532. The test laboratory must provide the Administrator and the manufacturer, within 30 days of the completion of testing, all documentation pertaining to the test, including the complete test report and raw data sheets, laboratory technician notes, and test results for all test runs.

(iv) Upon receiving notification of a test failure under paragraph (n)(4)(ii) of this section, the manufacturer may request up to four additional wood heaters from the same model line be selected under paragraph (n)(1) of this section for testing at the manufacturer's expense, at the test laboratory that

performed the emissions test for the Administrator.

(v) Whether or not the manufacturer proceeds under paragraph (n)(4)(iv) of this section, the manufacturer may submit any relevant information to the Administrator, including any other test data generated pursuant to this subpart. The manufacturer must pay the expense of any additional testing.

(vi) The Administrator will withdraw any notice issued under paragraph (n)(4)(ii) of this section if tests under paragraph (n)(4)(iv) of this section show either—

(A) That all wood heaters tested for the manufacturer met the applicable emission limits; or

(B) That the second and third wood heaters selected met the applicable emission limits and the average of all three (including the original audit test) was below the applicable emission limits.

(C) The Administrator will revise the certification values based on the test data and other relevant information and the manufacturer must revise the labels and marketing information accordingly.

(vii) The Administrator may withdraw any proposed revocation, if the Administrator finds that an audit test failure has been rebutted by information submitted by the manufacturer under paragraph (n)(4)(iv) of this section and/or (n)(4)(v) of this section or by any other relevant information available to the Administrator.

**§ 60.534 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?**

Test methods and procedures specified in this section or in appendices of this part, except as provided under § 60.8(b), must be used to determine compliance with the standards and requirements for certification under §§ 60.532 and 60.533 as follows:

(a)(1) Method 28 of appendix A–8 of this part must be used to establish the certification test conditions and the particulate matter emission values for affected wood heaters subject to the 1990 particulate matter standards specified in § 60.532(a).

(2) For affected wood heaters subject to the 2015 particulate matter standards specified in § 60.532(b), you must conduct testing according to paragraphs § 60.534(a)(2)(i) and (ii) of this section and submit the full test reports. You have the option of submitting the test results of either (a)(2)(i) or (ii) of this section to the Administrator as specified under § 60.537 for certification compliance.

(i) Conduct testing with crib wood using EPA Method 28R of appendix A-8 of this part to establish the certification test conditions and the particulate matter emission values.

(ii) Conduct testing with cord wood using EPA Method 28R of appendix A-8 of this part to establish the certification test conditions and the particulate matter emission values.

(3) For affected wood heaters subject to the 2020 particulate matter standards specified in § 60.532(c), you must conduct testing with cord wood using EPA Method 28R of appendix A-8 of this part to establish the certification test conditions, except that you should first test Burn Rate Categories 1 and 4 and then test 2 more times for whichever burn rate category is worse and then report the results separately per burn rate category.

(b) For affected wood heaters subject to the 1990 particulate matter standards specified in § 60.532(a), emission concentrations must be measured with Method 5G of appendix A-3 of this part, *i.e.*, using a dilution tunnel sampling location. Method 5H is no longer allowed for certification testing.

(c) For affected wood heaters subject to the 2015 and 2020 particulate matter standards specified in § 60.532(b) and (c), emission concentrations must be measured with ASTM E2515-10.

(d) Canadian Standards Administration Method B415.1-10, section 13.7, must be used to measure the efficiency and carbon monoxide output of the tested appliance.

(e) [Reserved]

(f) The manufacturer of an affected wood heater must notify the Administrator of the date that certification testing is scheduled to begin by email to Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program). This notice must be received by the EPA at least 30 days before the start of testing. The notification of testing must include the manufacturer's name and physical and email addresses, the accredited test laboratory's name and physical and email addresses, certifying entity name, the model name and number (or, if unavailable, some other way to distinguish between models), and the dates of testing.

(g) The accredited test laboratory must allow the manufacturer, the EPA and delegated states to observe certification testing. However, manufacturers must not involve themselves in the conduct of the test after the pretest burn has begun. Communications between the manufacturer and laboratory or certifying entity personnel regarding operation of the wood heater must be

limited to written communications transmitted prior to the first pretest burn of the certification series. Written communications between the manufacturer and laboratory personnel may be exchanged during the certification test only if deviations from the test procedures are observed that constitute improper conduct of the test. All communications must be included in the test documentation required to be submitted pursuant to § 60.533(b)(3) and must be consistent with instructions provided in the owner's manual required under § 60.536(f), except to the extent that they address details of the certification tests that would not be relevant to owners or regulators.

**§ 60.535 What procedures must I use for laboratory accreditation or certifying body accreditation?**

(a)(1) A laboratory must apply to the Administrator for accreditation as an EPA accredited test laboratory by submitting documentation that the laboratory is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17025 to perform testing using the test methods specified under § 60.534.

(2) As part of the application, the test laboratory must:

(i) Agree to enter into a contract as described in § 60.533(e) with each wood heater manufacturer for whom a certification test has been performed;

(ii) Agree to participate biennially in a proficiency testing program conducted by the Administrator;

(iii) Agree to allow the Administrator and delegated states and certifying bodies access to observe certification testing;

(iv) Agree to comply with reporting and recordkeeping requirements that affect testing laboratories; and

(v) Agree to perform a compliance audit test (as determined by the Administrator) at the cost normally charged to manufacturers if it is selected to conduct the compliance audit test of a model line originally tested for certification at another laboratory.

(vi) Have no conflict of interest and receive no financial benefit from the outcome of certification testing conducted pursuant to § 60.533.

(vii) Agree to not perform initial certification tests on any models manufactured by a manufacturer for which the laboratory has conducted research and development tests within the last 5 years.

(3) If the EPA approves the accreditation, the Administrator will provide the test laboratory with a certificate of accreditation. If the EPA denies the accreditation, the

Administrator will give written notice to the laboratory setting forth the basis for the determination.

(b)(1) The Administrator may revoke the EPA laboratory accreditation if it is determined that the laboratory:

(i) Is no longer is accredited by the nationally recognized ISO certifying entity;

(ii) Does not follow required procedures or practices;

(iii) Has falsified data or otherwise misrepresented emission data;

(iv) Failed to participate in a proficiency testing program, in accordance with its commitment under paragraph (a)(2)(ii) of this section; or

(v) Failed to seal the wood heater in accordance with paragraph (d) of this section.

(2) Revocation of accreditation under this paragraph will not take effect until the laboratory concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity for a Petition for Supplemental Review under § 60.539. However, if revocation is ultimately upheld, all tests conducted by the laboratory after written notice was given will, at the discretion of the Administrator, be declared invalid.

(c)(1) With the exception of laboratories meeting the provisions of paragraph (c)(2) of this section, and unless revoked sooner, a certificate of accreditation as an accredited test laboratory granted by the Administrator is valid for 5 years from the date of issuance.

(2) Laboratories accredited by the EPA by February 3, 2014 under the provisions of § 60.535 in effect prior to that date may continue to be accredited until [1 YEAR AFTER EFFECTIVE DATE OF FINAL RULE], at which time the accreditation ends unless the laboratory has obtained accreditation under § 60.535 as in effect beginning on [EFFECTIVE DATE OF FINAL RULE].

(d) A laboratory accredited by the Administrator must seal any wood heater on which it performed certification tests, immediately upon completion or suspension of certification testing, by using a laboratory-specific seal. For any tests that are suspended, the laboratory must email the EPA immediately with the date suspended, the reason(s) why, and the projected date for re-starting. The laboratory must submit the operation and test data obtained, even if the test is not completed.

(e)(1) A Certifying Entity may apply to the Administrator for approval to be an EPA-approved certifying entity by submitting credentials demonstrating that they have been accredited by a

nationally recognized accrediting entity to perform certifications and inspections under ISO-17025, ISO-IEC Standard 17065 and ISO-IEC Standard 10720.

(2) As part of the application, the certifying entity must:

(i) Agree to enter into a contract as described in § 60.533(e) with each wood heater manufacturer for whom a certification test has been performed and a test report has been received and reviewed;

(ii) Agree to periodically conduct audits as described in § 60.534 and manufacturer's QA/QC Plan;

(iii) Agree to participate biennially in a proficiency testing program conducted by the Administrator;

(iv) Agree to comply with reporting and recordkeeping requirements that affect accredited wood heater testing laboratories and certifying entities;

(v) Have no conflict of interest and receive no financial benefit from the outcome of certification testing conducted pursuant to § 60.533;

(vi) Agree to make available to the EPA supporting documentation for each wood heater certification and audit; and

(vii) Agree to not perform initial certification reviews on any models manufactured by a manufacturer for which the certifying entity has conducted research and development within the last 5 years.

(3) If approved, the Administrator will provide the certifying entity with a certificate of accreditation. The accreditation will expire 5 years after being issued unless renewed by the certifying entity. If the EPA denies the accreditation, the Administrator will give written notice to the certifying entity for the basis for the determination.

(f)(1) The Administrator will revoke the EPA certifying entity accreditation if it is determined that the certifying entity:

(i) Is no longer accredited by the nationally recognized ISO certifying entity

(ii) Does not follow required procedures or practices;

(iii) Has falsified certification data or otherwise misrepresented emission data; or

(iv) Failed to participate in the EPA proficiency testing program.

(2) Revocation of accreditation under this paragraph will not take effect until the certifying entity concerned is given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity for a Petition for Supplemental Review under § 60.539. However, if revocation is upheld, all tests reviewed by the

certifying entity will, at the discretion of the Administrator, be declared invalid.

**§ 60.536 What requirements must I meet for permanent labels and owner's manuals?**

(a) *Permanent Label Requirements.* (1) Each affected wood heater manufactured on or after the date the applicable standards come into effect as specified in § 60.532, must have a permanent label affixed to it that meets the requirements of this section.

(2) Except for wood heaters subject to § 60.530(b)(1) through (b)(5), the permanent label must contain the following information:

(i) Month and year of manufacture of the individual unit;

(ii) Model name or number; and

(iii) Serial number.

(3) The permanent label must:

(i) Be affixed in a readily visible or accessible location in such a manner that it can be easily viewed before and after the appliance is installed;

(ii) Be at least 8.9 cm long and 5.1 cm wide (3½ inches long and 2 inches wide);

(iii) Be made of a material expected to last the lifetime of the wood heater;

(iv) Present required information in a manner so that it is likely to remain legible for the lifetime of the wood heater; and

(v) Be affixed in such a manner that it cannot be removed from the appliance without damage to the label.

(4) The permanent label may be combined with any other label, as long as the required information is displayed, the integrity of the permanent label is not compromised, and the permanent label still meets the requirements in § 60.536(a)(3).

(5) Any label statement under paragraph (b) or (c) of this section constitutes a representation by the manufacturer as to any wood heater that bears it:

(i) That certification of compliance was in effect at the time the wood heater left the possession of the manufacturer;

(ii) That the manufacturer was, at the time the label was affixed, conducting a quality assurance program in conformity with § 60.533(o); and

(iii) That any wood heater individually tested for emissions by the manufacturer under § 60.533(o)(2) or (o)(4) met the applicable emissions limits.

(b) If the adjustable burn rate wood heater or pellet stove belongs to a model line certified under § 60.533, and it has been found to meet the applicable emission limits or tolerances through quality assurance testing, one of the following statements, as appropriate, must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 1990 particulate emission standards. Not approved for sale or operation after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] or

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2015 particulate emission standards. Not approved for sale or operation after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] or

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2020 particulate emission standards.

(c) If the single burn rate wood heater belongs to a model line certified under § 60.533, and it has been found to meet the applicable emission limits or tolerances through quality assurance testing, the following statements must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2015 particulate emission standards. Not approved for sale or operation after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] or

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2020 particulate emission standards.

(d)(1) If an affected wood heater is manufactured in the United States for export as provided in § 60.530(b)(1), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Export stove. May not be sold or operated within the United States.

(2) If an affected wood heater is manufactured for use for research and development purposes as provided in § 60.530(b)(2), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Not certified. Research Stove. Not approved for sale or for operation other than research.

(3) If an affected wood heater is exclusively a non wood-burning heater as provided § 60.530(b)(3) the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This heater is not certified for wood burning. Use of any wood fuel is a violation of federal law.

(4) If an affected wood heater is a cookstove that meets the applicable definition in § 60.531, the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This unit is not a certified residential wood heater. The primary use for this unit is for cooking or baking.

(5) If an affected wood heater is a camp stove that meets the applicable definition in § 60.531, the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This unit is not a certified residential wood heater. For portable and temporary use only.

(e) The permanent label for all certified wood heaters must also contain the following statement:

“This wood heater needs periodic inspection and repair for proper operation. Consult owner’s manual for further information. It is against the law to operate this wood heater in a manner inconsistent with operating instructions in the owner’s manual.”

(f) *Owner’s Manual.*

(1) Each affected wood heater offered for sale by a commercial owner must be accompanied by an owner’s manual that must contain the information listed in paragraphs (f)(2) and (f)(3) of this section. Such information must be adequate to enable consumers to achieve optimal emissions performance. Such information must be consistent with the operating instructions provided by the manufacturer to the accredited test laboratory for operating the wood heater during certification testing, except for details of the certification test that would not be relevant to the ultimate purchaser. The commercial owner must also make current and historical owner’s manuals available on the company Web site and upon request to the EPA.

(2) Installation information: Requirements for achieving proper draft.

(3) Operation and maintenance information:

(i) Fuel loading procedures, recommendations on fuel selection, and warnings on what fuels not to use, such as treated wood, colored paper, cardboard, solvents, trash and garbage.

(ii) Fire starting procedures

(iii) Proper use of air controls

(iv) Ash removal procedures

(v) Instructions for replacement of gaskets, air tubes and other parts that are critical to the emissions performance of the unit and other maintenance and repair instructions

(vi) For catalytic models, information on the following pertaining to the catalytic combustor: Procedures for achieving and maintaining catalyst activity, maintenance procedures, procedures for determining deterioration or failure, procedures for replacement, and information on how to exercise warranty rights

(vii) For catalytic models, the following statement:

“This wood heater contains a catalytic combustor, which needs periodic inspection and replacement for proper operation. It is against federal law to operate this wood heater in a manner inconsistent with operating instructions in this manual, or if the catalytic element is deactivated or removed.”

(viii) For noncatalytic models, the following statement:

“This wood heater needs periodic inspection and repair for proper operation. It is against federal law to operate this wood heater in a manner inconsistent with operating instructions in this manual.”

(4) Any manufacturer using the EPA-recommended language contained in appendix I of this part to satisfy any requirement of this paragraph (f) will be considered to be in compliance with that requirement, provided that the particular language is printed in full, with only such changes as are necessary to ensure accuracy for the particular wood heater model line.

(5) Wood heaters that are affected by this subpart, but that have been owned and operated by a noncommercial owner, are not subject to paragraphs (f) of this section when offered for resale.

#### **§ 60.537 What records must I keep and what reports must I submit?**

(a)(1) Each manufacturer who holds a certificate of compliance under § 60.533(c) or (f) for a model line must maintain records containing the information required by paragraph (a) of this section with respect to that model line.

(2) All documentation pertaining to the certification test used to obtain certification, including the full test report and raw data sheets, laboratory technician notes, calculations, and the test results for all test runs.

(3) Results of the quality assurance program inspections required by § 60.533(m).

(4) For emissions tests conducted pursuant to the quality assurance program required by § 60.533(o), all test reports, data sheets, laboratory technician notes, calculations, and test results for all test runs, the remedial actions taken, if any, and any follow-up actions such as additional testing.

(b) Each accredited test laboratory and certifying entity must maintain records consisting of all documentation pertaining to each certification test, QA/QC inspection and audit test, including the full test report and raw data sheets, technician notes, calculations, and the test results for all test runs. Each accredited test laboratory must submit initial and biennial proficiency test results to the Administrator. Each

certifying entity must submit each certification test, QA/QC inspection report and ISO IEC accreditation credentials to the Administrator.

(c) Each manufacturer must retain each wood heater upon which certification tests were performed based upon which certification was granted under § 60.533(c) or (f) at the manufacturer’s facility for as long as the model line in question is manufactured. Each heater or furnace must remain sealed and unaltered. Any such wood heater must be made available to the Administrator upon request for inspection and testing.

(d) Each manufacturer of an affected wood heater certified under § 60.533(c) or (f) must submit a report to the Administrator every 2 years following issuance of a certificate of compliance for each model line. This report must include the sales for each model by state and certify that no changes in the design or manufacture of this model line have been made that require recertification under § 60.533(k).

(e)(1) Unless otherwise specified, all records required under this section must be maintained by the manufacturer, commercial owner of the affected wood heater, accredited test laboratory or certifying entity for a period of no less than 5 years.

(2) Unless otherwise specified, all reports to the Administrator required under this subpart must be made to: Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program).

(f) Within 60 days after the date of completing each performance test, each manufacturer or accredited test laboratory or certifying entity must submit performance test data electronically to the EPA’s Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (<http://www.epa.gov/ttn/chief/ert/index.html>). Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically to the EPA’s CDX.

Manufacturers may submit compliance reports to the EPA via regular mail at the address listed below if the test methods they use are not compatible with ERT or if ERT is not available to accept reports at the time the final rule is published. Owners or operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a completed ERT file, including information claimed to be CBI on a compact disk or other commonly used electronic storage media (including, but not limited to, flash drives), to the EPA, and the same ERT

file, with the CBI omitted, to the EPA via CDX as described earlier in this paragraph. The compact disk must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. Emission data, including all information necessary to determine compliance, except sensitive engineering drawings and sensitive detailed material specifications, may not be claimed as CBI.

**§ 60.538 What activities are prohibited under this subpart?**

(a) No person is permitted to operate an affected wood heater that does not have affixed to it a permanent label pursuant to § 60.536 (b), (c), or (d)(2) through (d)(5).

(b) No commercial owner is permitted to advertise for sale, offer for sale, or sell an affected wood heater labeled under § 60.536(d)(1) except for export.

(c)(1) No commercial owner is permitted to advertise for sale, offer for sale or sell an affected wood heater permanently labeled under § 60.536 (b) or (c) unless:

(i) The affected wood heater has been certified to comply with 2020 particulate emission standards. This prohibition does not apply to wood heaters affected by this subpart that have been previously owned and operated by a noncommercial owner; and

(ii) The commercial owner provides any purchaser or transferee with an owner's manual that meets the requirements of § 60.536(f), a copy of the warranty and a moisture meter.

(2) No commercial owner is permitted to advertise for sale, offer for sale, or sell an affected wood heater permanently labeled under § 60.536(d)(3), unless the affected wood heater has been certified to comply with 2020 particulate emission. This prohibition does not apply to wood heaters affected by this subpart that have been previously owned and operated by a noncommercial owner.

(3) A commercial owner other than a manufacturer complies with the requirements of paragraph (c)(1) of this section if the commercial owner:

(i) Receives the required documentation from the manufacturer or a previous commercial owner; and

(ii) Provides that documentation unaltered to any person to whom the wood heater that it covers is sold or transferred.

(d)(1) In any case in which the Administrator revokes a certificate of compliance either for the knowing submission of false or inaccurate

information or other fraudulent acts, or based on a finding under § 60.533(l)(1)(ii) that the certification test was not valid, the Administrator may give notice of that revocation and the grounds for it to all commercial owners.

(2) On and after the date of receipt of the notice given under paragraph (d)(1) of this section, no commercial owner is permitted to sell any wood heater covered by the revoked certificate (other than to the manufacturer) unless the model line has been recertified in accordance with this subpart.

(e) No person is permitted to install or operate an affected wood heater except in a manner consistent with the instructions on its permanent label and in the owner's manual pursuant to § 60.536(f).

(f) No person is permitted to operate an affected wood heater that was originally equipped with a catalytic combustor if the catalytic element is deactivated or removed.

(g) No person is permitted to operate an affected wood heater that has been physically altered to exceed the tolerance limits of its certificate of compliance.

(h) No person is permitted to alter, deface, or remove any permanent label required to be affixed pursuant to § 60.536.

(i) No certifying entity is permitted to certify its own certification test report.

**§ 60.539 What Petition for Review procedures apply to me?**

(a)(1) In any case where the Administrator—

(i) Denies an application under § 60.530(c) or § 60.533(f);

(ii) Issues a notice of revocation of certification under § 60.533(l);

(iii) Denies an application for laboratory accreditation under § 60.535(a); or

(iv) Issues a notice of revocation of laboratory accreditation under § 60.535(b), the manufacturer or laboratory affected may submit to the EPA, a Petition for Review request under this section within 30 days following receipt of the required notification of the action in question.

(2) In any case where the Administrator issues a notice of revocation under § 60.533(p), the manufacturer may submit to the EPA a Petition for Review request under this section with the time limits set out in § 60.533(p)(4).

(b) Any Petition for Review request must be in writing, must be signed by an authorized representative of the petitioning manufacturer or laboratory, and must include a statement and

supporting documentation setting forth with particularity the petitioner's objection to the Administrator's determination or proposed determination.

(c) Upon receipt of a Petition for Review under paragraph (a) of this section, the Administrator shall provide a written response within 45 days.

**§ 60.539a Who implements and enforces this subpart?**

(a) In delegating implementation and enforcement authority to a state under section 111(c) of the Act, the authorities contained in paragraph (b) of this section must be retained by the Administrator and not transferred to a state.

(b) Authorities that must not be delegated to states:

(1) Section 60.531, Definitions;

(2) Section 60.533, Compliance and certification;

(3) Section 60.534, Test methods and procedures; and

(4) Section 60.535, Laboratory accreditation.

**§ 60.539b What parts of the General Provisions do not apply to me?**

The following provisions of subpart A of part 60 do not apply to this subpart:

(a) Section 60.7;

(b) Section 60.8(a), (c), (d), (e), (f) and (g); and

(c) Section 60.15(d).

■ 4. Add subpart QQQQ to read as follows:

**Subpart QQQQ—Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces**

Sec.

60.5472 Am I subject to this subpart?

60.5473 What definitions must I know?

60.5474 What standards and requirements must I meet and by when?

60.5475 What compliance and certification requirements must I meet and by when?

60.5476 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?

60.5477 What procedures must I use for laboratory accreditation?

60.5478 What requirements must I meet for permanent labels and owner's manuals?

60.5479 What records must I keep and what reports must I submit?

60.5480 What activities are prohibited under this subpart?

60.5481 What Petition for Review procedures apply to me?

60.5482 Who implements and enforces this subpart?

60.5483 What parts of the General Provisions do not apply to me?

### Subpart QQQQ—Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces

#### § 60.5472 Am I subject to this subpart?

(a) You are subject to this subpart if you operate, manufacture, sell, offer for sale, import for sale, distribute, offer to distribute, introduce, or deliver for introduction, into commerce in the United States, residential hydronic heater or forced-air furnace manufactured on or after [EFFECTIVE DATE OF FINAL RULE].

(b) Each residential hydronic heater or forced-air furnace must comply with the provisions of this subpart unless exempted under paragraphs (b)(1) through (b)(3) of this section.

(1) Affected residential hydronic heaters or forced-air furnaces manufactured in the United States for export are exempt from the applicable emission limits of § 60.5474 and the requirements of § 60.5475.

(2) Affected residential hydronic heaters or forced-air furnaces used for research and development purposes that are never offered for sale or sold and that are not used to provide heat are exempt from the applicable emission limits of § 60.5474 and the requirements of § 60.5475. No more than 12 affected residential hydronic heaters or forced-air furnaces manufactured per model line may be exempted for this purpose.

(3) Appliances that do not burn wood or wood pellets (such as coal-only hydronic heaters or forced-air furnaces that meet the definition in § 60.5473 or corn-only hydronic heaters or forced-air furnaces) are exempt from the applicable emission limits of § 60.5474 and the requirements of § 60.5475.

(c) The following are not affected residential hydronic heaters or forced-air furnaces and are not subject to this subpart:

(1) Residential wood heaters subject to subpart AAA of this part.

(2) Residential masonry heaters subject to subpart RRRR of this part.

#### § 60.5473 What definitions must I know?

As used in this subpart, all terms not defined herein have the same meaning given them in the Clean Air Act and subpart A of this part.

*Accredited test laboratory* means a test laboratory that is accredited for residential hydronic heater or forced-air furnace certification testing under § 60.5477 and is an independent third-party test laboratory that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17025 to perform testing using the test methods specified in § 60.5476 and approved by

the EPA for conducting certification tests under this subpart.

*At retail* means the sale by a commercial owner of a residential hydronic heater or forced-air furnace to the ultimate purchaser.

*Central heater* means a fuel-burning device designed to burn wood or wood pellet fuel that warms spaces other than the space where the device is located, by the distribution of air heated by the furnace through ducts or liquid heated in the device and distributed typically through pipes. Unless otherwise specified, these devices include residential forced-air furnaces and residential hydronic heaters.

*Certifying entity* means an independent third party that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17020 to perform certifications, inspections and audits under ISO-IEC Guide 17065 and approved by the EPA for conducting certifications, inspections and audits under this subpart.

*Coal-only hydronic heater or forced-air furnace* means an enclosed, coal-burning appliance capable of space heating or domestic water heating that has all of the following characteristics:

(1) Installation instructions that state that the use of wood in the appliance, except for coal ignition purposes, is prohibited by law; and

(2) The model is listed by a nationally recognized safety-testing laboratory for coal use only, except for coal ignition purposes.

*Commercial owner* means any person who owns or controls a residential hydronic heater or forced-air furnace in the course of the business of the manufacture, importation, distribution, or sale of the unit.

*Manufactured* means completed and ready for shipment (whether or not packaged) for purposes of determining the date of manufacture.

*Manufacturer* means any person who constructs or imports into the United States a residential hydronic heater or forced-air furnace.

*Model line* means all residential hydronic heaters or forced-air furnaces offered for sale by a single manufacturer that are similar in all material respects as defined in this section.

*Particulate matter (PM)* means total particulate matter including PM<sub>10</sub> and PM<sub>2.5</sub>.

*Pellet fuel* means refined and densified solid wood shaped into small pellets or briquettes that are uniform in size, shape, moisture, density and energy content.

*Representative residential hydronic heater or forced-air furnace* means an

individual residential hydronic heater or forced-air furnace that is similar in all material respects as defined in this section to other residential hydronic heaters or forced-air furnaces within the model line it represents.

*Residential forced-air furnace* means a fuel burning device designed to burn wood or wood pellet fuel that warms spaces other than the space where the furnace is located, by the distribution of air heated by the furnace through ducts.

*Residential hydronic heater* means a fuel burning device designed to burn wood or wood pellet fuel for the purpose of heating building space and/or water through the distribution, typically through pipes, of a fluid heated in the device, typically water or a water and antifreeze mixture.

*Sale* means the transfer of ownership or control, except that a transfer of control of an affected residential hydronic heater or forced-air furnace for research and development purposes within the scope of § 60.5472(b)(2) is not a sale.

*Seasoned wood* means wood with a moisture content of 20 percent or less.

*Similar in all material respects* means that the construction materials, exhaust and inlet air system, and other design features are within the allowed tolerances for components identified in § 60.533(k).

*Valid certification test* means a test that meets the following criteria:

(1) The Administrator was notified about the test in accordance with § 60.5476(f);

(2) The test was conducted by an accredited test laboratory as defined in this section;

(3) The test was conducted on a residential hydronic heater or forced-air furnace similar in all material respects as defined in this section to other residential hydronic heaters or forced-air furnaces of the model line that is to be certified; and

(4) The test was conducted in accordance with the test methods and procedures specified in § 60.5476.

#### § 60.5474 What standards and requirements must I meet and by when?

(a) *Particulate Matter Standards.* Unless exempted under § 60.5472, no person is permitted to:

(1) On or after [EFFECTIVE DATE OF FINAL RULE], manufacture or sell at retail a residential hydronic heater unless it has been certified to meet the 2015 particulate matter emission limits in paragraph (b)(1) of this section.

(2) On or after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] manufacture or sell at retail a residential hydronic heater unless it has been

certified to meet the 2020 particulate matter emission limit in paragraph (b)(2) of this section.

(3) On or after [EFFECTIVE DATE OF FINAL RULE], manufacture or sell at retail a residential forced-air furnace unless it has been certified to meet the 2015 particulate matter emission limits in paragraph (b)(3) of this section.

(4) On or after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE] manufacture or sell at retail a residential forced-air furnace unless it has been certified to meet the 2020 particulate matter emission limit in paragraph (b)(4) of this section.

(b)(1) 2015 residential hydronic heater particulate matter emission limit: 0.32 lb/million Btu (0.137 g/megajoule) heat output and 7.5 g/hr (0.017 lb/hr) as determined by the test methods and procedures in § 60.5476.

(2) 2020 residential hydronic heater particulate matter emission limit: 0.06 lb/million Btu (0.026 g/megajoule) heat output as determined by the test methods and procedures in § 60.5476.

(3) 2015 forced-air furnace particulate matter emission limit: 0.93 lb/million Btu (0.40 g/megajoule) heat output and 7.5 g/hr (0.017 lb/hr) as determined by the test methods and procedures in § 60.5476.

(4) 2020 forced-air furnace particulate matter emission limit: 0.06 lb/million Btu (0.026 g/megajoule) heat output as determined by the test methods and procedures in § 60.5476.

(c) [Reserved]

(d) [Reserved]

(e) *Pellet Fuel Requirements.*

Operators of outdoor residential hydronic heaters, indoor residential hydronic heaters, or residential forced-air furnaces that are certified to burn pellet fuels may only burn pellets that have been produced under a licensing agreement with the Pellet Fuels Institute or an equivalent organization approved by the EPA. The pellet fuel must meet the following minimum requirements:

(1) Density: consistent hardness and energy content with a minimum density of 38 pounds/cubic foot;

(2) Dimensions: maximum length of 1.5 inches and diameter between 0.230 and 0.285 inches;

(3) Inorganic fines: less than or equal to 1 percent;

(4) Chlorides: less than or equal to 300 parts per million by weight; and

(5) Ash content: no more than 2 percent.

(6) A quality assurance process licensed by the Pellet Fuel Institute or equivalent organization approved by EPA.

(f) *Prohibited Fuel Types.* No person is permitted to burn any of the following

materials in an outdoor residential hydronic heater, indoor residential hydronic heater, or residential forced-air furnace:

(1) Residential or commercial garbage;

(2) Lawn clippings or yard waste;

(3) Materials containing rubber, including tires;

(4) Materials containing plastic;

(5) Waste petroleum products, paints or paint thinners, or asphalt products;

(6) Materials containing asbestos;

(7) Construction or demolition debris;

(8) Paper products; cardboard,

plywood or particleboard. The prohibition against burning these materials does not prohibit the use of fire starters made from paper, cardboard, saw dust, wax and similar substances for the purpose of starting a fire in an affected residential hydronic heater or forced-air furnace;

(9) Railroad ties or pressure treated lumber;

(10) Manure or animal remains;

(11) Salt water driftwood or other or other previously salt water saturated materials;

(12) Unseasoned wood; or

(13) Any materials that were not included in the certification tests for the subject heater or furnace.

(g) *Owner's Manual.* A person must not operate an outdoor residential hydronic heater, indoor residential hydronic heater, or residential forced-air furnace in a manner inconsistent with the owner's manual. The owner's manual must clearly specify that operation in a manner inconsistent with the owner's manual would violate the warranty.

**§ 60.5475 What compliance and certification requirements must I meet and by when?**

(a)(1) *Certification Requirement.* Each affected residential hydronic heater and forced-air furnace must be certified to be in compliance with the applicable emission standards and other requirements of this subpart. For each model line manufactured or sold by a single entity, *e.g.*, company or manufacturer, compliance with applicable emission standards of § 60.5474(b) must be determined based on testing of representative affected residential hydronic heaters and forced-air furnaces within the model line. If one entity licenses a model line to another entity, each entity's model line must be certified. If a entity changes the name of the entity or the name of the model, the manufacturer must apply for a new certification.

(2) The manufacturer of each model line must submit the information required in § 60.533(b) and follow the

certification procedure specified in § 60.533(f) except that, for the purposes of this paragraph, the references in § 60.533(f) to the "emission standards" in § 60.532 must be understood to refer to the emission limits in § 60.5474(b).

(b) *Waiver from Submitting Test Results.* An applicant for certification may apply for a potential waiver of the requirements to submit the results of a certification test pursuant to the certification procedures specified in § 60.533(f) according to the procedure specified in § 60.533(g)(1).

(c) *Certification Period.* Unless revoked sooner by the Administrator, a certificate of compliance will be valid 5 years from the date of issuance.

(d) *Renewal of Certification.* (1) Any manufacturer of an affected residential hydronic heater or forced-air furnace may apply to the Administrator for potential renewal of a certificate of compliance by submitting the material specified in § 60.533(b) and following the procedures specified in § 60.533(f).

(2) The certificate must be recertified or renewed every 5 years or the manufacture may choose to no longer manufacture or sell that model. If the manufacturer chooses to no longer manufacture or sell that model, then the manufacturer must submit a statement to the EPA for that model. A manufacturer may apply for potential renewal of their certificate by submitting certification information in accordance with § 60.533(b) or by affirming in writing that the wood heater has been subject to no changes that would impact emissions and request a potential waiver from certification testing.

(3) If the Administrator grants or waives certification testing under paragraph (d)(2) of this section, the Administrator will give written notice to the manufacturer setting forth the basis for the determination and issue a certification renewal.

(4) If the Administrator denies the request for a renewal of certification, the Administrator will give written notice to the manufacturer setting forth the basis for the determination.

(e) *Recertification.* The procedure specified in § 60.533(k) must be used to determine when a product line must be recertified.

(f) *Criteria for Revocation of Certification.* (1) The Administrator may revoke certification of a product line if it is determined that the residential hydronic heaters or forced-air furnaces being manufactured or sold in that model line do not comply with the requirements of this subpart. Such a determination will be based on all

available evidence, including but not limited to:

- (i) Test data from retesting of the original unit on which the certification was conducted or a similar unit;
- (ii) A finding that the certification test was not valid. The finding will be based on problems or irregularities with the certification test or its documentation, but may be supplemented by other information;
- (iii) A finding that the labeling of the residential hydronic heater or forced-air furnace model line or the owner's manual or marketing information does not comply with the requirements of § 60.5478;
- (iv) Failure by the manufacturer to comply with the reporting and recordkeeping requirements of § 60.5479;
- (v) Physical examination showing that a significant percentage (as defined in the quality assurance plan, but no larger than 1 percent) of production units inspected is not similar in all material respects as defined in this subpart to the representative affected hydronic heater or forced-air furnace submitted for testing; or
- (vi) Failure of the manufacturer to conduct a quality assurance program in conformity with paragraph (g) of this section.

(2) Revocation of certification under this paragraph will not take effect until the manufacturer concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity to request a review under § 60.5481.

(g) *Quality Assurance Program.* For each certified model line, the manufacturer must conduct a quality assurance program according to the requirements of § 60.533(m).

(h) *EPA Compliance Audit Testing.* The Administrator will conduct compliance audit testing according to the requirements of § 60.533(n). For the purposes of this paragraph, references in § 60.533(n) to §§ 60.532 through 60.535 must be understood to refer to the comparable paragraphs in §§ 60.5474 through 60.5477 and the associated test methods specified in this subpart.

**§ 60.5476 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?**

Test methods and procedures specified in this section or in appendix A of this part, except as provided under § 60.8(b), must be used to determine compliance with the standards and requirements for certification under §§ 60.5474 and 60.5475 as follows:

(a)(1) Method 28 WHH must be used to measure the heat output (million Btu/hr) of outdoor and indoor residential hydronic heaters.

(2) If the model is subject to the 2015 particulate matter standards specified in § 60.5474(a)(1) and is equipped with an external heat storage unit, you must conduct testing according to paragraph § 60.5476(a)(2)(i) and (ii) of this section. You have the option of submitting the test results of either (a)(2)(i) or (ii) of this section to the Administrator as specified under § 60.5479 for certification compliance.

(i) Conduct testing using crib wood as specified in Method 28 WHH. The heat input and heat output measurements must be performed according to ASTM method E2618–13 entitled “Standard Test Method for Determining Particulate Matter Emissions and Heating of Outdoor Solid Fuel-fired Hydronic Heating Appliances.” Testing conducted with continuously fed biomass as the fuel(s) must be conducted according to the relevant section of the ASTM method.

(ii) Conduct testing using cord wood as specified in “A Test Method for Certification of Cord Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage: Measurement of Particulate Matter (PM) and Carbon Monoxide (CO) Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage.”

(3) If the model is subject to the 2020 particulate matter standards specified in § 60.5474(a)(2) and is equipped with an external partial heat storage unit, you must conduct cord wood testing according to the test methods and procedures of “A Test Method for Certification of Cord Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage: Measurement of Particulate Matter (PM) and Carbon Monoxide (CO) Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances with Partial Thermal Storage.”

(b) Method 28 WHH in conjunction with ASTM E2515–10 must be used to measure the particulate matter emission rate (lb/million Btu heat output) of outdoor and indoor residential hydronic heaters, except that for the 2020 standards, you should first test Burn Rate Categories 1 and 4 and then test 2 more times for whichever burn rate category is worse on a lb/million BTU heat output basis and report the results separately per burn rate category.

(c) Canadian Standards Administration (CSA) Method B415.1–10 must be used to measure the heat output (million Btu/hr) and particulate

matter emission rate (lb/million Btu heat output) of forced-air furnaces, except that for the 2020 standards, you should first test Burn Rate Categories 1 and 4 and then test 2 more times for whichever burn rate category is worse on a lb/million BTU heat output basis and report the results separately per burn rate category.

(d) CSA Method B415.1–10, section 13.7, must be used to measure the thermal efficiency of outdoor and indoor residential hydronic heaters.

(e) [Reserved]

(f) The manufacturer of an affected residential hydronic heater or forced-air furnace must notify the Administrator of the date that certification testing is to begin, by email, to Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program). This notice must be at least 30 days before the start of testing. The notification of testing must include the manufacturer's name and address, the accredited test laboratory's name and address, certifying entity name, the model name and number (or, if unavailable, some other way to distinguish between models), and the dates of testing.

(g) The accredited test laboratory must allow the manufacturer, the EPA and delegated states to observe certification testing. However, manufacturers must not involve themselves in the conduct of the test after the pretest burn (as defined by EPA Method 28 WHH) has begun. Communications between the manufacturer and laboratory or certifying entity personnel regarding operation of the hydronic heater must be limited to written communications transmitted prior to the first pretest burn of the certification series. Written communications between the manufacturer and laboratory personnel may be exchanged during the certification test only if deviations from the test procedures are observed that constitute improper conduct of the test. All communications must be included in the test documentation required to be submitted pursuant to § 60.533(b)(3) and must be consistent with instructions provided in the owner's manual required under § 60.5478(f), except to the extent that they address details of the certification tests that would not be relevant to owners.

**§ 60.5477 What procedures must I use for laboratory accreditation?**

The accreditation procedure specified in § 60.535 must be used to certify test laboratories under this subpart.

**§ 60.5478 What requirements must I meet for permanent labels and owner's manuals?****(a) Permanent Label Requirements.**

(1) Each affected residential hydronic heater or forced-air furnace manufactured or sold on or after the date the applicable standards come into effect as specified in § 60.5474, must have a permanent label affixed to it that meets the requirements of this section.

(2) The permanent label must contain the following information:

(i) Month and year of manufacture of the individual unit;

(ii) Model name or number; and

(iii) Serial number.

(3) The permanent label must:

(i) Be affixed in a readily visible or accessible location in such a manner that it can be easily viewed before and after the appliance is installed;

(ii) Be at least 8.9 cm long and 5.1 cm wide (3 1/2 inches long and 2 inches wide);

(iii) Be made of a material expected to last the lifetime of the residential hydronic heater or forced-air furnace;

(iv) Present required information in a manner so that it is likely to remain legible for the lifetime of the residential hydronic heater or forced-air furnace; and

(v) Be affixed in such a manner that it cannot be removed without damage to the label.

(4) The permanent label may be combined with any other label, as long as the required information is displayed, the integrity of the permanent label is not compromised, and the requirements of § 60.5478(a)(3) are still met.

(b) If the residential hydronic heater or forced-air furnace belongs to a model line certified under § 60.5475, and it has been found to meet the applicable emission limits or tolerances through quality assurance testing, one of the following statements, as appropriate, must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2015 particulate emission standards.

or  
U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2020 particulate emission standards.

(c) The label under paragraph (b) of this section must also contain the following statement on the permanent label:

“This appliance needs periodic inspection and repair for proper operation. Consult owner’s manual for further information. It is against the law to operate this appliance in a manner inconsistent with operating instructions in the owner’s manual.”

(d) Any label statement under paragraph (b) of this section constitutes

a representation by the manufacturer as to any residential hydronic heater or forced-air furnace that bears it:

(1) That the certification of compliance was in effect at the time the residential hydronic heater or forced-air furnace left the possession of the manufacturer;

(2) That the manufacturer was, at the time the label was affixed, conducting a quality assurance program in conformity with the manufacturer’s quality assurance program; and

(3) That as to any residential hydronic heater or forced-air furnace individually tested for emissions by the manufacturer under § 60.5475(f), it met the applicable emission limit.

(e)(1) If an affected residential hydronic heater or forced-air furnace is manufactured in the United States for export as provided in § 60.5472(b)(1), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Export appliance. May not be operated in the United States.

(2) If an affected residential hydronic heater or forced-air furnace is manufactured for use for research and development purposes as provided in § 60.5472(b)(2), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Not certified. Research Appliance. Not approved for sale.

(3) If an affected residential hydronic heater or forced-air furnace is a non wood-burning hydronic heater or forced-air furnace exclusively as provided in § 60.5472(b)(3) the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This appliance is not certified for wood burning. Use of any wood fuel is a violation of federal law.

(f) *Owner’s Manual.* (1) Each affected residential hydronic heater or forced-air furnace offered for sale by a commercial owner must be accompanied by an owner’s manual that must contain the information listed in paragraph (f)(2) of this section (pertaining to installation), and paragraph (f)(3) of this section (pertaining to operation and maintenance). Such information must be adequate to enable consumers to achieve optimal emissions performance. Such information must be consistent with the operating instructions provided by the manufacturer to the accredited test laboratory for operating the residential hydronic heater or forced-air furnace during certification testing, except for details of the certification test that would not be relevant to the

ultimate purchaser. The commercial owner must also make current and historical owner’s manuals available on the company Web site.

(2) Installation information:

Requirements for achieving proper draft.

(3) Operation and maintenance information:

(i) Fuel loading procedures, recommendations on fuel selection, and warnings on what fuels not to use, such as treated wood, colored paper, cardboard, solvents, trash and garbage.

(ii) Fire starting procedures

(iii) Proper use of air controls

(iv) Ash removal procedures

(v) Instructions for replacement of gaskets and other parts that are critical to the emissions performance of the unit and other maintenance and repair instructions

(vi) The following statement: “This wood heating appliance needs periodic inspection and repair for proper operation. It is against federal law to operate this wood heating appliance in a manner inconsistent with operating instructions in the manual.”

(4) Any manufacturer using the EPA model language contained in appendix I of this part to satisfy any requirement of this paragraph (f) will be considered to be in compliance with that requirement, provided that the particular model language is printed in full, with only such changes as are necessary to ensure accuracy for the particular model line.

(5) Residential hydronic heaters and forced-air furnaces that are affected by this subpart but have been operated by a noncommercial owner are not subject to paragraph (f) of this section when offered for resale.

**§ 60.5479 What records must I keep and what reports must I submit?**

(a) Each manufacturer who holds a certificate of compliance pursuant to § 60.5475(a)(2) for a model line must maintain records containing the following information with respect to that model line.

(1) All documentation pertaining to the certification test used to obtain certification, including the full test report and raw data sheets, laboratory technician notes, calculations, and the test results for all test runs.

(2) Results of the quality assurance program inspections required pursuant to § 60.5475(g).

(3) For emissions tests conducted pursuant to the quality assurance program required by § 60.5475(g), all test reports, data sheets, laboratory technician notes, calculations, and test results for all test runs, the corrective actions taken, if any, and any follow-up actions such as additional testing.

(b) Each accredited test laboratory must maintain records consisting of all documentation pertaining to each certification test and audit test, including the full test report and raw data sheets, laboratory technician notes, calculations, and the test results for all test runs. Each accredited test laboratory must submit initial and biennial proficiency test results to the Administrator.

(c) Each manufacturer must retain each residential hydronic heater and forced-air furnace upon which certification tests were performed and certification granted under § 60.5475(a)(2) at the manufacturer's facility for as long as the model line is manufactured. Each heater or furnace must remain sealed and unaltered. Any such residential hydronic heater or forced-air furnace must be made available upon request to the Administrator for inspection and testing.

(d) Each manufacturer of an affected residential hydronic heater or forced-air furnace certified pursuant to § 60.5475(a)(2) must submit a report to the Administrator every 2 years following issuance of a certificate of compliance for each model line. This report must include the sales for each model by state and certify that no changes in the design or manufacture of the model line have been made that require recertification pursuant to § 60.5475(e).

(e)(1) Unless otherwise specified, all records required under this section must be maintained by the manufacturer, commercial owner of the affected residential hydronic heater or forced-air furnace, accredited test laboratory or certifying entity for a period of no less than 5 years.

(2) Unless otherwise specified, all reports to the Administrator required under this subpart must be made to: Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program).

(f) Within 60 days after the date of completing each performance test, each manufacturer or accredited test laboratory or certifying entity must submit performance test data electronically to the EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (<http://www.epa.gov/ttn/chief/ert/index.html>). Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically to EPA's CDX.

Manufacturers may submit compliance reports to the EPA via regular mail at the address listed below if the test methods they use are not compatible

with ERT or if ERT is not available to accept reports at the time the final rule is published. Owners or operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a completed ERT file, including information claimed to be CBI on a compact disk or other commonly used electronic storage media (including, but not limited to, flash drives), to the EPA and the same ERT file, with the CBI omitted, to the EPA via CDX as described earlier in this paragraph. The compact disk must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. Emission data and all information necessary to determine compliance, except sensitive engineering drawings and sensitive detailed material specifications, may not be claimed as CBI.

#### **§ 60.5480 What activities are prohibited under this subpart?**

(a) No person is permitted to operate an affected residential hydronic heater or forced-air furnace that does not have affixed to it a permanent label pursuant to § 60.5478(b) or (c).

(b)(1) No commercial owner is permitted to advertise for sale, offer for sale, or sell an affected residential hydronic heater or forced-air furnace that does not have affixed to it a permanent label pursuant to § 60.5478(b) or (e)(3).

(2) No commercial owner is permitted to advertise for sale, offer for sale, or sell an affected residential hydronic heater or forced-air furnace labeled under § 60.5478(e)(1) except for export.

(c)(1) No commercial owner is permitted to advertise for sale, offer for sale, or sell an affected residential hydronic heater or forced-air furnace permanently labeled under § 60.5478(b) or (e)(3) unless:

(i) The affected appliance has been certified to comply with 2020 particulate emission standards. This prohibition does not apply to affected residential hydronic heaters or forced-air furnaces regulated under this subpart that have been previously owned and operated by a noncommercial owner; and

(ii) The commercial owner provides any purchaser or transferee with an owner's manual that meets the requirements of § 60.5478(f), a copy of the warranty and a moisture meter.

(2) A commercial owner other than a manufacturer complies with the requirements of paragraph (c)(1) of this section if the commercial owner:

(i) Receives the required documentation from the manufacturer or a previous commercial owner; and

(ii) Provides that documentation unaltered to any person to whom the residential hydronic heater or forced-air furnace that it covers is sold or transferred.

(d)(1) In any case in which the Administrator revokes a certificate of compliance either for the knowing submission of false or inaccurate information or other fraudulent acts, or based on a finding under § 60.5475(e)(1)(ii) that the certification test was not valid, the Administrator may give notice of that revocation and the grounds for it to all commercial owners.

(2) On and after the date of receipt of the notice given under paragraph (d)(1) of this section, no commercial owner is permitted to sell any residential hydronic heater or forced-air furnace covered by the revoked certificate (other than to the manufacturer) unless the model line has been recertified in accordance with this subpart.

(e) No person is permitted to install or operate an affected residential hydronic heater or forced-air furnace except in a manner consistent with the instructions on its permanent label and in the owner's manual pursuant to § 60.5478(f), including only using fuels for which the unit is certified.

(f) No person is permitted to operate an affected residential hydronic heater or forced-air furnace that has been physically altered to exceed the tolerance limits of its certificate of compliance.

(g) No person is permitted to alter, deface, or remove any permanent label required to be affixed pursuant to § 60.5478.

(h) No certifying entity is permitted to certify its own certification test report.

#### **§ 60.5481 What Petition for Review procedures apply to me?**

(a) In any case where the Administrator:

(1) Denies an application under § 60.5475(a)(2);

(2) Issues a notice of revocation of certification pursuant to § 60.5475(e);

(3) Denies an application for laboratory accreditation pursuant to § 60.5477; or

(4) Issues a notice of revocation of laboratory accreditation pursuant to § 60.5477, the manufacturer or laboratory affected may submit to the EPA a request for review under this section pursuant to the procedures specified in § 60.539 within 30 days following receipt of the required notification of the action in question.

(b) In any case where the Administrator issues a notice of revocation pursuant to § 60.5475(g), the manufacturer may submit to the EPA a Petition for Review request under this section with the time limits set out in § 60.533(p)(4).

**§ 60.5482 Who implements and enforces this subpart?**

(a) In delegating implementation and enforcement authority to a state under section 111(c) of the Clean Air Act, the authorities contained in paragraph (b) of this section must be retained by the Administrator and not transferred to a state.

(b) Authorities that must not be delegated to states:

- (1) Section 60.5473, Definitions;
- (2) Section 60.5475, Compliance and certification;
- (3) Section 60.5476, Test methods and procedures; and
- (4) Section 60.5477, Laboratory accreditation.

**§ 60.5483 What parts of the General Provisions do not apply to me?**

The following provisions of subpart A of part 60 do not apply to this subpart:

- (a) Section 60.7;
- (b) Section 60.8(a), (c), (d), (e), (f) and (g); and
- (c) Section 60.15(d).

■ 5. Add subpart RRRR to read as follows:

**Subpart RRRR—Standards of Performance for New Residential Masonry Heaters**

Sec.

- 60.5484 Am I subject to this subpart?  
 60.5485 What definitions must I know?  
 60.5486 What standards and requirements must I meet and by when?  
 60.5487 What compliance and certification requirements must I meet and by when?  
 60.5488 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?  
 60.5489 What procedures must I use for laboratory accreditation?  
 60.5490 What requirements must I meet for permanent labels and owner's manuals?  
 60.5491 What records must I keep and what reports must I submit?  
 60.5492 What activities are prohibited under this subpart?  
 60.5493 What Petition for Review procedures apply to me?  
 60.5494 Who implements and enforces this subpart?  
 60.5495 What parts of the General Provisions do not apply to me?

**Subpart RRRR—Standards of Performance for New Residential Masonry Heaters**

**§ 60.5484 Am I subject to this subpart?**

(a) You are subject to this subpart if you operate, manufacture, sell, offer for

sale, import for sale, distribute, offer to distribute, introduce, or deliver for introduction, into commerce in the United States, a residential masonry heater manufactured on or after [EFFECTIVE DATE OF FINAL RULE].

(b) Each affected masonry heater must comply with the provisions of this subpart unless exempted under paragraphs (b)(1) through (b)(3) of this section.

(1) Affected masonry heaters manufactured in the United States for export are exempt from the applicable emission limits of § 60.5486 and the requirements of § 60.5487.

(2) Affected masonry heaters used for research and development purposes that are never offered for sale or sold and that are not used to provide heat are exempt from the applicable emission limits of § 60.5486 and the requirements of § 60.5487. No more than six affected masonry heaters manufactured per model line may be exempted for this purpose.

(3) Affected masonry heaters that do not burn wood or wood pellets (such as coal-only heaters that meet the definition in § 60.5485 or corn-only heaters) are exempt from the applicable emission limits of § 60.5486 and the requirements of § 60.5487.

(c) The following are not affected masonry heaters and are not subject to this subpart:

- (1) Residential wood heaters subject to subpart AAA of this part.
- (2) Residential hydronic heaters and forced-air furnaces subject to subpart QQQQ of this part.

**§ 60.5485 What definitions must I know?**

As used in this subpart, all terms not defined herein have the same meaning given them in the Clean Air Act and subpart A of this part.

*Accredited test laboratory* means a test laboratory that is accredited for masonry heater certification testing under § 60.5489 or is an independent third party test laboratory that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17025 to perform testing using the test methods specified in § 60.5488 and approved by the EPA for conducting certification tests under this subpart.

*At retail* means the sale by a commercial owner of a residential masonry heater to the ultimate purchaser.

*Certifying entity* means an independent third party that is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17020 to perform certifications and inspections under ISO-IEC Guide

17065 and approved by the EPA for conducting certifications, inspections and audits under this subpart.

*Coal-only heater* means an enclosed, coal-burning appliance capable of space heating or domestic water heating which has all of the following characteristics:

- (1) Installation instructions that state that the use of wood in the heater, except for coal ignition purposes, is prohibited by law; and
- (2) The model is listed by a nationally recognized safety-testing laboratory for coal use only, except for coal ignition purposes.

*Commercial owner* means any person who owns or controls a residential masonry heater in the course of the business of the manufacture, importation, distribution, or sale of the unit.

*Manufactured* means completed and ready for shipment (whether or not packaged) or installed in a residence in the case of custom-built masonry heaters for purposes of determining the date of manufacture.

*Manufacturer* means any person who constructs or imports into the United States a residential masonry heater.

*Model line* means all residential masonry heaters offered for sale by a single manufacturer that are similar in all material respects as defined in this section.

*Particulate matter (PM)* means total particulate matter including PM<sub>10</sub> and PM<sub>2.5</sub>.

*Pellet fuel* means refined and densified wood shaped into small pellets or briquettes that are uniform in size, shape, moisture, density and energy content.

*Representative affected masonry heater* means an individual residential masonry heater that is similar in all material respects as defined in this section to other residential masonry heaters within the model line it represents.

*Residential masonry heater* means a factory-built or site-built wood-burning device that has the following characteristics:

- (1) The device has a core constructed primarily of manufacturer-built, supplied, or specified masonry materials (such as stone, cemented aggregate, clay, tile, or other non-combustible, non-metallic solid materials) that weighs at least 1700 pounds;

(2) The firebox effluent of the masonry heater travels horizontally and/or downward through one or more heat absorbing masonry duct(s) for a distance at least the length of the largest single internal firebox dimension before

leaving the masonry heater. These parameters are determined as follows:

(i) Horizontal or downward travel distance is defined as the net horizontal and/or downward internal duct length, measured from the top of the uppermost firebox door opening(s) to the exit of the masonry heater as traveled by any effluent on a single pathway through duct channel(s) within the heater (or average of net internal duct lengths for multiple pathways of different lengths, if applicable). Net internal duct length is measured from the center of the internal side or top surface of a duct, horizontally or vertically to the center of the opposite side or the bottom surface of the same duct, and summed for multiple ducts or directions on a single pathway, if applicable. For duct channel(s) traversing horizontal angles of less than ninety degrees from vertical, only the net actual horizontal distance traveled is included in the total duct length; and

(ii) The largest single internal firebox dimensions is defined as the longest of either the length or the width of the firebox hearth and the height of the firebox, measured from the hearth to the top of the uppermost firebox door opening(s);

(3) The device has one or more air-controlling doors for fuel-loading that are designed to be closed during the combustion of fuel loads, and that control the entry of combustion air (beyond simple spark arresting screens) to one or more inlets as prescribed by the masonry heater manufacturer; and

(4) The device is assembled in conformance with Underwriters Laboratories' and/or manufacturer's specifications for its assembly and, if the core is constructed with a substantial portion of materials not supplied by the manufacturer, is certified by a representative of the manufacturer to be substantially in conformance with those specifications.

*Sale* means the transfer of ownership or control, except that a transfer of control of an affected heater for research and development purposes within the scope of § 60.5484(b)(2) is not a sale.

*Seasoned wood* means wood with a moisture content of 20 percent or less.

*Similar in all material respects* means that the construction materials, exhaust and inlet air system, and other design features are within the allowed tolerances for components identified in § 60.533(k).

*Valid certification test* means a test that meets the following criteria:

(1) The Administrator was notified about the test in accordance with § 60.5488(d)

(2) The test was conducted by an accredited test laboratory as defined in this section;

(3) The test was conducted on a residential masonry heater similar in all material respects as defined in this section to other residential masonry heaters of the model line that is to be certified; and

(4) The test was conducted in accordance with the test methods and procedures specified in § 60.5488.

**§ 60.5486 What standards and requirements must I meet and by when?**

(a) *Particulate Matter Standard.*

Unless exempted under § 60.5484:

(1) On or after [EFFECTIVE DATE OF FINAL RULE], no person is permitted to manufacture and, on or after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], no person is permitted to sell at retail a residential masonry heater unless the heater has been certified to meet the particulate matter emission limit in paragraph (b) of this section or the manufacturer is a small manufacturer as defined in paragraph (a)(2) of this section.

(2) On or after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE], no small manufacturer is permitted to manufacture a residential masonry heater unless it has been certified to meet the particulate matter emission limit in paragraph (b) of this section. For the purposes of this subpart, a small manufacturer is defined as a manufacturer that constructs less than 15 residential masonry heaters per year. A small manufacturer may elect to comply with the emission limit in paragraph (b) of this section earlier than specified in this paragraph.

(b) Residential masonry heater particulate matter emission limit: 0.32 lb/million Btu (0.137 g/megajoule) heat output as determined by the test methods and procedures in § 60.5488.

(c) *Pellet Fuel Requirements.*

Operators of masonry heaters that are certified to burn pellet fuels may only burn pellets that have been produced under a licensing agreement with the Pellet Fuel Institute or an equivalent organization approved by EPA. The pellet fuel must meet the following minimum requirements:

(1) Density: consistent hardness and energy content with a minimum density of 38 pounds/cubic foot;

(2) Dimensions: maximum length of 1.5 inches and diameter between 0.230 and 0.285 inches;

(3) Inorganic fines: less than or equal to 1 percent;

(4) Chlorides: less than or equal to 300 parts per million by weight; and

(5) Ash content: no more than 2 percent.

(6) A quality assurance process licensed by the Pellet Fuel Institute or equivalent organization approved by the EPA.

(d) *Prohibited Fuel Types.* No person is permitted to burn any of the following materials in a residential masonry heater:

(1) Residential or commercial garbage;

(2) Lawn clippings or yard waste;

(3) Materials containing rubber, including tires;

(4) Materials containing plastic;

(5) Waste petroleum products, paints or paint thinners, or asphalt products;

(6) Materials containing asbestos;

(7) Construction or demolition debris;

(8) Paper products, cardboard, plywood, or particleboard. The prohibition against burning these materials does not prohibit the use of fire starters made from paper, cardboard, saw dust, wax and similar substances for the purpose of starting a fire in an affected masonry heater;

(9) Railroad ties or pressure treated wood;

(10) Manure or animal remains; or

(11) Salt water driftwood or other

previously salt water saturated materials.

(e) *Owner's Manual.* A person must not operate a residential masonry heater in a manner inconsistent with the owner's manual. The owner's manual must clearly specify that operation in a manner inconsistent with the owner's manual would violate the warranty.

**§ 60.5487 What compliance and certification requirements must I meet and by when?**

(a)(1) *Certification Requirement.* Each affected residential masonry heater must be certified to be in compliance with the applicable emission standards and other requirements of this subpart. For each model line manufactured or sold by a single entity, e.g., company or manufacturer, compliance with applicable emission standards of § 60.5486(b) must be determined based on testing of representative affected appliances within the model line. If one entity licenses a model line to another entity, each entity's model line must be certified. If an entity changes the name of the entity or the name of the model, the manufacturer must apply for a new certification.

(2) The manufacturer of each model line must submit to the EPA the information required in paragraph (b) of this section and follow the certification procedure specified in § 60.533(f) except that, for the purposes of this paragraph, the reference in § 60.533(f) to the emission limits in § 60.532 must be understood to refer to the emission

limits in § 60.5486(b) and the associated test methods are those specified in this subpart.

(3) As an alternative to the certification process described in paragraph (a)(2) of this section, an applicant may choose to submit a computer model simulation program for review and certification by the certifying entity and subsequent review and approval by the Administrator for use as a surrogate for emissions testing. The Administrator will post the certified model on the EPA Burnwise Web site.

(b) *Waiver from Submitting Test Results.*

(1) An applicant for certification may apply for a potential waiver of the requirements to submit the results of a certification test pursuant to the certification procedures specified in § 60.533(f) according to the procedure specified in § 60.533(g)(1).

(2) Alternatively, an applicant may submit results using a validated computer model simulation program that demonstrates the masonry heater design meets the emission limit in § 60.5486(b).

(c) *Certification Period.*

(1) Unless revoked sooner by the Administrator, a certificate of compliance will be valid for 5 years from the date of issuance.

(2) If the manufacturer qualifies as a small manufacturer as defined in § 60.5486(a)(2) and the model was certified using the procedure defined in paragraph (a)(3) of this section, the certificate of compliance will be valid for the life of the model line unless it is revoked by the Administrator.

(d) *Renewal of Certification.*

(1) Any manufacturer of an affected masonry heater may apply to the Administrator for potential renewal of a certificate of compliance by submitting the material specified in § 60.533(b) and following the process specified in § 60.533(f).

(2) A certificate issued pursuant to paragraph (c)(1) of this section must be recertified or renewed every 5 years or the manufacture may choose to no longer manufacture or sell that model. If the manufacturer chooses to no longer manufacture or sell that model, then the manufacturer must submit a statement to EPA for that model. A manufacturer may apply to the Administrator for potential renewal of their certificate by submitting certification information in accordance with § 60.533(b) or by affirming in writing that the wood heater has been subject to no changes that would impact emissions and request a potential waiver from certification testing.

(3) If the Administrator waives certification testing under paragraph (c)(2) of this section, the Administrator will give written notice to the manufacturer setting forth the basis for the determination and issue a certification.

(4) If the Administrator denies the request, the Administrator will give written notice to the manufacturer setting forth the basis for the determination.

(e) *Recertification.*

(1) The procedure specified in § 60.533(k) must be used to determine when a model line must be recertified.

(2) If the manufacturer qualifies as a small manufacturer as defined in § 60.5486(a)(2) and the model line was certified using the procedure defined in paragraph (a)(3) of this section, the recertification provisions of paragraph (e)(1) of this section do not apply.

(f) *Criteria for Revocation of Certification.*

(1) The Administrator may revoke certification of a model line if it is determined that the residential masonry heaters produced in that model line do not comply with the requirements of this subpart. Such a determination will be based on all available evidence, including but not limited to:

- (i) Test data from retesting of the original unit on which the certification was conducted or a similar unit;
- (ii) A finding that the certification test or model simulation was not valid;
- (iii) A finding that the labeling of the residential masonry heater model line or the associated owner's manual or marketing information does not comply with the requirements of § 60.5490;
- (iv) Failure by the manufacturer to comply with the reporting and recordkeeping requirements of § 60.5491;

(v) Physical examination showing that an inspected production unit is not similar in all material respects as defined in this subpart to the representative affected masonry heater submitted for testing; or

(vi) Failure of the manufacturer to conduct a quality assurance program in conformity with paragraph (f) of this section.

(2) Revocation of certification under this paragraph will not take effect until the manufacturer concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity to request a Petition for Review under § 60.5493.

(g) *Quality Assurance Program.* For each certified model line, except for any model line at small manufacturers as defined in § 60.5486(a)(2) and where the

model line was certified using the procedure defined in paragraph (a)(3) of this section, the manufacturer must conduct a quality assurance program according to the requirements of § 60.533(m).

(h) *EPA Compliance Audit Testing.*

The Administrator may conduct compliance audit testing according to the requirements of § 60.533(n). For the purposes of this paragraph, references in § 60.533(p) to §§ 60.532 through 60.535 must be understood to refer to the comparable paragraphs in § 60.5486 through 60.5489, respectively. The requirements of this paragraph do not apply to small manufacturers as defined in § 60.5486(a)(2) and where the model line was certified using the procedure defined in paragraph (a)(3) of this section.

**§ 60.5488 What test methods and procedures must I use to determine compliance with the standards and requirements for certification?**

Test methods and procedures specified in this section or in appendix A of this part, except as provided under § 60.8(b), must be used to determine compliance with the standards and requirements for certification under §§ 60.5486 and 60.5487 as follows:

(a) ASTM E2817–11, Standard Test Method for Test Fueling Masonry Heaters, must be used to measure the heat output (million Btu/hr) of residential masonry heaters.

(b) ASTM E2515–10 must be used in conjunction with ASTM E2817–11 to measure the particulate emission rate (lb/million BTU heat output) of residential masonry heaters.

(c)(1) ASTM WK26558, New Specification for Calculation Method for Custom Designed, Site Built Masonry Heaters may be used as an alternative to certification testing as specified in paragraphs (a), (b) and (d) of this section.

(2) If the Administrator approves an alternative computer model simulation program pursuant to § 60.5487(a)(3), the approved simulation program also may be used as an alternative to certification testing as specified in paragraphs (a) and (b) of this section.

(d) Method 10 in appendix A–4 of this part must be used to measure CO emissions of residential masonry heaters.

(e) The manufacturer of an affected masonry heater must notify the Administrator of the date that certification testing is to begin, by email, to Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program). This notice must be received at least 30 days

before the start of testing. The notification of testing must include the manufacturer's name and address, the accredited test laboratory's name and address, certifying entity name, the model name and number (or, if unavailable, some other way to distinguish between models), and the dates of testing.

(f) The accredited test laboratory must allow the manufacturer, the EPA and delegated states to observe certification testing. However, manufacturers must not involve themselves in the conduct of the test after the pretest burn (as defined by ASTM E2817-11) has begun. Communications between the manufacturer and laboratory or certifying entity personnel regarding operation of the masonry heater must be limited to written communications transmitted prior to the first pretest burn of the certification series. Written communications between the manufacturer and laboratory personnel may be exchanged during the certification test only if deviations from the test procedures are observed that constitute improper conduct of the test. All communications must be included in the test documentation required to be submitted pursuant to § 60.533(b)(3) and must be consistent with instructions provided in the owner's manual required under § 60.5490(g), except to the extent that they address details of the certification tests that would not be relevant to owners.

**§ 60.5489 What procedures must I use for laboratory accreditation?**

The accreditation procedure specified in § 60.535 must be used to certify test laboratories under this subpart.

**§ 60.5490 What requirements must I meet for permanent labels and owner's manuals?**

(a) *Permanent Label Requirements.*

(1) Each affected masonry heater manufactured on or after the date the applicable standards come into effect as specified in § 60.5486, must have a permanent label affixed to it that meets the requirements of this section.

(2) The permanent label must contain the following information:

(i) Month and year of manufacture of the individual unit;

(ii) Model name or number; and

(iii) Serial number.

(3) The permanent label must:

(i) Be affixed in a readily visible or accessible location in such a manner that it can be easily viewed before and after the appliance is installed;

(ii) Be at least 8.9 cm long and 5.1 cm wide (3 1/2 inches long and 2 inches wide);

(iii) Be made of a material expected to last the lifetime of the residential masonry heater;

(iv) Present required information in a manner so that it is likely to remain legible for the lifetime of the residential masonry heater; and

(v) Be affixed in such a manner that it cannot be removed without damage to the label.

(4) The permanent label may be combined with any other label, as long as the required information is displayed, the integrity of the permanent label is not compromised, and the requirements of § 60.5490(3) are still met.

(b)(1) If the residential masonry heater belongs to a model line certified under § 60.5487, and it has been found to meet the applicable emission limits or tolerances through quality assurance testing, the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Certified to comply with 2015 particulate emissions standards.

(2) If the masonry heater belongs to a model line owned by a manufacturer that qualifies for the small volume manufacturer delay as specified in § 60.5486(a)(2), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This masonry heater was produced by a small volume manufacturer that manufactures or exports to the United States fewer than 15 masonry heaters per year. This appliance cannot be sold after [5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE].

(c) The label under paragraph (b) of this section must also contain the following statement on the permanent label: "This appliance needs periodic inspection and repair for proper operation. Consult owner's manual for further information. It is against the law to operate this appliance in a manner inconsistent with operating instructions in the owner's manual."

(d) Any label statement under paragraph (b) of this section constitutes a representation by the manufacturer as to any residential masonry heater that bears it:

(1) That the certification was in effect at the time the residential masonry heater left the possession of the manufacturer;

(2) That the manufacturer was, at the time the label was affixed, conducting a quality assurance program in conformity with the manufacturer's quality assurance program; and

(3) That as to any residential masonry heater individually tested for emissions

by the manufacturer under § 60.5487(f), it met the applicable emission limit.

(e)(1) If an affected masonry heater is manufactured in the United States for export as provide in § 60.5484(b)(1), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Export unit. May not be operated in the United States.

(2) If an affected masonry heater is manufactured for research and development purposes as provided in § 60.5484(b)(2), the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY Not certified. Research unit. Not approved for sale.

(3) If an affected masonry heater is a non wood-burning masonry heater exclusively as provided § 60.5484(b)(3) the following statement must appear on the permanent label:

U.S. ENVIRONMENTAL PROTECTION AGENCY This appliance is not certified for wood burning. Use of any wood fuel is a violation of federal law.

(f) *Owner's Manual.*

(1) Each affected masonry heater offered for sale by a commercial owner must be accompanied by an owner's manual that must contain the information listed in paragraph (f)(2) of this section (pertaining to installation), and paragraph (f)(3) of this section (pertaining to operation and maintenance). Such information must be adequate to enable consumers to achieve optimal emissions performance. Such information must be consistent with the operating instructions provided by the manufacturer to the accredited test laboratory for operating the residential masonry heater, except for details of the certification test that would not be relevant to the ultimate purchaser. The commercial owner must also make current and historical owner's manuals available on the company Web site.

(2) Installation information: Requirements for achieving proper draft.

(3) Operation and maintenance information:

(i) Fuel loading procedures, recommendations on fuel selection, and warnings on what fuels not to use, such as treated wood, colored paper, cardboard, solvents, trash and garbage.

(ii) Fire starting procedures

(iii) Proper use of air controls

(iv) Ash removal procedures

(v) Instructions for replacement of gasket and other parts that are critical to the emissions performance of the unit and other maintenance and repair instructions

(vi) The following statement: “This wood heating appliance needs periodic inspection and repair for proper operation. It is against federal law to operate this wood heating appliance in a manner inconsistent with operating instructions in the manual.”

(4) Any manufacturer using the EPA model language contained in appendix I of this part to satisfy any requirement of this paragraph (f) will be considered to be in compliance with that requirement, provided that the particular model language is printed in full, with only such changes as are necessary to ensure accuracy for the particular model line.

(5) Residential masonry heaters that are affected by this subpart but have been operated by a noncommercial owner are not subject to paragraph (f) of this section when offered for resale.

**§ 60.5491 What records must I keep and what reports must I submit?**

(a) Each manufacturer who holds a certificate of compliance pursuant to § 60.5487(a)(2) for a model line must maintain records containing the information required by this paragraph (a) with respect to that model line.

(1) All documentation pertaining to the certification test or computer simulation used to obtain certification.

(i) For certification tests, this includes the full test report and raw data sheets, laboratory technician notes, calculations, and the test results for all test runs.

(ii) For computer simulations, this includes all data input into the simulation program and all computer-generated output.

(2) Results of the quality assurance program inspections required pursuant to § 60.5487(f).

(3) For emissions tests conducted pursuant to the quality assurance program required by § 60.5487(f), all test reports, data sheets, laboratory technician notes, calculations, and test results for all test runs, the remedial actions taken, if any, and any follow-up actions such as additional testing.

(4) If a masonry heater manufacturer qualifies as a small volume manufacturer as specified in § 60.5486(a)(2) and elects to defer compliance as allowed by that paragraph, records of the number of masonry heaters produced or constructed per year during the deferral period.

(b) Each accredited test laboratory must maintain records consisting of all documentation pertaining to each certification test, audit test, or computer simulation, including the full test report and raw data sheets, laboratory

technician notes, calculations, and the test results for all test runs. Each accredited test laboratory must submit initial and biennial proficiency test results to the Administrator.

(c) Each manufacturer must retain each residential masonry heater upon which certification tests were performed and certification granted pursuant to § 60.5487(a)(2) at the manufacturer's facility for as long as the model line is manufactured. Each masonry heater must remain sealed and unaltered. Any such residential masonry heater must be made available upon request to the Administrator for inspection and testing.

(d)(1) Each manufacturer of an affected masonry heater certified pursuant to § 60.5487 must submit a report to the Administrator every 2 years following issuance of a certificate of compliance for each model line. This report must include the sales for each model by state and certify that no changes in the design or manufacture of the model line have been made that require recertification pursuant to § 60.5487(d).

(2) If the manufacturer qualifies as a small manufacturer as defined in § 60.5486(b)(2) and the model line was certified using the procedure defined in paragraph (a)(3) of this section, the reporting provision of paragraph (d)(1) of this section does not apply.

(e)(1) Unless otherwise specified, all records required under this section must be maintained by the manufacturer, commercial owner of the affected masonry heater, accredited test laboratory or certifying entity for a period of no less than 5 years.

(2) Unless otherwise specified, all reports to the Administrator required under this subpart must be made to: Wood Heater NSPS Compliance Program at [www.epa.gov/Wood\\_Heater\\_NSPS\\_Compliance\\_Program](http://www.epa.gov/Wood_Heater_NSPS_Compliance_Program).

(f) Within 60 days after the date of completing each performance test, each manufacturer or accredited test laboratory or certifying entity must submit performance test data, except opacity data, electronically to the EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (<http://www.epa.gov/ttn/chief/ert/index.html>). Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically to the EPA's CDX. Manufacturers may submit compliance reports to the EPA via regular mail at the address listed below if the test methods they use are not compatible with ERT or if ERT is not available to accept reports at the time the final rule is published. Owners or

operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a completed ERT file, including information claimed to be CBI, on a compact disk or other commonly used electronic storage media (including, but not limited to, flash drives), to the EPA, and the same ERT file, with the CBI omitted, to the EPA via CDX as described earlier in this paragraph. The compact disk must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. Emission data and all information necessary to determine compliance, except sensitive engineering drawings and sensitive detailed material specifications, may not be claimed as CBI.

**§ 60.5492 What activities are prohibited under this subpart?**

(a) No person is permitted to operate an affected masonry heater manufactured after [EFFECTIVE DATE OF FINAL RULE] or sold at retail after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] that does not have affixed to it a permanent label pursuant to § 60.5490.

(b)(1) No manufacturer or commercial owner is permitted to advertise for sale, offer for sale, or sell an affected masonry heater manufactured after [EFFECTIVE DATE OF FINAL RULE] or sold at retail after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] that does not have affixed to it a permanent label pursuant to § 60.5490.

(2) No manufacturer or commercial owner is permitted to advertise for sale, offer for sale, or sell an affected masonry heater manufactured after [EFFECTIVE DATE OF FINAL RULE] or sold at retail after [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] labeled under § 60.5490(d)(1) except for export.

(c)(1) No commercial owner is permitted to advertise for sale, offer for sale or sell an affected masonry heater permanently labeled under § 60.5490(b) unless:

(i) The affected appliance regulated under this subpart was previously owned and operated by a noncommercial owner;

(ii) The commercial owner provides any purchaser or transferee with an owner's manual that meets the requirements of § 60.5490(g), a copy of the warranty and a moisture meter.

(2) A commercial owner other than a manufacturer complies with the requirements of paragraph (c) of this section if the commercial owner:

(i) Receives the required documentation from the manufacturer or a previous commercial owner; and

(ii) Provides that documentation unaltered to any person to whom the residential masonry heater that it covers is sold or transferred.

(d)(1) In any case in which the Administrator revokes a certificate of compliance either for the knowing submission of false or inaccurate information or other fraudulent acts, or based on a finding under § 60.5487(e)(1)(ii) that the certification test was not valid, the Administrator may give notice of that revocation and the grounds for it to all commercial owners.

(2) On and after the date of receipt of the notice given under paragraph (d)(1) of this section, no commercial owner is permitted to sell any residential masonry heater covered by the revoked certificate (other than to the manufacturer) unless the model line has been recertified in accordance with this subpart.

(e) No person is permitted to install or operate an affected masonry heater except in a manner consistent with the instructions on its permanent label and in the owner's manual pursuant to § 60.5490(g), including only using fuels for which the unit is certified.

(f) No person is permitted to operate an affected masonry heater that has been physically altered to exceed the tolerance limits of its certificate of compliance.

(g) No person is permitted to alter, deface, or remove any permanent label required to be affixed pursuant to § 60.5490.

(h) No certifying entity is permitted to certify its own certification test report.

#### **§ 60.5493 What Petition for Review procedures apply to me?**

(a) In any case where the Administrator:

(1) Denies an application under § 60.5487(a)(2);

(2) Issues a notice of revocation of certification under § 60.5487(e);

(3) Denies an application for laboratory accreditation pursuant to § 60.5489; or

(4) Issues a notice of revocation of laboratory accreditation pursuant to § 60.5489, the manufacturer or laboratory affected may submit to the EPA a Petition for Review request under this section pursuant to the procedures specified in § 60.593 within 30 days following receipt of the required notification of the action in question.

(b) In any case where the Administrator issues a notice of revocation under § 60.5487(e), the

manufacturer may submit to the EPA a Petition for Review request under this section pursuant to the procedures specified in § 60.5493 with the time limits set out in § 60.533(p)(4).

#### **§ 60.5494 Who implements and enforces this subpart?**

(a) In delegating implementation and enforcement authority to a state under section 111(c) of the Clean Air Act, the authorities contained in paragraph (b) of this section must be retained by the Administrator and not transferred to a state.

(b) Authorities that must not be delegated to states:

- (1) Section 60.5473, Definitions;
- (2) Section 60.5475, Compliance and certification;
- (3) Section 60.5476, Test methods and procedures; and
- (4) Section 60.5477, Laboratory accreditation.

#### **§ 60.5495 What parts of the General Provisions do not apply to me?**

The following provisions of subpart A of part 60 do not apply to this subpart:

- (a) Section 60.7;
- (b) Section 60.8(a), (c), (d), (e), and (f); and
- (c) Section 60.15(d).

6. Part 60 Appendix A–8 is amended by adding Methods 28R, 28WHH, and 28WHH–PTS to follow Method 28A to read as follows:

#### **Appendix A–8 to Part 60—Test Methods 26 through 30B**

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#### **Test Method 28R for Certification and Auditing of Wood Heaters**

##### **1.0 Scope and Application**

1.1 This test method applies to certification and auditing of wood-fired room heaters and fireplace inserts.

1.2 The test method covers the fueling and operating protocol for measuring particulate emissions, as well as determining burn rates, heat output and efficiency.

1.3 Particulate emissions are measured by the dilution tunnel method as specified in ASTM E2515–10 *Standard Test Method for Determination of Particulate Matter Emissions Collected in a Dilution Tunnel*.

##### **2.0 Procedures**

2.1 This method incorporates the provisions of ASTM E2780–10 except as follows:

2.1.1 The burn rate categories, low burn rate requirement, and weightings in Method 28 shall be used.

2.1.2 The startup procedures shall be the same as in Method 28.

2.1.3 The equation for converting the emission test values between the EPA Reference Method 5G “Determination of Particulate Emissions From Wood Heaters From a Dilution Tunnel Sampling Location”

and EPA Reference Method 5H “Determination of Particulate Emissions From Wood Heaters From a Stack Location” shall be the same as in Method 28.

2.1.4 Manufacturers shall not specify a smaller volume of the firebox for testing than the full usable firebox.

2.1.5 The test fuel moisture content, fuel load, and coal bed depth shall be as follows:

(a) The fuel load dry-basis moisture content shall be within a range of 22.5 percent  $\pm$  1 percent;

(b) The fuel load weight shall be 7 lb/ft<sup>3</sup>  $\pm$  1 percent (or 7 lb  $\pm$  0.07 lb) of the fuel load weight, calculated in accordance with Method 28; and

(c) The range for the test-initiation coal-bed weight shall be 22 percent  $\pm$  1 percent of the fuel load weight.

#### **Test Method 28 WHH for Measurement of Particulate Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances**

##### **1.0 Scope and Application**

1.1 This test method applies to wood-fired hydronic heating appliances. The units typically transfer heat through circulation of a liquid heat exchange media such as water or a water-antifreeze mixture.

1.2 The test method measures particulate emissions and delivered heating efficiency at specified heat output rates based on the appliance's rated heating capacity.

1.3 Particulate emissions are measured by the dilution tunnel method as specified in ASTM E2515–10 *Standard Test Method for Determination of Particulate Matter Emissions Collected in a Dilution Tunnel*.

Delivered Efficiency is measured by determining the heat output through measurement of the flow rate and temperature change of water circulated through a heat exchanger external to the appliance and determining the input from the mass of dry wood fuel and its higher heating value. Delivered efficiency does not attempt to account for pipeline loss.

1.4 Products covered by this test method include both pressurized and non-pressurized heating appliances intended to be fired with wood. These products are wood-fired hydronic heating appliances that the manufacturer specifies for indoor or outdoor installation. They are often connected to a heat exchanger by insulated pipes and normally include a pump to circulate heated liquid. They are used to heat structures such as homes, barns and greenhouses and can heat domestic hot water, spas or swimming pools.

1.5 Distinguishing features of products covered by this standard include:

1.5.1 Manufacturer specifies for indoor or outdoor installation.

1.5.2 A firebox with an access door for hand loading of fuel.

1.5.3 Typically an aquastat that controls combustion air supply to maintain the liquid in the appliance within a predetermined temperature range provided sufficient fuel is available in the firebox.

1.5.4 A chimney or vent that exhausts combustion products from the appliance.

1.6 The values stated are to be regarded as the standard whether in I–P or SI units. The

values given in parentheses are for information only.

## 2.0 Summary of Method and References

2.1 Particulate matter emissions are measured from a wood-fired hydronic heating appliance burning a prepared test fuel crib in a test facility maintained at a set of prescribed conditions. Procedures for determining burn rates, and particulate emissions rates and for reducing data are provided.

### 2.2 Referenced Documents

#### 2.2.1 EPA Standards

##### 2.2.1.1 Method 28 Certification and Auditing of Wood Heaters

##### 2.2.2 Other Standards

2.2.2.1 ASTM E2515–10 *Standard Test Method for Determination of Particulate Matter Emissions Collected in a Dilution Tunnel*.

2.2.2.2 CAN/CSA–B415.1–2010 *Performance Testing of Solid-Fuel-Burning Heating Appliances*.

## 3.0 Terminology

### 3.1 Definitions

3.1.1 Hydronic Heating—A heating system in which a heat source supplies energy to a liquid heat exchange media such as water that is circulated to a heating load and returned to the heat source through pipes.

3.1.2 Aquastat—A control device that opens or closes a circuit to control the rate of fuel consumption in response to the temperature of the heating media in the heating appliance.

3.1.3 Delivered Efficiency—The percentage of heat available in a test fuel charge that is delivered to a simulated heating load as specified in this test method.

3.1.4 Manufacturer's Rated Heat Output Capacity—The value in BTU/hr (MJ/hr) that the manufacturer specifies that a particular model of hydronic heating appliance is capable of supplying at its design capacity as verified by testing, in accordance with Section 13.

3.1.5 Burn rate—The rate at which test fuel is consumed in an appliance. Measured in pounds (lbs) of wood (dry basis) per hour (kg/hr).

3.1.6 Firebox—The chamber in the appliance in which the test fuel charge is placed and combusted.

3.1.7 Test fuel charge—The collection of Test Fuel layers placed in the appliance at the start of the emission test run.

3.1.8 Test Fuel Layer—Horizontal arrangement of Test Fuel Units.

3.1.9 Test Fuel Unit—One or more Test Fuel Pieces with 3/4 inch (19 mm) spacers attached to the bottom and to one side. If composed of multiple Test Fuel Pieces, the bottom spacer may be one continuous piece.

3.1.10 Test Fuel Piece—A single 4 x 4 (4 ± 0.25 inches by 4 ± 0.25 inches)[100 ± 6 mm by 100 ± 6 mm] white or red oak wood piece cut to the length required.

3.1.11 Test Run—An individual emission test that encompasses the time required to consume the mass of the test fuel charge.

3.1.12 Overall Efficiency (SLM)—The efficiency for each test run as determined using the CSA B415.1–2010 Stack Loss Method.

3.1.13 Thermopile—A device consisting of a number of thermocouples connected in series, used for measuring differential temperature.

## 4.0 Summary of Test Method

4.1 Dilution Tunnel. Emissions are determined using the “dilution tunnel” method specified in ASTM E2515 *Standard Test Method for Determination of Particulate Matter Emissions Collected in a Dilution Tunnel*. The flow rate in the dilution tunnel is maintained at a constant level throughout the test cycle and accurately measured.

Samples of the dilution tunnel flow stream are extracted at a constant flow rate and drawn through high efficiency filters. The filters are dried and weighed before and after the test to determine the emissions catch and this value is multiplied by the ratio of tunnel flow to filter flow to determine the total particulate emissions produced in the test cycle.

4.2 Efficiency. The efficiency test procedure takes advantage of the fact that this type of appliance delivers heat through circulation of the heated liquid (water) from the appliance to a remote heat exchanger and back to the appliance. Measurements of the water temperature difference as it enters and exits the heat exchanger along with the measured flow rate allow for an accurate determination of the useful heat output of the appliance. The input is determined by weight of the test fuel charge, adjusted for moisture content, multiplied by the Higher Heating Value. Additional measurements of the appliance weight and temperature at the beginning and end of a test cycle are used to correct for heat stored in the appliance. Overall Efficiency (SLM) is determined using the CSA B415.1–2010 stack loss method for data quality assurance purposes.

4.3 Operation. Appliance operation is conducted on a hot-to-hot test cycle meaning that the appliance is brought to operating temperature and a coal bed is established prior to the addition of the test fuel charge and measurements are made for each test fuel charge cycle. The measurements are made under constant heat draw conditions within predetermined ranges. No attempt is made to modulate the heat demand to simulate an indoor thermostat cycling on and off in response to changes in the indoor environment. Four test categories are used. These are:

4.3.1 Category I: A heat output of 15 percent or less of Manufacturer's Rated Heat Output Capacity.

4.3.2 Category II: A heat output of 16 percent to 24 percent of Manufacturer's Rated Heat Output Capacity.

4.3.3 Category III: A heat output of 25 percent to 50 percent of Manufacturer's Rated Heat Output Capacity.

4.3.4 Category IV: Manufacturer's Rated Heat Output Capacity.

## 5.0 Significance and Use

5.1 The measurement of particulate matter emission rates is an important test method widely used in the practice of air pollution control.

5.1.1 These measurements, when approved by state or federal agencies, are

often required for the purpose of determining compliance with regulations and statutes.

5.1.2 The measurements made before and after design modifications are necessary to demonstrate the effectiveness of design changes in reducing emissions and make this standard an important tool in manufacturers' research and development programs.

5.2 Measurement of heating efficiency provides a uniform basis for comparison of product performance that is useful to the consumer. It is also required to relate emissions produced to the useful heat production.

5.3 This is a laboratory method and is not intended to be fully representative of all actual field use. It is recognized that users of hand-fired, wood-burning equipment have a great deal of influence over the performance of any wood-burning appliance. Some compromises in realism have been made in the interest of providing a reliable and repeatable test method.

## 6.0 Test Equipment

6.1 Scale. A platform scale capable of weighing the appliance under test and associated parts and accessories when completely filled with water to an accuracy of ±1.0 pound (±0.5 kg).

6.2 Heat exchanger. A water-to-water heat exchanger capable of dissipating the expected heat output from the system under test.

6.3 Water Temperature Difference Measurement. A Type-T ‘special limits’ thermopile with a minimum of 5 pairs of junctions shall be used to measure the temperature difference in water entering and leaving the heat exchanger. The temperature difference measurement uncertainty of this type of thermopile is equal to or less than ± 0.05 °F (± 0.25 °C). Other temperature measurement methods may be used if the temperature difference measurement uncertainty is equal to or less than, ± 0.50 °F (± 0.25 °C).

6.4 Water flow meter. A water flow meter shall be installed in the inlet to the load side of the heat exchanger. The flow meter shall have an accuracy of ± 1 percent of measured flow.

6.4.1 Optional—Appliance side water flow meter. A water flow meter with an accuracy of ± 1 percent of the flow rate is recommended to monitor supply side water flow rate.

6.5 Optional Recirculation Pump. Circulating pump used during test to prevent stratification of liquid being heated.

6.6 Water Temperature Measurement—Thermocouples or other temperature sensors to measure the water temperature at the inlet and outlet of the load side of the heat exchanger. Must meet the calibration requirements specified in 10.1.

6.7 Wood Moisture Meter—Calibrated electrical resistance meter capable of measuring test fuel moisture to within 1 percent moisture content. Must meet the calibration requirements specified in 10.4.

6.8 Flue Gas Temperature Measurement—Must meet the requirements of CSA B415.1–2010, Clause 6.2.2.

6.9 Test Room Temperature Measurement—Must meet the requirements of CSA B415.1–2010, Clause 6.2.1.

6.10 Flue Gas Composition Measurement—Must meet the requirements of CSA B415.1–2010, Clauses 6.3.1 through 6.3.3.

## 7.0 Safety

7.1 These tests involve combustion of wood fuel and substantial release of heat and products of combustion. The heating system also produces large quantities of very hot water and the potential for steam production and system pressurization. Appropriate precautions must be taken to protect personnel from burn hazards and respiration of products of combustion.

## 8.0 Sampling, Test Specimens and Test Appliances

8.1 Test specimens shall be supplied as complete appliances including all controls and accessories necessary for installation in the test facility. A full set of specifications and design and assembly drawings shall be provided when the product is to be placed under certification of a third-party agency. The manufacturer's written installation and operating instructions are to be used as a guide in the set-up and testing of the appliance.

## 9.0 Preparation of Test Equipment

9.1 The appliance is to be placed on a scale capable of weighing the appliance fully loaded with a resolution of  $\pm 1.0$  lb (0.5 kg).

9.2 The appliance shall be fitted with the type of chimney recommended or provided by the manufacturer and extending to  $15 \pm 0.5$  feet ( $4.6 \pm 0.15$  m) from the upper surface of the scale. If no flue or chimney system is recommended or provided by the manufacturer, connect the appliance to a flue of a diameter equal to the flue outlet of the appliance. The flue section from the appliance flue collar to  $8 \pm 0.5$  feet above the scale shall be single wall stove pipe and the remainder of the flue shall be double wall insulated class A chimney.

### 9.3 Optional Equipment Use

9.3.1 A recirculation pump may be installed between connections at the top and bottom of the appliance to minimize thermal stratification if specified by the manufacturer. The pump shall not be installed in such a way as to change or affect the flow rate between the appliance and the heat exchanger.

9.3.2 If the manufacturer specifies that a thermal control valve or other device be installed and set to control the return water temperature to a specific set point, the valve or other device shall be installed and set per the manufacturer's written instructions.

9.4 Prior to filling the tank, weigh and record the appliance mass.

### 9.5 Heat Exchanger

9.5.1 Plumb the unit to a water-to-water heat exchanger with sufficient capacity to draw off heat at the maximum rate anticipated. Route hoses, electrical cables, and instrument wires in a manner that does not influence the weighing accuracy of the scale as indicated by placing dead weights on the platform and verifying the scale's accuracy.

9.5.2 Locate thermocouples to measure the water temperature at the inlet and outlet of the load side of the heat exchanger.

9.5.3 Install a thermopile meeting the requirements of 6.3 to measure the water temperature difference between the inlet and outlet of the load side of the heat exchanger.

9.5.4 Install a calibrated water flow meter in the heat exchanger load side supply line. The water flow meter is to be installed on the cooling water inlet side of the heat exchanger so that it will operate at the temperature at which it is calibrated.

9.5.5 Place the heat exchanger in a box with 2 in. (50 mm) of expanded polystyrene (EPS) foam insulation surrounding it to minimize heat losses from the heat exchanger.

9.5.6 The reported efficiency and heat output rate shall be based on measurements made on the load side of the heat exchanger.

9.5.7 Temperature instrumentation per 6.6 shall be installed in the appliance outlet and return lines. The average of the outlet and return water temperature on the supply side of the system shall be considered the average appliance temperature for calculation of heat storage in the appliance ( $TF_{avg}$  and  $TI_{avg}$ ). Installation of a water flow meter in the supply side of the system is optional.

9.6 Fill the system with water. Determine the total weight of the water in the appliance when the water is circulating. Verify that the scale indicates a stable weight under operating conditions. Make sure air is purged properly.

## 10.0 Calibration and Standardization

10.1 Water Temperature Sensors. Temperature measuring equipment shall be calibrated before initial use and at least semi-annually thereafter. Calibrations shall be in compliance with National Institute of Standards and Technology (NIST) Monograph 175, Standard Limits of Error. 10.2 Heat Exchanger Load Side Water Flow Meter.

10.2.1 The heat exchanger load side water flow meter shall be calibrated within the flow range used for the test run using NIST Traceable methods. Verify the calibration of the water flow meter before and after each test run and at least once during each test run by comparing the water flow rate indicated by the flow meter to the mass of water collected from the outlet of the heat exchanger over a timed interval. Volume of the collected water shall be determined based on the water density calculated from section 13, Eq. 8, using the water temperature measured at the flow meter. The uncertainty in the verification procedure used shall be 1 percent or less. The water flow rate determined by the collection and weighing method shall be within 1 percent of the flow rate indicated by the water flow meter.

10.3 Scales. The scales used to weigh the appliance and test fuel charge shall be calibrated using NIST Traceable methods at least once every 6 months.

10.4 Moisture Meter. The moisture meter shall be calibrated per the manufacturer's instructions and checked before each use.

10.5 Flue Gas Analyzers—In accordance with CSA B415.1–2010, Clause 6.8.

## 11.0 Conditioning

11.1 Prior to testing, the noncatalytic appliance is to be operated for a minimum

of 10 hours using a medium heat draw rate. Catalytic units shall be operated for a minimum of 50 hours using a medium heat draw rate. The pre-burn for the first test can be included as part of the conditioning requirement. If conditioning is included in pre-burn, then the appliance shall be aged with fuel meeting the specifications outlined in sections 12.2 with a moisture content between 19 and 25 percent on a dry basis. Operate the appliance at a medium burn rate (Category II or III) for at least 10 hours for noncatalytic appliances and 50 hours for catalytic appliances. Record and report hourly flue gas exit temperature data and the hours of operation. The aging procedure shall be conducted and documented by a testing laboratory.

## 12.0 Procedure

12.1 Appliance Installation. Assemble the appliance and parts in conformance with the manufacturer's written installation instructions. Clean the flue with an appropriately sized, wire chimney brush before each certification test series.

12.2 Fuel. Test fuel charge fuel shall be red (*Quercus ruba L.*) or white (*Quercus alba*) oak 19 to 25 percent moisture content on a dry basis. Piece length shall be 80 percent of the firebox depth rounded down to the nearest 1 inch (25mm) increment. For example, if the firebox depth is 46 inches (1168mm) the  $4 \times 4$  piece length would be 36 inches ( $46 \text{ inches} \times 0.8 = 36.8 \text{ inches}$  round down to 36 inches). Pieces are to be placed in the firebox parallel to the longest firebox dimension. For fireboxes with sloped surfaces that create a non-uniform firebox length, the piece length shall be adjusted for each layer based on 80 percent of the length at the level where the layer is placed. Pieces are to be spaced  $\frac{3}{4}$  inches (19 mm) apart on all faces. The first fuel layer may be assembled using fuel units consisting of multiple  $4 \times 4$ s consisting of single pieces with bottom and side spacers of 3 or more pieces if needed for a stable layer. The second layer may consist of fuel units consisting of no more than two pieces with spacers attached on the bottom and side. The top two layers of the fuel charge must consist of single pieces unless the fuel charge is only three layers. In that instance only the top layer must consist of single units. Three-quarter inch (19 mm) by 1.5 inch (38 mm) spacers shall be attached to the bottom of piece to maintain a  $\frac{3}{4}$  inch (19 mm) separation. When a layer consists of two or more units of  $4 \times 4$ s an additional  $\frac{3}{4}$  inch (19 mm) thick by 1.5 inch (38 mm) wide spacer shall be attached to the vertical face of each end of one  $4 \times 4$ , such that the  $\frac{3}{4}$  inch (19 mm) space will be maintained when two  $4 \times 4$  units or pieces are loaded side by side. In cases where a layer contains an odd number of  $4 \times 4$ s one piece shall not be attached, but shall have spacers attached in a manner that will provide for the  $\frac{3}{4}$  inch (19 mm) space to be maintained. (See Figure 1). Spacers shall be attached perpendicular to the length of the  $4 \times 4$ s such that the edge of the spacer is  $1 \pm 0.25$  inch from the end of the  $4 \times 4$ s in the previous layers. Spacers shall be red or white oak and will be attached with either nails (non-galvanized), brads or

oak dowels. The use of kiln-dried wood is not allowed.

12.2.1 Using a fuel moisture meter as specified in 6.7 of the test method, determine the fuel moisture for each test fuel piece used for the test fuel load by averaging at least five fuel moisture meter readings measured parallel to the wood grain. Penetration of the moisture meter insulated electrodes for all readings shall be  $\frac{1}{4}$  the thickness of the fuel piece or 19 mm ( $\frac{3}{4}$  in.), whichever is lesser. One measurement from each of three sides shall be made at approximately 3 inches from each end and the center. Two additional measurements shall be made centered between the other three locations. Each individual moisture content reading shall be in the range of 18 to 28 percent on a dry basis. The average moisture content of each piece of test fuel shall be in the range of 19 to 25 percent. It is not required to measure the moisture content of the spacers. Moisture shall not be added to previously dried fuel pieces except by storage under high humidity conditions and temperature up to 100 °F. Fuel moisture shall be measured within four hours of using the fuel for a test.

12.2.2 Firebox Volume. Determine the firebox volume in cubic feet. Firebox volume shall include all areas accessible through the fuel loading door where firewood could reasonably be placed up to the horizontal plane defined by the top of the loading door. A drawing of the firebox showing front, side and plan views or an isometric view with interior dimensions shall be provided by the manufacturer and verified by the laboratory. Calculations for firebox volume from computer aided design (CAD) software programs are acceptable and shall be included in the test report if used. If the firebox volume is calculated by the laboratory the firebox drawings and calculations shall be included in the test report.

12.2.3 Test Fuel charge. Test fuel charges shall be determined by multiplying the firebox volume by 10 pounds (4.54 kg) per ft<sup>3</sup> (28L), or a higher load density as recommended by the manufacturer's printed operating instructions, of wood (as used wet weight). Select the number of pieces of standard fuel that most nearly match this target weight. This is the standard fuel charge for all tests. For example, if the firebox loading area volume is 10 ft<sup>3</sup> (280L) and the firebox depth is 46 inches (1168 mm), test fuel charge target is 100 lbs (45 kg) minimum and the piece length is 36 inches (914 mm). If 8-4 × 4s, 36 inches long weigh 105 lbs (48 kg), use 8 pieces for each test fuel charge. All test fuel charges will be of the same configuration.

12.3 Sampling Equipment. Prepare the particulate emission sampling equipment as defined by ASTM E2515-10 "Standard Test Method For Determination of Particulate Matter Emissions Collected In a Dilution Tunnel."

12.4 Appliance Startup. The appliance shall be fired with wood fuel of any species, size and moisture content at the laboratories discretion to bring it up to operating temperature. Operate the appliance until the water is heated to the upper operating control limit and has cycled at least two times. Then

remove all unburned fuel, zero the scale and verify the scales accuracy using dead weights.

12.4.1 Pre-Test Burn Cycle. Reload appliance with oak wood and allow it to burn down to the specified coal bed weight. The Pre-Test burn cycle fuel charge weight shall be within  $\pm 10$  percent of the test fuel charge weight. Piece size and length shall be selected such that charcoaling is achieved by the time the fuel charge has burned down to the required coal bed weight. Pieces with a maximum thickness of approximately 2 inches have been found to be suitable. Charcoaling is a general condition of the test fuel bed evidenced by an absence of large pieces of burning wood in the coal bed and the remaining fuel pieces being brittle enough to be broken into smaller charcoal pieces with a metal poker. Manipulations to the fuel bed prior to the start of the test run are to be done to achieve charcoaling while maintaining the desired heat output rate. During the pre-test burn cycle and at least one hour prior to starting the test run, adjust water flow to the heat exchanger to establish the target heat draw for the test. For the first test run the heat draw rate shall be equal to the manufacturer's rated heat output capacity.

12.4.1.1 Allowable Adjustments. Fuel addition or subtractions, and coal bed raking shall be kept to a minimum but are allowed up to 15 minutes prior to the start of the test run. For the purposes of this method, coal bed raking is the use of a metal tool (poker) to stir coals, break burning fuel into smaller pieces, dislodge fuel pieces from positions of poor combustion, and check for the condition of charcoaling. Record all adjustments to and additions or subtractions of fuel, and any other changes to the appliance operations that occur during pretest ignition period. During the 15-minute period prior to the start of the test run, the wood heater loading door shall not be open more than a total of 1 minute. Coal bed raking is the only adjustment allowed during this period.

12.4.2 Coal Bed Weight. The appliance is to be loaded with the test fuel charge when the coal bed weight is between 10 percent and 20 percent of the test fuel charge weight. Coals may be raked as necessary to level the coal bed but may only be raked and stirred once between 15 to 20 minutes prior to the addition of the test fuel charge.

12.5 Test Runs. For all test runs, the return water temperature to the hydronic heater must be equal to or greater than 120 °F. Aquastat or other heater output control device settings that are adjustable shall be set using manufacturer specifications, either as factory set or in accordance with the owner's manual, and shall remain the same for all burn categories.

Complete a test run in each heat output rate category, as follows:

12.5.1 Test Run Start. Once the appliance is operating normally and the pretest coal bed weight has reached the target value per 12.4.2, tare the scale and load the full test charge into the appliance. Time for loading shall not exceed 5 minutes. The actual weight of the test fuel charge shall be measured and recorded within 30 minutes prior to loading. Start all sampling systems.

12.5.1.1 Record all water temperatures, differential water temperatures and water flow rates at time intervals of one minute or less.

12.5.1.2 Record particulate emissions data per the requirements of ASTM E2515.

12.5.1.3 Record data needed to determine Overall Efficiency (SLM) per the requirements of CSA B415.1-2010 Clauses 6.2.1, 6.2.2, 6.3, 8.5.7, 10.4.3(a), 10.4.3(f), and 13.7.9.3.

12.5.1.3.1 Measure and record the test room air temperature in accordance with the requirements of Clauses 6.2.1, 8.5.7 and 10.4.3(g).

12.5.1.3.2 Measure and record the flue gas temperature in accordance with the requirements of Clauses 6.2.2, 8.5.7 and 10.4.3(f).

12.5.1.3.3 Determine and record the Carbon Monoxide (CO) and Carbon Dioxide (CO<sub>2</sub>) concentrations in the flue gas in accordance with Clauses 6.3, 8.5.7 and 10.4.3(i) and (j).

12.5.1.3.4 Measure and record the test fuel weight per the requirements of Clauses 8.5.7 and 10.4.3(h).

12.5.1.3.5 Record the test run time per the requirements of Clause 10.4.3(a).

12.5.1.4 Monitor the average heat output rate on the load side of the heat exchanger. If the heat output rate gets close to the upper or lower limit of the target range ( $\pm 5$  percent) adjust the water flow through the heat exchanger to compensate. Make changes as infrequently as possible while maintaining the target heat output rate. The first test run shall be conducted at the category IV heat output rate to validate that the appliance is capable of producing the manufacturer's rated heat output capacity.

12.5.2 Test Fuel Charge Adjustment. It is acceptable to adjust the test fuel charge (*i.e.*, reposition) once during a test run if more than 60 percent of the initial test fuel charge weight has been consumed and more than 10 minutes have elapsed without a measurable (1 lb or 0.5 kg) weight change while the operating control is in the demand mode. The time used to make this adjustment shall be less than 60 seconds.

12.5.3 Test Run Completion. The test run is completed when the remaining weight of the test fuel charge is 0.0 lb (0.0 kg). End the test run when the scale has indicated a test fuel charge weight of 0.0 lb (0.0 kg) or less for 30 seconds.

12.5.3.1 At the end of the test run, stop the particulate sampling train and Overall Efficiency (SLM) measurements, and record the run time, and all final measurement values.

12.5.4 Heat Output Capacity Validation. The first test run must produce a heat output rate that is within 10 percent of the manufacturer's rated heat output capacity (Category IV) throughout the test run and an average heat output rate within 5 percent of the manufacturer's rated heat output capacity. If the appliance is not capable of producing a heat output within these limits, the manufacturer's rated heat output capacity is considered not validated and testing is to be terminated. In such cases, the tests may be restarted using a lower heat output capacity if requested by the manufacturer.

12.5.5 Additional Test Runs. Using the Manufacturer's Rated Heat Output Capacity as a basis, conduct a test for additional heat output categories as specified in 4.3. It is not required to run these tests in any particular order.

12.5.6 Alternative Heat Output Rate for Category I. If an appliance cannot be operated in the category I heat output range due to stopped combustion, two test runs shall be conducted at heat output rates within Category II. When this is the case, the weightings for the weighted averages indicated in Table 2 shall be the average of the category I and II weightings and shall be applied to both category II results. Appliances that are not capable of operation within Category II (<25 percent of maximum) cannot be evaluated by this test method.

12.5.6.1 Stopped Fuel Combustion. Evidence that an appliance cannot be operated at a category I heat output rate due to stopped fuel combustion shall include documentation of two or more attempts to operate the appliance in burn rate Category I and fuel combustion has stopped prior to complete consumption of the test fuel charge. Stopped fuel combustion is evidenced when an elapsed time of 60 minutes or more has occurred without a measurable (1 lb or 0.5 kg) weight change in the test fuel charge while the appliance operating control is in the demand mode. Report the evidence and the reasoning used to determine that a test in burn rate Category I cannot be achieved. For example, two unsuccessful attempts to operate at an output rate of 10 percent of the rated output capacity are not sufficient evidence that burn rate Category I cannot be achieved.

12.5.7 Appliance Overheating. Appliances shall be capable of operating in all heat output categories without overheating to be rated by this test method. Appliance overheating occurs when the rate of heat withdrawal from the appliance is lower than the rate of heat production when the unit control is in the idle mode. This condition results in the water in the appliance continuing to increase in temperature well above the upper limit setting of the operating control. Evidence of overheating includes: 1 Hour or more of appliance water temperature increase above the upper temperature set-point of the operating control, exceeding the temperature limit of a safety control device (independent from the operating control), boiling water in a non-pressurized system or activation of a pressure or temperature relief valve in a pressurized system.

12.6 Additional Test Runs. The testing laboratory may conduct more than one test run in each of the heat output categories specified in section 4.4.1. If more than one test run is conducted at a specified heat output rate, the results from at least two-thirds of the test runs in that heat output rate category shall be used in calculating the weighted average emission rate (See section 15.1.14). The measurement data and results of all test runs shall be reported regardless of which values are used in calculating the weighted average emission rate.

### 13.0 Calculation of Results

#### 13.1 Nomenclature

$E_T$ —Total particulate emissions for the full test run as determined per ASTM E2515 in grams.

$E_g/MJ$ —Emissions rate in grams per mega joule of heat output.

$E_{lb/mmBtu\ output}$ —Emissions rate in pounds per million Btu's of heat output.

$E_g/kg$ —Emissions factor in grams per kilogram of dry fuel burned.

$E_g/hr$ —Emissions factor in grams per hour.

HHV—Higher Heating Value of fuel = 8600 Btu/lb (19.990 MJ/kg).

LHV—Lower Heating Value of fuel = 7988 Btu/lb (18.567 MJ/kg).

$\Delta T$ —Temperature difference between water entering and exiting the heat exchanger.

$Q_{out}$ —Total heat output in BTU's (mega joules).

$Q_{in}$ —Total heat input available in test fuel charge in BTU's (mega joules).

$M$ —Mass flow rate of water in lb/min (kg/min).

$V_i$ —Volume of water indicated by a totalizing flow meter at the  $i$ th reading in gallons (liters).

$V_f$ —Volumetric Flow rate of water in heat exchange system in gallons per minute (liters/min).

$\Theta$ —Total length of test run in hours

$t_i$ —Data sampling interval in minutes.

$\eta_{del}$ —Delivered heating efficiency in percent.

$F_i$ —Weighting factor for heat output category  $i$ . (See Tables 2A and 2B)

$T_1$ —Temperature of water at the inlet on the supply side of the heat exchanger.

$T_2$ —Temperature of the water at the outlet on the supply side of the heat exchanger.

$T_3$ —Temperature of water at the inlet on the load side of the heat exchanger.

$T_{avg}$ —Average temperature of the appliance and water at start of the test.

$$T_{I_{avg}} = (T_1 + T_2)/2 \text{ at the start of the test, } ^\circ\text{F} \quad \text{Eq. 1}$$

$T_{F_{avg}}$ —Average temperature of the appliance and water at the end of the test.

$$T_{F_{avg}} = (T_1 + T_2)/2 \text{ at the end of the test, } ^\circ\text{F} \quad \text{Eq. 2}$$

MC—Fuel moisture content in percent dry basis.

$MC_i$ —Average moisture content of individual  $4 \times 4$  fuel pieces in percent dry basis.

$MC_{sp}$ —Moisture content of spacers assumed to be 10 percent dry basis.

$\sigma$ —Density of water in pounds per gallon.

$C_p$ —Specific Heat of Water in Btu/lb  $^\circ\text{F}$ .

$C_{steel}$ —Specific Heat of Steel (0.1 Btu/lb  $^\circ\text{F}$ ).

$W_{fuel}$ —Fuel charge weight in pounds (kg).

$W_i$ —Weight of individual fuel  $4 \times 4$  pieces in pounds (kg).

$W_{sp}$ —Weight of all spacers used in a fuel load in pounds (kg).

$W_{app}$ —Weight of empty appliance in pounds.

$W_{wat}$ —Weight of water in supply side of the system in pounds.

13.2 After the test is completed, determine the particulate emissions  $E_T$  in accordance with ASTM E2515.

#### 13.3 Determine Average Fuel Load Moisture Content

$$MC_{Ave} = [ [ \sum W_i \times MC_i ] + [ W_{sp} \times MC_{sp} ] ] \div W_{fuel}, \% \quad \text{Eq. 3}$$

### 13.4 Determine heat input

$$Q_{in} = (W_{fuel}/(1+(MC/100))) \times HHV, \text{ BTU} \quad \text{Eq. 4}$$

$$Q_{in\ LHV} = (W_{fuel}/(1+(MC/100))) \times LHV, \text{ BTU} \quad \text{Eq. 5}$$

13.5 Determine heat output and efficiency.

13.5.1 Determine heat output as:

$Q_{out} = \Sigma$  [Heat output determined for each sampling time interval]+ Change in heat stored in the appliance.

$$Q_{out} = \left[ \sum (C_{pi} \cdot \Delta T_i \cdot \dot{M}_i \cdot t_i) \right] + (W_{app} \cdot C_{Steel} + C_{pa} W_{water}) \cdot (TF_{avg} - TI_{avg}), \text{ BTU Eq. 6}$$

Note: The subscript (i) indicates the parameter value for sampling time interval  $t_i$ .

$M_i$  = Mass flow rate = gal/min x Density of Water (lb/gal) = lb/min

$$M_i = V_{fi} \cdot \sigma_i, \text{ lb/min Eq. 7}$$

$$\Sigma_i = (62.56 + (-.0003413 \times T_{3i}) + (-.00006225 \times T_{3i}^2)) 0.1337, \text{ lbs/gal Eq. 8}$$

$$C_p = 1.0014 + (-.000003485 \times T_{3i}) \text{ Btu/lb-}^\circ\text{F Eq. 9}$$

$$C_{steel} = 0.1 \text{ Btu/lb-}^\circ\text{F}$$

$$C_{pa} = 1.0014 + (-.000003485 \times (TI_{avg} + TF_{avg})/2), \text{ Btu/lb-}^\circ\text{F Eq. 10}$$

$$V_{fi} = (V_i - V_{i-1}) / (t_i - t_{i-1}), \text{ gal/min Eq. 11}$$

Note:  $V_i$  is the total water volume at the end of interval  $i$  and  $V_{i-1}$  is the total water volume at the beginning of the time interval. This calculation is necessary when a totalizing type water meter is used.

13.5.2 Determine Heat output rate as:

$$\text{Heat Output Rate} = Q_{out} / \Theta, \text{ BTU/hr Eq. 12}$$

13.5.3 Determine Emission Rates and Emission Factors as:

$$E_{g/MJ} = E_T / (Q_{out} \times 0.001055), \text{ g/MJ Eq. 13}$$

$$E_{lb/MMBTU \text{ output}} = (E_T / 453.59) / (Q_{output} \times 10^{-6}), \text{ lb/MMBtu Out Eq. 14}$$

$$E_{g/kg} = E_T / (W_{fuel} / (1 + MC/100)), \text{ g/dry kg Eq. 15}$$

$$E_{g/hr} = E_T / \Theta, \text{ g/hr Eq. 16}$$

13.5.4 Determine delivered efficiency as:

$$\eta_{del} = (Q_{out} / Q_{in}) \times 100, \% \text{ Eq. 17}$$

$$\eta_{del \text{ LHV}} = (Q_{out} / Q_{in \text{ LHV}}) \times 100, \% \text{ Eq. 18}$$

13.5.5 Determine  $\eta_{SLM}$ —Overall Efficiency (SLM) using Stack Loss For determination of the average overall thermal efficiency ( $\eta_{SLM}$ ) for the test run, use the data collected over the full test run and the calculations in accordance with CSA B415.1–2010, Clause 13.7 except for 13.7.2 (e), (f), (g), and (h), use the following average fuel properties for oak: percent C = 50.0, percent H = 6.6, percent O = 43.2, percent Ash = 0.2 percent.

13.5.5.1 Whenever the CSA B415.1–2010 overall efficiency is found to be lower than the overall efficiency based on load side measurements, as determined by Eq. 16 of this method, section 14.1.7 of the test report must include a discussion of the reasons for this result.

13.6 Weighted Average Emissions and Efficiency

13.6.1 Determine the weighted average emission rate and delivered efficiency from

the individual tests in the specified heat output categories. The weighting factors ( $F_i$ ) are derived from an analysis of ASHRAE Bin Data which provides details of normal building heating requirements in terms of percent of design capacity and time in a particular capacity range—or “bin”—over the course of a heating season. The values used in this method represent an average of data from several cities located in the northern United States.

$$\text{Weighted average delivered efficiency: } \eta_{avg} = \sum \eta_i \times F_i, \% \quad \text{Eq. 17}$$

$$\text{Weighted average emissions: } E_{avg} = \sum E_i \times F_i, \% \quad \text{Eq. 18}$$

13.7 Average Heat Output ( $Q_{out-8hr}$ ) and Efficiency ( $\eta_{avg-8hr}$ ) for 8 hour burn time.

13.7.1 Units tested under this standard typically require infrequent fuelling, 8 to 12

hours intervals being typical. Rating unit's based on an Average Output sustainable over an 8 hour duration will assist consumers in

appropriately sizing units to match the theoretical heat demand of their application.

13.7.2 Calculations:

$$Q_{out-8hr} = X1 + \{ (8 - Y1) \times [ (X2 - X1) / (Y2 - Y1) ] \}, \% \quad \text{Eq. 19}$$

$$\eta_{avg-8hr} = \eta_{del1} + \{ (8 - Y1) \times [ (\eta_{del2} - \eta_{del1}) / (Y2 - Y1) ] \}, \% \quad \text{Eq. 20}$$

Where:

- Y1 = Test Duration just above 8 hrs
- Y2 = Test Duration just below 8 hrs
- X1 = Actual Load for duration Y1
- X2 = Actual Load for duration Y2

$\eta_{del1}$  = Average Delivered Efficiency for duration Y1

$\eta_{del2}$  = Average Delivered Efficiency for duration Y2

13.7.2.1 Determine the Test Durations and Actual Load for each Category as recorded in Table 1A.

13.7.2.2 Determine the data point that has the nearest duration greater than 8 hrs. X1 = Actual Load,

Y1 = Test Duration and  $\eta_{del1}$  = Average Delivered Efficiency for this data point.

13.7.2.3 Determine the data point that has the nearest duration less than 8 hrs.

X2 = Actual Load, Y2 = Test Duration and  $\eta_{del2}$  = Average Delivered Efficiency for this data point.

13.7.2.4 Example:

**CATEGORY ACTUAL LOAD DURATION**  
[Category Actual Load Duration  $\eta_{del}$ ]

	(Btu/Hr)	(Hr)	(%)
1	15,000 .....	10.2	70.0
2	26,000 .....	8.4	75.5
3	50,000 .....	6.4	80.1
4	100,000 .....	4.7	80.9

Category 2 Duration is just above 8 hours, therefore: X1 = 26,000 BTU/hr,  $\eta_{del1}$  = 75.5% and Y1 = 8.4 Hrs

Category 3 Duration is just below 8 hours, therefore: X2 = 50,000 BTU/hr,  $\eta_{del2}$  = 80.1% and Y2 = 6.4 Hrs

$$Q_{out-8hr} = 26,000 + \{ (8 - 8.4) \times [(50,000 - 26,000) / (6.4 - 8.4)] \}$$

$$= 30,800 \text{ BTU/hr}$$

$$\eta_{avg-8hr} = 75.5 + \{ (8 - 8.4) \times [(80.1 - 75.5) / (6.4 - 8.4)] \} = 76.4\%$$

**14.0 Report**

14.1.1 The report shall include the following.

14.1.2 Name and location of the laboratory conducting the test.

14.1.3 A description of the appliance tested and its condition, date of receipt and dates of tests.

14.1.4 A statement that the test results apply only to the specific appliance tested.

14.1.5 A statement that the test report shall not be reproduced except in full, without the written approval of the laboratory.

14.1.6 A description of the test procedures and test equipment including a schematic or other drawing showing the location of all required test equipment. Also, a description of test fuel sourcing, handling and storage practices shall be included.

14.1.7 Details of deviations from, additions to or exclusions from the test method, and their data quality implications on the test results (if any), as well as information on specific test conditions, such as environmental conditions.

14.1.8 A list of participants and observers present for the tests.

14.1.9 Data and drawings indicating the fire box size and location of the fuel charge.

14.1.10 Drawings and calculations used to determine firebox volume.

14.1.11 Information for each test run fuel charge including piece size, moisture content, and weight.

14.1.12 All required data for each test run shall be provided in spreadsheet format. Formulae used for all calculations shall be accessible for review.

14.1.13 Test run duration for each test.

14.1.14 Calculated results for delivered efficiency at each burn rate and the weighted average Emissions reported as total emissions in grams, pounds per million Btu of delivered heat, grams per mega-joule of delivered heat, grams per kilogram of dry fuel and grams per hour. Results shall be reported for each heat output category and the weighted average.

14.1.15 Tables 1A, 1B, 1C and 2 must be used for presentation of results in test reports.

14.1.16 A statement of the estimated uncertainty of measurement of the emissions and efficiency test results.

14.1.17 Raw data, calibration records, and other relevant documentation shall be retained by the laboratory for a minimum of 7 years.

**15.0 Precision and Bias**

15.1 Precision—It is not possible to specify the precision of the procedure in Draft Test because the appliance

operation and fueling protocols and the appliances themselves produce variable amounts of emissions and cannot be used to determine reproducibility or repeatability of this measurement method.

15.2 Bias—No definitive information can be presented on the bias of the procedure in Draft Test Method 28 WHH for measuring solid fuel burning hydronic heater emissions because no

material having an accepted reference value is available.

**16.0 Keywords**

16.1 Solid fuel, hydronic heating appliances, wood-burning hydronic heaters.

Table 1A. Data Summary Part A

Category	Run No	Load % Capacity	Target Load BTU/hr	Actual Load BTU/hr	Act Load % of max	$\Theta$	$W_{fuel}$	$MC_{ave}$	$Q_{in}$	$Q_{out}$
						Test Duration	Wood Wt	Wood Moisture	Heat Input	Heat Output
						hrs	lb	% DB	BTU	BTU
I		< 15% of max								
II		16-24% of max								
III		25-50% of max								
IV		Max capacity								

Table 1B. Data Summary Part B

Category	Run No	Load % Capacity	T2 Min	$E_T$	E	E	$E_{g/hr}$	$E_{g/kg}$	$\eta_{del}$	$\eta_{SLM}$
			Min Return Water Temp.	Total PM Emissions	PM Output Based	PM Output Based	PM Rate	PM Factor	Delivered Efficiency	Stack Loss Efficiency
			°F	g	lb <sub>MMBTU Out</sub>	g/MJ	g/hr	g/kg	%	%
I		< 15% of max								
II		16-24% of max								
III		25-50% of max								
IV		Max capacity								

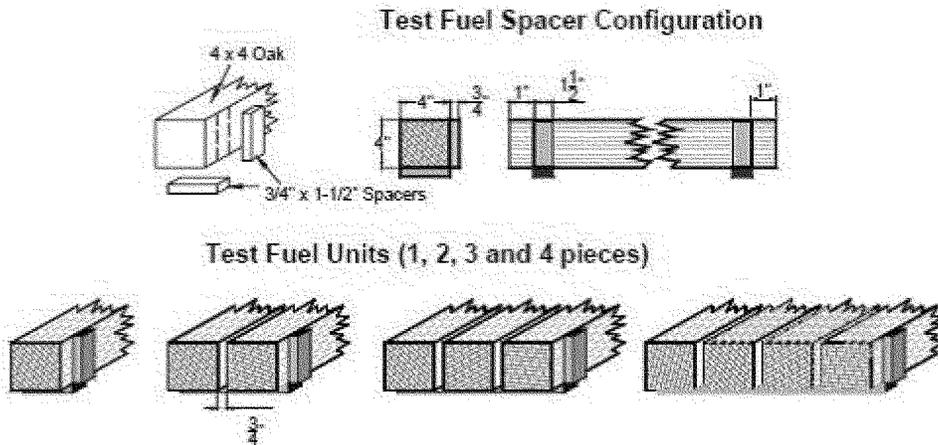
Table 1C: Hangtag Information

MANUFACTURER:			
MODEL NUMBER:			
8-HOUR OUTPUT RATING:	$Q_{out-8hr}$		BTU/HR
8-HOUR AVERAGE EFFICIENCY:	$\eta_{avg-8hr}$		<b>(Using higher heating value)</b>
			(Using lower heating value)
ANNUAL EFFICIENCY RATING:	$\eta_{avg}$		<b>(Using higher heating value)</b>
			(Using lower heating value)
PARTICLE EMISSIONS:	$E_{avg}$		GRAMS/HR (average)
			LBS/MILLION BTU OUTPUT

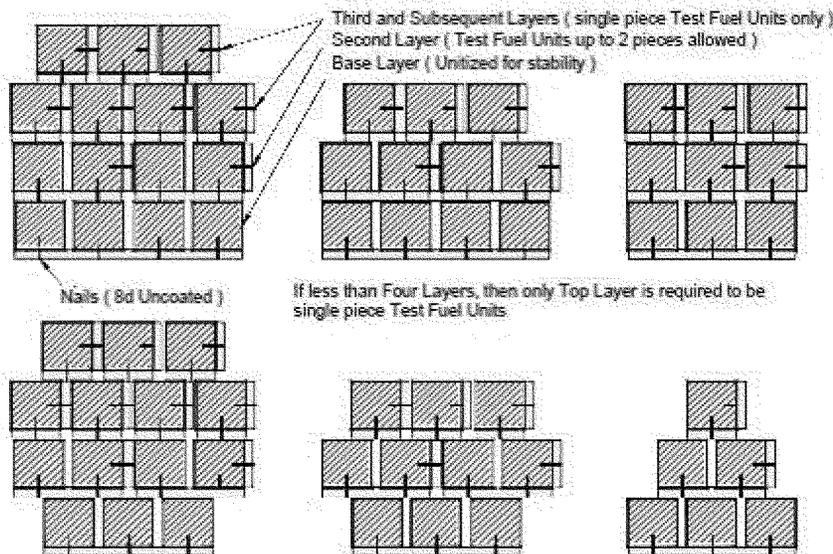
Table 2. Year Round Use Weighting

Category	Weighting Factor ( $F_i$ )	$\eta_{del,i} \times F_i$	$E_{g/MJ,i} \times F_i$	$E_{g/kg,i} \times F_i$	$E_{lb/MMBTU Out,i} \times F_i$	$E_{g/hr,i} \times F_i$
I	0.437					
II	0.024					
III	0.275					
IV	0.050					
Totals	1.000					

Figure 1. Typical Test Fuel Piece



Typical Test Fuel Charge Configurations



**Method 28WHH-PTS A Test Method for Certification of Cord Wood-Fired Hydronic Heating Appliances With Partial Thermal Storage: Measurement of Particulate Matter (PM) and Carbon Monoxide (CO) Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances With Partial Thermal Storage**

**1.0 Scope and Application**

1.1 This test method applies to wood-fired hydronic heating appliances with heat storage external to the appliance. The units typically transfer heat through circulation of a liquid heat exchange media such as water or a water-antifreeze mixture. Throughout this document, the term “water” will be used to denote any of the heat transfer liquids approved for use by the manufacturer.

1.2 The test method measures PM and CO emissions and delivered heating efficiency at specified heat output rates referenced against the appliance’s rated heating capacity as specified by the manufacturer and verified under this test method.

1.3 PM emissions are measured by the dilution tunnel method as specified in the EPA Method 28 WHH and the standards referenced therein with the exceptions noted in Section 12.5.9. Delivered Efficiency is measured by determining the fuel energy input and appliance output. Heat output is determined through measurement of the flow rate and temperature change of water circulated through a heat exchanger external to the appliance and the increase in energy of the external storage. Heat input is determined from the mass of dry wood fuel and its higher heating value (HHV). Delivered efficiency does not attempt to account for pipeline loss.

1.4 Products covered by this test method include both pressurized and non-pressurized hydronic heating appliances intended to be fired with wood and for which the manufacturer specifies for indoor or outdoor installation. The system, which includes the heating appliance and external storage, is commonly connected to a heat exchanger by insulated pipes and normally includes a pump to circulate heated liquid. These systems are used to heat structures such as homes, barns and greenhouses. They also provide heat for domestic hot water, spas and swimming pools.

1.5 Distinguishing features of products covered by this standard include:

1.5.1 The manufacturer specifies the application for either indoor or outdoor installation.

1.5.2 A firebox with an access door for hand loading of fuel.

1.5.3 Typically an aquastat mounted as part of the appliance that controls combustion air supply to maintain the liquid in the appliance within a predetermined temperature range provided sufficient fuel is available in the firebox. The appliance may be equipped with other devices to control combustion.

1.5.4 A chimney or vent that exhausts combustion products from the appliance.

1.5.5 A liquid storage system, typically water, which is not large enough to accept all of the heat produced when a full load of wood is burned and the storage system starts a burn cycle at 125 °F.

1.5.6 The heating appliances require external thermal storage and these units will only be installed as part of a system which includes thermal storage. The manufacturer specifies the minimum amount of thermal storage required. However, the storage system shall be large enough to ensure that the boiler (heater) does not cycle, slumber, or go into an off-mode when operated in a Category III load condition (See section 4.3).

1.6 The values stated are to be regarded as the standard whether in I-P or SI units. The values given in parentheses are for information only.

**2.0 Summary of Method and References**

2.1 PM and CO emissions are measured from a wood-fired hydronic heating appliance burning a prepared test fuel charge in a test facility maintained at a set of prescribed conditions. Procedures for determining heat output rates, PM and CO emissions, and efficiency and for reducing data are provided.

**2.2 Referenced Documents**

2.2.1 EPA Standards

2.2.1.1 Method 28 Certification and Auditing of Wood Heaters

2.2.1.2 Method 28 WHH Measurement of Particulate Emissions and Heating Efficiency of Wood-Fired Hydronic Heating Appliances and the standards referenced therein.

2.2.2 Other Standards

2.2.2.1 CAN/CSA-B415.1-2010 *Performance Testing of Solid-Fuel-Burning Heating Appliances*

**3.0 Terminology**

**3.1 Definitions**

3.1.1 Hydronic Heating—A heating system in which a heat source supplies energy to a liquid heat exchange media such as water that is circulated to a heating load and returned to the heat source through pipes.

3.1.2 Aquastat—A control device that opens or closes a circuit to control the rate of fuel consumption in response to the temperature of the heating media in the heating appliance.

3.1.3 Delivered Efficiency—The percentage of heat available in a test fuel charge that is delivered to a simulated heating load or the storage system as specified in this test method.

3.1.4 Emission factor—the emission of a pollutant expressed in mass per unit of energy (typically) output from the boiler/heater

3.1.5 Emission index—the emission of a pollutant expressed in mass per unit mass of fuel used

3.1.6 Emission rate—the emission of a pollutant expressed in mass per unit time

3.1.7 Manufacturer’s Rated Heat Output Capacity – The value in Btu/hr (MJ/hr) that the manufacturer specifies that a particular model of hydronic heating appliance is capable of supplying at its design capacity as verified by testing, in accordance with section 12.5.4.

3.1.8 Heat output rate—The average rate of energy output from the appliance during a specific test period in Btu/hr (MJ/hr)

3.1.9 Firebox—The chamber in the appliance in which the test fuel charge is placed and combusted.

3.1.10 NIST—National Institute of Standards and Technology

3.1.11 Test fuel charge—The collection of test fuel placed in the appliance at the start of the emission test run.

3.1.12 Test Run—An individual emission test which encompasses the time required to consume the mass of the test fuel charge. The time of the test run also considers the time for the energy to be drawn from the thermal storage.

3.1.13 Test Run Under “Cold-to-Cold” Condition—under this test condition the test fuel is added into an empty chamber along with kindling and ignition materials (paper). The boiler/heater at the start of this test is typically 125° to 130° F.

3.1.14 Test Run Under “Hot-to-Hot” Condition—under this test condition the test fuel is added onto a still-burning bed of charcoals produced in a pre-burn period. The boiler/heater water is near its operating control limit at the start of the test.

3.1.15 Overall Efficiency, also known as Stack Loss Efficiency—The efficiency for each test run as determined using the CSA B415.1-2010 Stack Loss Method (SLM).

3.1.16 Phases of a Burn Cycle. The “startup phase” is defined as the period from the start of the test until 15 percent of the test fuel charge is consumed. The “steady state phase” is defined as the period from the end of the startup phase to a point at which 80 percent of the test fuel charge is consumed. The “end phase” is defined as the time from the end of the steady state period to the end of the test.

3.1.17 Thermopile—A device consisting of a number of thermocouples connected in series, used for measuring differential temperature.

3.1.18 Slumber Mode—This is a mode in which the temperature of the water in the boiler/heater has exceeded the operating control limit and the control has changed the boiler/heater fan speed, dampers, and/or other operating parameters to minimize the heat output of the boiler/heater.

**4.0 Summary of Test Method**

4.1 Dilution Tunnel. Emissions are determined using the “dilution tunnel” method specified in EPA Method 28 WHH and the standards referenced therein. The flow rate in the dilution tunnel is maintained at a constant level throughout the test cycle and accurately measured. Samples of the dilution tunnel flow stream are extracted at a constant flow rate and drawn through high efficiency filters. The filters are dried and weighed before and after the test to determine the emissions collected and this value is multiplied by the ratio of tunnel flow to filter flow to determine the total particulate emissions produced in the test cycle.

4.2 Efficiency. The efficiency test procedure takes advantage of the fact that this type of system delivers heat through circulation of the heated liquid (water) from the system to a remote heat exchanger (e.g. baseboard radiators in a room) and back to the system. Measurements of the cooling

water temperature difference as it enters and exits the test system heat exchanger along with the measured flow rate allow for an accurate determination of the useful heat output of the appliance. Also included in the heat output is the change in the energy content in the storage system during a test run. Energy input to the appliance during the test run is determined by weight of the test fuel charge, adjusted for moisture content, multiplied by the Higher Heating Value. Additional measurements of the appliance weight and temperature at the beginning and end of a test cycle are used to correct for heat stored in the appliance. Overall Efficiency (SLM) is determined using the CSA B415.1–2010 stack loss method for data quality assurance purposes.

4.3 Operation. Four test categories are defined for use in this method. These are:

4.3.1 Category I: A heat output of 15 percent or less of Manufacturer's Rated Heat Output Capacity.

4.3.2 Category II: A heat output of 16 percent to 24 percent of Manufacturer's Rated Heat Output Capacity.

4.3.3 Category III: A heat output of 25 percent to 50 percent of Manufacturer's Rated Heat Output Capacity.

4.3.4 Category IV: Manufacturer's Rated Heat Output Capacity. These heat output categories refer to the output from the system by way of the load heat exchanger installed for the test. The output from just the boiler/heater part of the system may be higher for all or part of a test, as part of this boiler/heater output goes to storage.

For the Category III and IV runs, appliance operation is conducted on a hot-to-hot test cycle meaning that the appliance is brought to operating temperature and a coal bed is established prior to the addition of the test fuel charge and measurements are made for each test fuel charge cycle. The measurements are made under constant heat draw conditions within pre-determined ranges. No attempt is made to modulate the heat demand to simulate an indoor thermostat cycling on and off in response to changes in the indoor environment.

For the Category I and II runs, the unit is tested with a "cold start." At the manufacturer's option, the Category II and III runs may be waived and it may be assumed that the particulate emission values and efficiency values determined in the startup, steady-state, and end phases of Category I are applicable in Categories II and III for the purpose of determining the annual averages in lb/MMBtu and g/MJ (See section 13). For the annual average in g/hr, the length of time for stored heat to be drawn from thermal storage shall be determined for the test load requirements of the respective Category.

All test operations and measurements shall be conducted by personnel of the laboratory responsible for the submission of the test report.

## 5.0 Significance and Use

5.1 The measurement of particulate matter emission and CO rates is an important test method widely used in the practice of air pollution control.

5.1.1 These measurements, when approved by state or federal agencies, are

often required for the purpose of determining compliance with regulations and statutes.

5.1.2 The measurements made before and after design modifications are necessary to demonstrate the effectiveness of design changes in reducing emissions and make this standard an important tool in manufacturer's research and development programs.

5.2 Measurement of heating efficiency provides a uniform basis for comparison of product performance that is useful to the consumer. It is also required to relate emissions produced to the useful heat production.

5.3 This is a laboratory method and is not intended to be fully representative of all actual field use. It is recognized that users of hand-fired, wood-burning equipment have a great deal of influence over the performance of any wood-burning appliance. Some compromises in realism have been made in the interest of providing a reliable and repeatable test method.

## 6.0 Test Equipment

6.1 Scale. A platform scale capable of weighing the boiler/heater under test and associated parts and accessories when completely filled with water to an accuracy of  $\pm 1.0$  pound ( $\pm 0.5$  kg) and a readout resolution of  $\pm 0.2$  pound ( $\pm 0.1$  kg).

6.2 Heat Exchanger. A water-to-water heat exchanger capable of dissipating the expected heat output from the system under test.

6.3 Water Temperature Difference Measurement. A Type-T 'special limits' thermopile with a minimum of 5 pairs of junctions shall be used to measure the temperature difference in water entering and leaving the heat exchanger. The temperature difference measurement uncertainty of this type of thermopile is equal to or less than  $\pm 0.50$  °F ( $\pm 0.25$  °C). Other temperature measurement methods may be used if the temperature difference measurement uncertainty is equal to or less than  $\pm 0.50$  °F ( $\pm 0.25$  °C). This measurement uncertainty shall include the temperature sensor, sensor well arrangement, piping arrangements, lead wire, and measurement/recording system. The response time of the temperature measurement system shall be less than half of the time interval at which temperature measurements are recorded.

6.4 Water Flow Meter. A water flow meter shall be installed in the inlet to the load side of the heat exchanger. The flow meter shall have an accuracy of  $\pm 1$  percent of measured flow.

6.4.1 Optional—Appliance side water flow meter. A water flow meter with an accuracy of  $\pm 1$  percent of the flow rate is recommended to monitor supply side water flow rate.

6.5 Optional Recirculation Pump. Circulating pump used during test to prevent stratification, in the boiler/heater, of liquid being heated.

6.6 Water Temperature Measurement—Thermocouples or other temperature sensors to measure the water temperature at the inlet and outlet of the load side of the heat exchanger must meet the calibration requirements specified in 10.1 of this method.

6.7 Lab Scale—For measuring the moisture content of wood slices as part of the overall wood moisture determination. Accuracy of  $\pm 0.01$  pounds.

6.8 Flue Gas Temperature Measurement—Must meet the requirements of CSA B415.1–2010, Clause 6.2.2.

6.9 Test Room Temperature Measurement—Must meet the requirements of CSA B415.1–2010, Clause 6.2.1.

6.10 Flue Gas Composition Measurement—Must meet the requirements of CSA B415.1–2010, Clauses 6.3.1 through 6.3.3.

6.11 Dilution Tunnel CO Measurement—In parallel with the flue gas composition measurements, the CO concentration in the dilution tunnel shall also be measured and reported at time intervals not to exceed one minute. This analyzer shall meet the zero and span drift requirements of CSA B415.1–2012. In addition the measurement repeatability shall be better than  $\pm 15$  ppm over the range of CO levels observed in the dilution tunnel.

## 7.0 Safety

7.1 These tests involve combustion of wood fuel and substantial release of heat and products of combustion. The heating system also produces large quantities of very hot water and the potential for steam production and system pressurization. Appropriate precautions must be taken to protect personnel from burn hazards and respiration of products of combustion.

## 8.0 Sampling, Test Specimens and Test Appliances

8.1 Test specimens shall be supplied as complete appliances, as described in marketing materials, including all controls and accessories necessary for installation in the test facility. A full set of specifications, installation and operating instructions, and design and assembly drawings shall be provided when the product is to be placed under certification of a third-party agency. The manufacturer's written installation and operating instructions are to be used as a guide in the set-up and testing of the appliance and shall be part of the test record.

8.2 The size, connection arrangement, and control arrangement for the thermal storage shall be as specified in the manufacturer's documentation. It is not necessary to use the specific storage system that the boiler/heater will be marketed with. However, the capacity of the system used in the test cannot be greater than that specified as the minimum allowable for the boiler/heater.

8.3 All system control settings shall be the as-shipped, default settings. These default settings shall be the same as those communicated in a document to the installer or end user. These control settings and the documentation of the control settings as to be provided to the installer or end user shall be part of the test record.

8.4 Where the manufacturer defines several alternatives for the connection and loading arrangement, one shall be defined in the appliance documentation as the default or standard installation. It is expected that this will be the configuration for use with a simple baseboard heating system. This is the

configuration to be followed for these tests. The manufacturer's documentation shall define the other arrangements as optional or alternative arrangements.

## 9.0 Preparation of Test Equipment

9.1 The appliance is to be placed on a scale capable of weighing the appliance fully loaded with a resolution of  $\pm 0.2$  lb (0.1 kg).

9.2 The appliance shall be fitted with the type of chimney recommended or provided by the manufacturer and extending to  $15 \pm 0.5$  feet ( $4.6 \pm 0.15$  m) from the upper surface of the scale. If no flue or chimney system is recommended or provided by the manufacturer, connect the appliance to a flue of a diameter equal to the flue outlet of the appliance. The flue section from the appliance flue collar to  $8 \pm 0.5$  feet above the scale shall be single wall stove pipe and the remainder of the flue shall be double wall insulated class A chimney.

### 9.3 Optional Equipment Use

9.3.1 A recirculation pump may be installed between connections at the top and bottom of the appliance to minimize thermal stratification if specified by the manufacturer. The pump shall not be installed in such a way as to change or affect the flow rate between the appliance and the heat exchanger.

9.3.2 If the manufacturer specifies that a thermal control valve or other device be installed and set to control the return water temperature to a specific set point, the valve or other device shall be installed and set per the manufacturer's written instructions.

9.4 Prior to filling the boiler/heater with water, weigh and record the appliance mass.

### 9.5 Heat Exchanger

9.5.1 Plumb the unit to a water-to-water heat exchanger with sufficient capacity to draw off heat at the maximum rate anticipated. Route hoses and electrical cables and instrument wires in a manner that does not influence the weighing accuracy of the scale as indicated by placing dead weights on the platform and verifying the scale's accuracy.

9.5.2 Locate thermocouples to measure the water temperature at the inlet and outlet of the load side of the heat exchanger.

9.5.3 Install a thermopile (or equivalent instrumentation) meeting the requirements of section 6.3 to measure the water temperature difference between the inlet and outlet of the load side of the heat exchanger.

9.5.4 Install a calibrated water flow meter in the heat exchanger load side supply line. The water flow meter is to be installed on the cooling water inlet side of the heat exchanger so that it will operate at the temperature at which it is calibrated.

9.5.5 Place the heat exchanger in a box with 2 in. (50 mm) of expanded polystyrene (EPS) foam insulation surrounding it to minimize heat losses from the heat exchanger.

9.5.6 The reported efficiency and heat output rate shall be based on measurements made on the load side of the heat exchanger.

9.5.7 Temperature instrumentation per section 6.6 shall be installed in the appliance outlet and return lines. The average of the outlet and return water temperature on the supply side of the system shall be considered the average appliance temperature for calculation of heat storage in the appliance ( $TF_{avg}$  and  $TI_{avg}$ ). Installation of a water flow meter in the supply side of the system is optional.

9.6 Storage Tank. The storage tank shall include a destratification pump as illustrated in Figure 1. The pump will draw from the bottom of the tank and return to the top as illustrated. Temperature sensors (TS1 and TS2 in Figure 1) shall be included to measure the temperature in the recirculation loop. The valve plan in Figure 1 allows the tank recirculation loop to operate and the boiler/heater-to-heat exchanger loop to operate at the same time but in isolation. This would typically be done before the start of a test or following completion of a test to determine the end of test average tank temperature. The nominal flow rate in the storage tank recirculation loop can be estimated based on pump manufacturer's performance curves and any significant restriction in the recirculation loop.

9.7 Fill the system with water. Determine the total weight of the water in the appliance when the water is circulating. Verify that the scale indicates a stable weight under operating conditions. Make sure air is purged properly.

## 10.0 Calibration and Standardization

10.1 Water Temperature Sensors. Temperature measuring equipment shall be calibrated before initial use and at least semi-annually thereafter. Calibrations shall be in compliance with National Institute of Standards and Technology (NIST) Monograph 175, Standard Limits of Error.

10.2 Heat Exchanger Load Side Water Flow Meter.

10.2.1 The heat exchanger load side water flow meter shall be calibrated within the flow range used for the test run using NIST-traceable methods. Verify the calibration of the water flow meter before and after each test run and at least once during each test run by comparing the water flow rate indicated by the flow meter to the mass of water collected from the outlet of the heat exchanger over a timed interval. Volume of the collected water shall be determined based on the water density calculated from section 13, Eq. 12, using the water temperature measured at the flow meter. The uncertainty in the verification procedure used shall be 1 percent or less. The water flow rate determined by the collection and weighing method shall be within 1 percent of the flow rate indicated by the water flow meter.

10.3 Scales. The scales used to weigh the appliance and test fuel charge shall be calibrated using NIST-traceable methods at least once every 6 months.

10.4 Flue Gas Analyzers—In accordance with CSA B415.1–2010, Clause 6.8.

## 11.0 Conditioning

11.1 Prior to testing, a non-catalytic appliance is to be operated for a minimum of 10 hours using a medium heat draw rate. Catalytic units shall be operated for a minimum of 50 hours using a medium heat draw rate. The pre-burn for the first test can be included as part of the conditioning requirement. If conditioning is included in pre-burn, then the appliance shall be aged with fuel meeting the specifications outlined in section 12.2 with a moisture content between 19 and 25 percent on a dry basis. Operate the appliance at a medium heat output rate (Category II or III) for at least 10 hours for non-catalytic appliances and 50 hours for catalytic appliances. Record and report hourly flue gas exit temperature data and the hours of operation. The aging procedure shall be conducted and documented by a testing laboratory.

## 12.0 Procedure

12.1 Appliance Installation. Assemble the appliance and parts in conformance with the manufacturer's written installation instructions. Clean the flue with an appropriately sized, wire chimney brush before each certification test series.

12.2 Fuel. Test fuel charge fuel shall be red (*Quercus ruba L.*) or white (*Quercus Alba*) oak 19 to 25 percent moisture content on a dry basis. Piece length shall be 80 percent of the firebox depth rounded down to the nearest 1 inch (25mm) increment. For example, if the firebox depth is 46 inches (1168mm) the piece length would be 36 inches ( $46 \text{ inches} \times 0.8 = 36.8$  inches round down to 36 inches). Pieces are to be placed in the firebox parallel to the longest firebox dimension. For fireboxes with sloped surfaces that create a non-uniform firebox length, the piece length shall be adjusted for each layer based on 80 percent of the length at the level where the layer is placed. The test fuel shall be cord wood with cross section dimensions and weight limits as defined in CSA B415.1–2010, section 8.3, Table 4. The use of dimensional lumber is not allowed.

12.2.1 Select three pieces of cord wood from the same batch of wood as the test fuel and the same weight as the average weight of the pieces in the test load  $\pm 1.0$  lb. From each of these three pieces, cut three slices. Each slice shall be  $\frac{1}{2}$  inch to  $\frac{3}{4}$  inch thick. One slice shall be cut across the center of the length of the piece. The other two slices shall be cut half way between the center and the end. Immediately measure the mass of each piece in pounds. Dry each slice in an oven at 220 °F for 24 hours or until no further weight change occurs. The slices shall be arranged in the oven so as to provide separation between faces. Remove from the oven and measure the mass of each piece again as soon as practical in pounds.

The moisture content of each slice, on a dry basis shall be calculated as:

$$MC_{\text{slice}} = 100 \cdot (W_{\text{SliceWet}} - W_{\text{SliceDry}})$$

$$W_{\text{SliceDry}}$$

Where:

$W_{\text{SliceWet}}$  = weight of the slice before drying in pounds

$W_{\text{SliceDry}}$  = weight of the slice after drying in pounds

$MC_{\text{Slice}}$  = moisture content of the slice in % dry basis

The average moisture content of the entire test load (MC) shall be determined using Eq. 6. Each individual slice shall have a moisture content in the range of 18 percent to 28 percent on a dry basis. The average moisture content for the test fuel load shall be in the range of 19 percent to 25 percent. Moisture shall not be added to previously dried fuel pieces except by storage under high humidity conditions and temperature up to 100 °F. Fuel moisture measurement shall begin within four hours of using the fuel batch for a test. Use of a pin-type meter to estimate the moisture content prior to a test is recommended.

12.2.2 Firebox Volume. Determine the firebox volume in cubic feet. Firebox volume shall include all areas accessible through the fuel loading door where firewood could reasonably be placed up to the horizontal plane defined by the top of the loading door. A drawing of the firebox showing front, side and plan views or an isometric view with interior dimensions shall be provided by the manufacturer and verified by the laboratory. Calculations for firebox volume from computer aided design (CAD) software programs are acceptable and shall be included in the test report if used. If the firebox volume is calculated by the laboratory the firebox drawings and calculations shall be included in the test report.

12.2.3 Test Fuel charge. Test fuel charges shall be determined by multiplying the firebox volume by 10 pounds (4.54 kg) per ft<sup>3</sup> (28L), or a higher load density as recommended by the manufacturer's printed operating instructions, of wood (as used wet weight). Select the number of pieces of cord wood that most nearly match this target weight. However, the test fuel charge cannot be less than the target of 10 pounds (4.54 kg) per ft<sup>3</sup> (28L).

12.3 Sampling Equipment. Prepare the particulate emission sampling equipment as defined by EPA Method 28 WHH and the standards referenced therein.

12.4 Appliance Startup. The appliance shall be fired with wood fuel of any species, size and moisture content at the laboratories discretion to bring it up to operating temperature. Operate the appliance until the water is heated to the upper operating control limit and has cycled at least two times. Then remove all unburned fuel, zero the scale and verify the scales accuracy using dead weights.

12.4.1 Startup Procedure for Category III and IV Test Runs, "Hot-to-Hot"

12.4.1.1 Pre-Test Burn Cycle. Following appliance startup (section 12.4), reload

appliance with oak cord wood and allow it to burn down to the specified coal bed weight. The pre-test burn cycle fuel charge weight shall be within ±10 percent of the test fuel charge weight. Piece size and length shall be selected such that charcoaling is achieved by the time the fuel charge has burned down to the required coal bed weight. Pieces with a maximum thickness of approximately 2 inches have been found to be suitable. Charcoaling is a general condition of the test fuel bed evidenced by an absence of large pieces of burning wood in the coal bed and the remaining fuel pieces being brittle enough to be broken into smaller charcoal pieces with a metal poker. Manipulations to the fuel bed prior to the start of the test run are to be done to achieve charcoaling while maintaining the desired heat output rate. During the pre-test burn cycle and at least one hour prior to starting the test run, adjust water flow to the heat exchanger to establish the target heat draw for the test. For the first test run the heat draw rate shall be equal to the manufacturer's rated heat output capacity.

12.4.1.2 Allowable Adjustments. Fuel addition or subtractions, and coal bed raking shall be kept to a minimum but are allowed up to 15 minutes prior to the start of the test run. For the purposes of this method, coal bed raking is the use of a metal tool (poker) to stir coals, break burning fuel into smaller pieces, dislodge fuel pieces from positions of poor combustion, and check for the condition of charcoaling. Record all adjustments to and additions or subtractions of fuel, and any other changes to the appliance operations that occur during pretest ignition period. During the 15-minute period prior to the start of the test run, the wood heater loading door shall not be open more than a total of 1 minute. Coal bed raking is the only adjustment allowed during this period.

12.4.1.3 Coal Bed Weight. The appliance is to be loaded with the test fuel charge when the coal bed weight is between 10 percent and 20 percent of the test fuel charge weight. Coals may be raked as necessary to level the coal bed but may only be raked and stirred once between 15 to 20 minutes prior to the addition of the test fuel charge.

12.4.1.4 Storage. The Category III and IV test runs may be done either with or without the thermal storage. If thermal storage is used the initial temperature of the storage must be 125 °F or greater at the start of the test. The storage may be heated during the pre-test burn cycle or it may be heated by external means. If thermal storage is used, prior to the start of the test run, the storage tank destratification pump, shown in Figure 1, shall be operated until the total volume pumped exceeds 1.5 times the tank volume and the difference between the temperature at the top and bottom of the storage tank (TS<sub>1</sub> and TS<sub>2</sub>) is less than 1 °F. These two temperatures shall then be recorded to determine the starting average tank temperature. The total volume pumped may

be based on the nominal flow rate of the destratification pump (See section 9.6). If the Category III and IV runs are done with storage, it is recognized that during the last hour of the pre-burn cycle the storage tank must be mixed to achieve a uniform starting temperature and cannot receive heat from the boiler/heater during this time. During this time period the boiler/heater might cycle or go into a steady reduced output mode. (Note—this would happen, for example, in a Category IV run if the actual maximum output of the boiler/heater exceed the manufacturer's rated output.) A second storage tank may be used temporarily to enable the boiler/heater to operate during this last hour of the pre-burn period as it will during the test period. The temperature of this second storage tank is not used in the calculations but the return water to the boiler/heater (after mixing device if used) must be 125 °F or greater.

12.4.2 Startup Procedure for Category I and II test runs, "cold-to-cold."

12.4.2.1 Initial Temperatures. This test shall be started with both the boiler/heater and the storage at a minimum temperature of 125 °F. The boiler/heater maximum temperature at the start of this test shall be 135 °F. The boiler/heater and storage may be heated through a pre-burn or it may be heated by external means.

12.4.2.2 Firebox Condition at Test Start. Prior to the start of this test remove all ash and charcoal from the combustion chamber(s). The loading of the test fuel and kindling should follow the manufacturer's recommendations, subject to the following constraints: Up to 10 percent kindling and paper may be used which is in addition to the fuel load. Further, up to 10 percent of the fuel load (*i.e.*, included in the 10 lb/ft<sup>3</sup>) may be smaller than the main fuel. This startup fuel shall still be larger than 2 inches.

12.4.2.3 Storage. The Category I and II test runs shall be done with thermal storage. The initial temperature of the storage must be 125 °F or greater at the start of the test. The storage may be heated during the pre-test burn cycle or it may be heated by external means. Prior to the start of the test run, the storage tank destratification pump, shown in Figure 1, shall be operated until the total volume pumped exceeds 1.5 times the tank volume and the difference between the temperature at the top and bottom of the storage tank (TS<sub>1</sub> and TS<sub>2</sub>) is less than 1 °F. These two temperatures shall then be recorded to determine the starting average tank temperature. The total volume pumped may be based on the nominal flow rate of the destratification pump (See section 9.6).

12.5 Test Runs. For all test runs, the return water temperature to the hydronic heater must be equal to or greater than 120 °F (this is lower than the initial tank temperature to allow for any pipeline losses). Where the storage system is used, flow of water from the boiler/heater shall be divided between the storage tank and the heat

exchanger such that the temperature change of the circulating water across the heat exchanger shall be  $30 \pm 5$  °F, averaged over the entire test run. This is typically adjusted using the system valves.

Complete a test run in each heat output rate category, as follows:

12.5.1 Test Run Start. For Category III and IV runs: once the appliance is operating normally and the pretest coal bed weight has reached the target value per 12.4.1, tare the scale and load the full test charge into the appliance. Time for loading shall not exceed 5 minutes. The actual weight of the test fuel charge shall be measured and recorded within 30 minutes prior to loading. Start all sampling systems.

For Category I and II runs: once the appliance has reached the starting temperature, tare the scale and load the full test charge, including kindling into the appliance. The actual weight of the test fuel charge shall be measured and recorded within 30 minutes prior to loading. Light the fire following the manufacturer's written normal startup procedure. Start all sampling systems.

12.5.1.1 Record all water temperatures, differential water temperatures and water flow rates at time intervals of one minute or less.

12.5.1.2 Record particulate emissions data per the requirements of EPA Method 28 WHH and the standards referenced therein.

12.5.1.3 Record data needed to determine Overall Efficiency (SLM) per the requirements of CSA B415.1–2010 Clauses 6.2.1, 6.2.2, 6.3, 8.5.7, 10.4.3 (a), 10.4.3(f), and 13.7.9.3

12.5.1.3.1 Measure and record the test room air temperature in accordance with the requirements of Clauses 6.2.1, 8.5.7 and 10.4.3 (g).

12.5.1.3.2 Measure and record the flue gas temperature in accordance with the requirements of Clauses 6.2.2, 8.5.7 and 10.4.3 (f).

12.5.1.3.3 Determine and record the Carbon Monoxide (CO) and Carbon Dioxide (CO<sub>2</sub>) concentrations in the flue gas in accordance with Clauses 6.3, 8.5.7 and 10.4.3 (i) and (j).

12.5.1.3.4 Measure and record the test fuel weight per the requirements of Clauses 8.5.7 and 10.4.3 (h).

12.5.1.3.5 Record the test run time per the requirements of Clause 10.4.3 (a).

12.5.1.3.6 Record and document all settings and adjustments, if any, made to the boiler/heater as recommended/required by manufacturer's instruction manual for different combustion conditions or heat loads. These may include temperature setpoints, under and over-fire air adjustment, or other adjustments that could be made by an operator to optimize or alter combustion. All such settings shall be included in the report for each test run.

12.5.1.4 Monitor the average heat output rate on the load side of the heat exchanger based on water temperatures and flow. If the heat output rate over a 10 minute averaging period gets close to the upper or lower limit of the target range ( $\pm 5$  percent), adjust the water flow through the heat exchanger to compensate. Make changes as infrequently as

possible while maintaining the target heat output rate. The first test run shall be conducted at the category IV heat output rate to validate that the appliance is capable of producing the manufacturer's rated heat output capacity.

12.5.2 Test Fuel Charge Adjustment. It is acceptable to adjust the test fuel charge (*i.e.*, reposition) once during a test run if more than 60 percent of the initial test fuel charge weight has been consumed and more than 10 minutes have elapsed without a measurable (1 lb or 0.5 kg) weight change while the operating control is in the demand mode. The time used to make this adjustment shall be less than 60 seconds.

12.5.3 Test Run Completion. For the Category III and IV, "hot-to-hot" test runs, the test run is completed when the remaining weight of the test fuel charge is 0.0 lb (0.0 kg). ( $W_{FuelBurned} = W_{fuel}$ ) End the test run when the scale has indicated a test fuel charge weight of 0.0 lb (0.0 kg) or less for 30 seconds.

For the Category I and II "cold-to-cold" test runs, the test run is completed; and the end of a test is defined at the first occurrence of any one of the following:

(a) The remaining weight of the test fuel charge is less than 1 percent of the total test fuel weight ( $W_{FuelBurned} > 0.99 \cdot W_{fuel}$ );

(b) The automatic control system on the boiler/heater switches to an off mode. In this case the boiler/heater fan (if used) is typically stopped, and all air flow dampers are closed by the control system. Note that this off mode cannot be an "overheat" or emergency shutdown which typically requires a manual reset; or

(c) If the boiler/heater does not have an automatic off mode: After 90 percent of the fuel load has been consumed and the scale has indicated a rate of change of the test fuel charge of less than 1.0 lb/hr for a period of 10 minutes or longer. Note—this is not considered "stopped fuel combustion." See section 12.5.6.1.

12.5.3.1 At the end of the test run, stop the particulate sampling train and Overall Efficiency (SLM) measurements, and record the run time, and all final measurement values.

12.5.3.2 At the end of the test run, continue to operate the storage tank destratification pump until the total volume pumped exceeds 1.5 times the tank volume. The maximum average of the top and bottom temperatures measured after this time may be taken as the average tank temperature at the end of the tests (TFSavg, See section 13.1). The total volume pumped may be based on the nominal flow rate of the destratification pump (See section 9.6).

12.5.3.3 For the Category I and II test runs, there is a need to determine the energy content of the unburned fuel remaining in the chamber if the remaining mass in the chamber is greater than 1 percent of the test fuel weight. Following the completion of the test, as soon as safely practical, this remaining fuel is removed from the chamber, separated from the remaining ash and weighed. This separation could be implemented with a slotted "scoop" or similar tool. A ¼ inch opening size in the separation tool shall be used to separate the

ash and charcoal. This separated char is assigned a heating value of 12,500 Btu/lb.

12.5.4 Heat Output Capacity Validation. The first test run must produce a heat output rate that is within 10 percent of the manufacturer's rated heat output capacity (Category IV) throughout the test run and an average heat output rate within 5 percent of the manufacturer's rated heat output capacity. If the appliance is not capable of producing a heat output within these limits, the manufacturer's rated heat output capacity is considered not validated and testing is to be terminated. In such cases, the tests may be restarted using a lower heat output capacity if requested by the manufacturer. Alternatively, during the Category IV run, if the rated output cannot be maintained for a 15 minute interval, the manufacturer may elect to reduce the rated output to match the test and complete the Category IV run on this basis. The target outputs for Cat I, II, and III shall then be recalculated based on this change in rated output capacity.

12.5.5 Additional Test Runs. Using the Manufacturer's Rated Heat Output Capacity as a basis, conduct a test for additional heat output categories as specified in 4.3. It is not required to run these tests in any particular order.

12.5.6 Alternative Heat Output Rate for Category I. If an appliance cannot be operated in the Category I heat output range due to stopped combustion, two test runs shall be conducted at heat output rates within Category II. When this is the case, the weightings for the weighted averages indicated in section 15.1.14 shall be the average of the Category I and II weightings and shall be applied to both Category II results. Appliances that are not capable of operation within Category II (<25 percent of maximum) cannot be evaluated by this test method.

12.5.6.1 Stopped Fuel Combustion. Evidence that an appliance cannot be operated at a Category I heat output rate due to stopped fuel combustion shall include documentation of two or more attempts to operate the appliance in heat output rate Category I and fuel combustion has stopped prior to complete consumption of the test fuel charge. Stopped fuel combustion is evidenced when an elapsed time of 60 minutes or more has occurred without a measurable (1 lb or 0.5 kg) weight change in the test fuel charge while the appliance operating control is in the demand mode. Report the evidence and the reasoning used to determine that a test in heat output rate Category I cannot be achieved. For example, two unsuccessful attempts to operate at an output rate of 10 percent of the rated output capacity are not sufficient evidence that heat output rate Category I cannot be achieved.

12.5.7 Appliance Overheating. Appliances with their associated thermal storage shall be capable of operating in all heat output categories without overheating to be rated by this test method. Appliance overheating occurs when the rate of heat withdrawal from the appliance is lower than the rate of heat production when the unit control is in the idle mode. This condition results in the water in the appliance continuing to increase in temperature well

above the upper limit setting of the operating control. Evidence of overheating includes: 1 hour or more of appliance water temperature increase above the upper temperature set-point of the operating control, exceeding the temperature limit of a safety control device (independent from the operating control—typically requires manual reset), boiling water in a non-pressurized system or activation of a pressure or temperature relief valve in a pressurized system.

12.5.8 Option to Eliminate Tests in Category II and III. Following successful completion of a test run in Category I, the manufacturer may eliminate the Cat II and III tests. For the purpose of calculating the annual averages for particulates and efficiency, the values obtained in the Category I run shall be assumed to apply also to Category II and Category III. It is envisioned that this option would be applicable to systems which have sufficient thermal storage such that the fuel load in the Cat I test can be completely consumed without the system reaching its upper operating temperature limit. In this case the boiler/heater would likely be operating at maximum thermal output during the entire test and this output rate may be higher than the Manufacturer's Rated Heat Output Capacity. The Category II and III runs would then be the same as the Category I run. It may be assumed that the particulate emission values and efficiency values determined in the startup, steady-state, and end phases of Category I are applicable in Categories II and III, for the purpose of determining the annual averages in lb/MMBtu and g/MJ (See section 13). For the annual average in g/hr, the length of time for stored heat to be drawn from thermal storage shall be determined for the test load requirements of the respective Category.

12.5.9 Modification to Measurement Procedure in EPA Method 28 WHH to Determine Emissions Separately During the Startup, Steady-State and End Phases. With one of the two particulate sampling trains used, filter changes shall be made at the end of the startup phase and the steady state phase (See section 3.0). This shall be done to determine the particulate emission rate and particulate emission index for the startup, steady state, and end phases individually. For this one train, the particulates measured during each of these three phases shall be added together to also determine the particulate emissions for the whole run.

12.5.10 Modification to Measurement Procedure in EPA Method 28 WHH and the standards referenced therein on Averaging Period for Determination of Efficiency by the Stack Loss Method. The methods currently defined in Method 28 WHH allow averaging over 10 minute time periods for flue gas temperature, flue gas CO<sub>2</sub>, and flue gas CO for the determination of the efficiency with the Stack Loss Method. However, under some cycling conditions the "on" period may be short relative to this 10 minute period. For

this reason, during cycling operation the averaging period for these parameters may not be longer than the burner on period divided by 10. The averaging period need not be shorter than one minute. During the off period, under cycling operation, averaging periods as specified in EPA Method 28 WHH and the standards referenced therein may be used. Where short averaging times are used, however, the averaging period for fuel consumption may still be at 10 minutes. This average wood consumption rate shall be applied to all of the smaller time intervals included.

12.6 Additional Test Runs. The testing laboratory may conduct more than one test run in each of the heat output categories specified in section 4.3. If more than one test run is conducted at a specified heat output rate, the results from at least two-thirds of the test runs in that heat output rate category shall be used in calculating the weighted average emission rate. The measurement data and results of all test runs shall be reported regardless of which values are used in calculating the weighted average emission rate.

### 13.0 Calculation of Results

#### 13.1 Nomenclature.

CO<sub>s</sub>—Carbon monoxide measured in the dilution tunnel at arbitrary time in ppm dry basis.  
 CO<sub>g/min</sub>—Carbon monoxide emission rate in g/min.  
 CO<sub>T</sub>—Total carbon monoxide emission for the full test run in grams.  
 CO<sub>1</sub>—Startup period carbon monoxide emissions in grams.  
 CO<sub>2</sub>—Steady-state period carbon monoxide emission in grams.  
 CO<sub>3</sub>—End period carbon monoxide emission in grams.  
 E<sub>T</sub>—Total particulate emissions for the full test run as determined per EPA Method 28 WHH and the standards referenced therein in grams.  
 E<sub>1</sub> = Startup period particulate emissions in grams.  
 E<sub>2</sub> = Steady-state period particulate emissions in grams.  
 E<sub>3</sub> = End period particulate emissions in grams.  
 E<sub>1\_g/kg</sub> = Startup period particulate emission index in grams per kg fuel.  
 E<sub>2\_g/kg</sub> = Steady-state period particulate emission index in grams per kg fuel.  
 E<sub>3\_g/kg</sub> = End period particulate emission index in grams per kg fuel.  
 E<sub>1\_g/hr</sub> = Startup period particulate emission rate in grams per hour.  
 E<sub>2\_g/hr</sub> = Steady-state period particulate emission rate in grams per hour.  
 E<sub>3\_g/hr</sub> = End period particulate emission rate in grams per hour.  
 E<sub>g/MJ</sub>—Emission rate in grams per MJ of heat output.  
 E<sub>lb/mmBtu output</sub>—Emissions rate in pounds per million Btu's of heat output.

E<sub>g/kg</sub>—Emissions factor in grams per kilogram of dry fuel burned.

E<sub>g/hr</sub>—Emission factor in grams per hour.

HHV—Higher Heating Value of fuel = 8600 Btu/lb (19.990 MJ/kg).

LHV—Lower Heating Value of fuel = 7988 Btu/lb (18.567 MJ/kg).

ΔT—Temperature difference between cooling water entering and exiting the heat exchanger.

Q<sub>out</sub>—Total heat output in Btu's (MJ).

Q<sub>in</sub>—Total heat input available in test fuel charge in Btu's (MJ).

Q<sub>std</sub>—Volumetric flow rate in dilution tunnel in dscfm.

M—Mass flow rate of water in lb/min (kg/min).

V<sub>i</sub>—Volume of water indicated by a totalizing flow meter at the i<sub>th</sub> reading in gallons (liters).

V<sub>r</sub>—Volumetric flow rate of water in heat exchange system in gallons per minute (liters/min).

Θ—Total length of burn period in hours (Θ<sub>1</sub> + Θ<sub>2</sub> + Θ<sub>3</sub>).

Θ<sub>1</sub>—Length of time of the startup period in hours.

Θ<sub>2</sub>—Length of time of the steady state period in hours.

Θ<sub>3</sub>—Length of time of the end period in hours.

Θ<sub>4</sub>—Length of time for stored heat to be used following a burn period in hours.

t<sub>i</sub>—Data sampling interval in minutes.

η<sub>del</sub>—Delivered heating efficiency in percent.

F<sub>i</sub>—Weighting factor for heat output category i. See Table 2.

T<sub>1</sub>—Temperature of water at the inlet on the supply side of the heat exchanger, °F.

T<sub>2</sub>—Temperature of the water at the outlet on the supply side of the heat exchanger, °F.

T<sub>3</sub>—Temperature of cooling water at the inlet to the load side of the heat exchanger, °F.

T<sub>4</sub>—Temperature of cooling water at the outlet of the load side of the heat exchanger, °F.

T<sub>5</sub>—Temperature of the hot water supply as it leaves the boiler/heater, °F.

T<sub>6</sub>—Temperature of return water as it enters the boiler/heater, °F.

T<sub>7</sub>—Temperature in the boiler/heater optional destratification loop at the top of the boiler/heater, °F.

T<sub>8</sub>—Temperature in the boiler/heater optional destratification loop at the bottom of the boiler/heater, °F.

TI<sub>avg</sub>—Average temperature of the appliance and water at start of the test.

TIS<sub>1</sub>—Temperature at the inlet to the storage system at the start of the test.

TIS<sub>2</sub>—Temperature at the outlet from the storage system at the start of the test.

TFS<sub>1</sub>—Temperature at the inlet to the storage system at the end of the test.

TFS<sub>2</sub>—Temperature at the outlet from the storage system at the end of the test.

TIS<sub>avg</sub>—Average temperature of the storage system at the start of the test.

$$T_{I_{avg}} = (T_5 + T_6)/2 \text{ at the start of the test, } ^\circ\text{F.} \quad \text{Eq. 1}$$

$T_{F_{avg}}$  – Average temperature of the appliance and water at the end of the test.

$$T_{F_{avg}} = (T_5 + T_6)/2 \text{ at the end of the test, } ^\circ\text{F.} \quad \text{Eq. 2}$$

$$T_{IS_{avg}} = (T_{IS_1} + T_{IS_2})/2 \text{ at the end of the test.} \quad \text{Eq. 3}$$

$T_{FS_{avg}}$  – Average temperature of the storage system at the end of the test.

$$T_{FS_{avg}} = (T_{FS_1} + T_{FS_2})/2. \quad \text{Eq. 4}$$

MC—Fuel moisture content in percent dry basis.

$\sigma$ —Density of water in pounds per gallon.

$\sigma_{Initial}$ —Density of water in the boiler/heater system at the start of the test in pounds per gallons.

$\sigma_{boiler/heater}$ —Density of water in the boiler/heater system at arbitrary time during the test in pounds per gallon.

$C_p$ —Specific heat of water in Btu/lb  $-\ ^\circ\text{F}$ .

$C_{steel}$ —Specific heat of steel (0.1 Btu/lb  $-\ ^\circ\text{F}$ ).

$V_{boiler/heater}$ —total volume of water in the boiler/heater system on the weight scale in gallons.

$W_{fuel}$ —Fuel charge weight, as-fired or “wet”, in pounds (kg).

$W_{fuel_1}$ —Fuel consumed during the startup period in pounds (kg).

$W_{fuel_2}$ —Fuel consumed during the steady state period in pounds (kg).

$W_{fuel_3}$ —Fuel consumed during the end period in pounds (kg).

$W_{FuelBurned}$ —Weight of fuel that has been burned from the start of the test to an arbitrary time, including the needed correction for the change in density and weight of the water in the boiler/heater system on the scale in pounds (kg).

$W_{RemainingFuel}$ —weight of unburned fuel separated from the ash at the end of a test. Useful only for Cat I and Cat II tests.

$W_{app}$ —Weight of empty appliance in pounds (kg).

$W_{wat}$ —Weight of water in supply side of the system in pounds (kg).

$W_{ScaleInitial}$ —weight reading on the scale at the start of the test, just after the test load has been added in pounds (kg).

$W_{Scale}$ —Reading of the weight scale at arbitrary time during the test run in pounds (kg).

$W_{StorageTank}$ —Weight of the storage tank empty in pounds (kg).

$W_{WaterStorage}$ —Weight of the water in the storage tank at  $T_{IS_{avg}}$  in pounds (kg).

13.2 After the test is completed, determine the particulate emissions ET in accordance with EPA Method 28 WHH and the standards referenced therein.

13.3 Determination of the weight of fuel that has been burned at arbitrary time

For the purpose of tracking the consumption of the test fuel load during a test run the following may be used to calculate the weight of fuel that burned since the start of the test:

$$W_{FuelBurned} = (W_{ScaleInitial} - W_{Scale}) + V_{Boiler/heater} \cdot (\sigma_{Initial} - \sigma_{boiler/heater}) \quad \text{Eq. 5}$$

Water density,  $\sigma$ , is calculated using Equation 12.

### 13.4 Determine Average Fuel Load Moisture Content.

$$MC = \frac{\sum W_{SliceWet_i} - MC_{Slice_i}}{\sum W_{SliceWet_i}} \quad \text{Eq. 6}$$

$$\sum W_{SliceWet_i}$$

### 13.5 Determine heat input.

$$Q_{in} = (W_{fuel}/(1+(MC/100))) \times HHV, \text{ Btu (MJ)}. \quad \text{Eq. 7}$$

$$Q_{inLHV} = (W_{fuel}/(1+(MC/100))) \times LHV, \text{ Btu (MJ)}. \quad \text{Eq. 8}$$

13.5.1 Correction to  $Q_{in}$  for the Category I and II tests, where there is greater than 1 percent of the test fuel charge in the chamber at the end of the test period.

$$Q_{InCorrected} = Q_{in} - \frac{W_{Remaining} \cdot 12,500 \text{ Btu}}{lb} \quad \text{Eq. 9}$$

13.6 Determine heat output, efficiency, and emissions  $Q_{out} = \Sigma$  [Heat output determined for each sampling time interval] + Change in heat stored in the appliance + Change in heat in storage tank.

13.6.1 Determine heat output as:

$$Q_{out} = \Sigma [C_{pi} \cdot \Delta T_i \cdot M_i \cdot t_i] + (W_{app} \cdot C_{steel} + W_{water} \cdot C_{pa}) \cdot (TF_{avg} - TI_{avg}) + (W_{StorageTank} \cdot C_{steel} + W_{WaterStorage} \cdot C_{pa}) \cdot (TFS_{avg} - TIS_{avg}) \text{ Btu (MJ)} \quad \text{Eq. 10}$$

Note: The subscript (i) indicates the parameter value for sampling time interval t.  $M_i$  = Mass flow rate = gal/min  $\times$  Density of Water (lb/gal) = lb/min.

$$M_i = V_{fi} \cdot \sigma_i, \text{ lb/min.} \quad \text{Eq. 11}$$

$$\sigma_i = (62.56 + (-0.0003413 \times T_{3i}) + (-0.00006225 \times T_{3i}^2)) 0.1337, \text{ lbs/gal.} \quad \text{Eq. 12}$$

$$C_p = 1.0014 + (-0.000003485 \times T_{3i}) \text{ Btu/lb-}^\circ\text{F.} \quad \text{Eq. 13}$$

$$C_{steel} = 0.1 \text{ Btu/lb-}^\circ\text{F.}$$

$$C_{pa} = 1.0014 + (-0.000003485 \times (TI_{avg} + TF_{avg})/2), \text{ Btu/lb-}^\circ\text{F.} \quad \text{Eq. 14}$$

$$V_{fi} = (V_i - V_{i-1})/(t_i - t_{i-1}), \text{ gal/min.} \quad \text{Eq. 15}$$

Note:  $V_i$  is the total water volume at the end of interval i and  $V_{i-1}$  is the total water volume at the beginning of the time interval.

This calculation is necessary when a totalizing type water meter is used.

13.6.2 Determine Heat Output Rate Over Burn Period ( $\Theta_1 + \Theta_2 + \Theta_3$ ) as:

$$\text{Heat Output Rate} = Q_{out}/\Theta, \text{ Btu/hr (MJ/hr).} \quad \text{Eq. 16}$$

13.6.3 Determine Emission Rates and Emission Factors as:

$$E_{g/MJ} = E_T/(Q_{out} \times 0.001055), \text{ g/MJ.} \quad \text{Eq. 17}$$

$$E_{lb/MM \text{ Btu output}} = (E_T/453.59)/(Q_{out} \times 10^{-6}), \text{ lb/MMBtu Out.} \quad \text{Eq. 18}$$

$$E_{g/kg} = E_T/(W_{fuel}/(1+MC/100)), \text{ g/dry kg.} \quad \text{Eq. 19}$$

$$E_{g/hr} = E_T/(\Theta_1 + \Theta_2 + \Theta_3 + \Theta_4), \text{ g/hr.} \quad \text{Eq. 20}$$

$$\Theta_4 = (W_{StorageTank} \cdot C_{steel} + W_{WaterStorage} \cdot C_{pa}) \cdot (TFS_{avg} - TIS_{avg})/(Q_{out}/\Theta) \quad \text{Eq. 21}$$

If thermal storage is not used in a Category III or IV run, then  $\Theta_4 = 0$

$$E_{1_g/kg} = E_1/(W_{fuel_1}/(1+MC/100)), \text{ g/dry kg}$$

$$E_{2_g/kg} = E_2/(W_{fuel_2}/(1+MC/100)), \text{ g/dry kg}$$

$$E_{3_g/kg} = E_3/(W_{fuel_3}/(1+MC/100)), \text{ g/dry kg}$$

$$E_{1_g/hr} = E_1/\Theta_1, \text{ g/hr}$$

$$E_{2_g/hr} = E_2/\Theta_2, \text{ g/hr}$$

$$E_{3_g/hr} = E_3/\Theta_3, \text{ g/hr}$$

13.6.4 Determine delivered efficiency as:

$$\eta_{del} = (Q_{out}/Q_{InCorrected}) \times 100, \% \quad \text{Eq. 22}$$

$$\eta_{del \text{ LHV}} = (Q_{out}/Q_{in \text{ LHV}}) \times 100, \% \quad \text{Eq. 23}$$

13.6.5 Determine  $\eta_{SLM}$ —Overall Efficiency, also known as Stack Loss Efficiency, using Stack Loss Method (SLM).

For determination of the average overall thermal efficiency ( $\eta_{SLM}$ ) for the test run, use the data collected over the full test run and the calculations in accordance with CSA

B415.1–2010, Clause 13.7 except for 13.7.2 (e), (f), (g), and (h), use the following average fuel properties for oak: %C = 50.0, %H = 6.6, %O = 43.2, %Ash = 0.2.

13.6.5.1 Whenever the CSA B415.1–2010 overall efficiency is found to be lower than the overall efficiency based on load side

measurements, as determined by Eq. 22 of this method, section 14.1.7 of the test report must include a discussion of the reasons for this result. For a test where the CSA B415.1–2010 overall efficiency SLM is less than 2 percentage points lower than the overall efficiency based on load side measurements,

the efficiency based on load side measurements shall be considered invalid. [Note on the rationale for the 2 percentage points limit. The SLM method does not include boiler/heater jacket losses and, for this reason, should provide an efficiency which is actually higher than the efficiency

based on the energy input and output measurements or "delivered efficiency." A delivered efficiency that is higher than the efficiency based on the SLM could be considered suspect. A delivered efficiency greater than 2 percentage points higher than

the efficiency based on the SLM, then, clearly indicates a measurement error.]

13.6.6 Carbon Monoxide Emissions  
For each minute of the test period, the carbon monoxide emission rate shall be calculated as:

$$CO_{g/min} = Q_{std} \cdot CO_s \cdot 3.298 \times 10^{-5} \quad \text{Eq. 24}$$

Total CO emissions for each of the three test periods (CO<sub>1</sub>, CO<sub>2</sub>, CO<sub>3</sub>) shall be calculated as the sum of the emission rates for each of the 1 minute intervals. Total CO emission for the test run, CO<sub>T</sub>, shall be calculated as the sum of CO<sub>1</sub>, CO<sub>2</sub>, and CO<sub>3</sub>.

13.7 Weighted Average Emissions and Efficiency.

13.7.1 Determine the weighted average emission rate and delivered efficiency from the individual tests in the specified heat output categories. The weighting factors (F<sub>i</sub>) are derived from an analysis of ASHRAE Bin Data which provides details of normal

building heating requirements in terms of percent of design capacity and time in a particular capacity range—or "bin"—over the course of a heating season. The values used in this method represent an average of data from several cities located in the northern United States.

$$\text{Weighted average delivered efficiency: } \eta_{\text{avg}} = \sum \eta_i \times F_i, \% \quad \text{Eq. 25}$$

$$\text{Weighted average emissions: } E_{\text{avg}} = \sum E_i \times F_i, \% \quad \text{Eq. 26}$$

If, as discussed in section 12.5.8, the option to eliminate tests in Category II and III is elected, the values of efficiency and particulate emission rate as measured in Category I, shall be assigned also to Category II and III for the purpose of determining the annual averages.

#### 14.0 Report

14.1.1 The report shall include the following:

14.1.2 Name and location of the laboratory conducting the test.

14.1.3 A description of the appliance tested and its condition, date of receipt and dates of tests.

14.1.4 A description of the minimum amount of external thermal storage that is required for use with this system. This shall be specified both in terms of volume in gallons and stored energy content in Btu with a storage temperature ranging from 125 °F to the manufacturer's specified setpoint temperature.

14.1.5 A statement that the test results apply only to the specific appliance tested.

14.1.6 A statement that the test report shall not be reproduced except in full, without the written approval of the laboratory.

14.1.7 A description of the test procedures and test equipment including a schematic or other drawing showing the location of all required test equipment. Also, a description of test fuel sourcing, handling and storage practices shall be included.

14.1.8 Details of deviations from, additions to or exclusions from the test

method, and their data quality implications on the test results (if any), as well as information on specific test conditions, such as environmental conditions.

14.1.9 A list of participants and their roles and observers present for the tests.

14.1.10 Data and drawings indicating the fire box size and location of the fuel charge.

14.1.11 Drawings and calculations used to determine firebox volume.

14.1.12 Information for each test run fuel charge including piece size, moisture content and weight.

14.1.13 All required data and applicable blanks for each test run shall be provided in spreadsheet format both in the printed report and in a computer file such that the data can be easily analyzed and calculations easily verified. Formulas used for all calculations shall be accessible for review.

14.1.14 For each test run, Θ<sub>1</sub>, Θ<sub>2</sub>, Θ<sub>3</sub>, the total CO and particulate emission for each of these three periods, and Θ<sub>4</sub>.

14.1.15 Calculated results for delivered efficiency at each heat output rate and the weighted average emissions reported as total emissions in grams, pounds per million Btu of delivered heat, grams per MJ of delivered heat, grams per kilogram of dry fuel and grams per hour. Results shall be reported for each heat output category and the weighted average.

14.1.16 Tables 1A, 1B, 1C, 1D, 1E and 2 must be used for presentation of results in test reports.

14.1.17 A statement of the estimated uncertainty of measurement of the emissions and efficiency test results.

14.1.18 A plot of CO emission rate in grams/minute vs. time, based on 1 minute averages, for the entire test period, for each run.

14.1.19 A plot of estimated boiler/heater energy release rate in Btu/hr based on 10 minute averages, for the entire test period, for each run. This will be calculated from the fuel used, the wood heating value and moisture content, and the SLM efficiency during each 10 minute period.

14.1.20 Raw data, calibration records, and other relevant documentation shall be retained by the laboratory for a minimum of 7 years.

#### 15.0 Precision and Bias

15.1 Precision—It is not possible to specify the precision of the procedure in this test method because the appliance operation and fueling protocols and the appliances themselves produce variable amounts of emissions and cannot be used to determine reproducibility or repeatability of this test method.

15.2 Bias—No definitive information can be presented on the bias of the procedure in this test method for measuring solid fuel burning hydronic heater emissions because no material having an accepted reference value is available.

#### 16.0 Keywords

16.1 Solid fuel, hydronic heating appliances, wood-burning hydronic heaters, partial thermal storage.

TABLE 1A—DATA SUMMARY PART A

Category	Run No.	Load % capacity Btu/hr	Target load Btu/hr	Actual load % of max	Actual load hrs	$\Theta$	$W_{fuel}$	$MC_{ave}$	$Q_{in}$	$Q_{out}$
						Test duration	Wood weight as-fired	Wood moisture	Heat input	Heat input
						lb	%DB	Btu	Btu	
I .....	.....	<15% of max								
II .....	.....	16–24% of max.								
III .....	.....	25–50% of max.								
IV .....	.....	Max capacity ..								

TABLE 1B—DATA SUMMARY PART B

Category	Run No.	Load % capacity	T2 Min	$E_T$	E	E	$E_{g/hr}$	$E_{g/kg}$	$\eta_{del}$	$H_{SLM}$
			Min return water temp.	Total PM emissions	PM output based	PM output based	PM rate	PM factor	Delivered efficiency	Stack loss efficiency
			°F	g	lb/MMBtu Out	g/MJ	g/hr	g/kg	%	%
I .....	.....	<15% of max								
II .....	.....	16–24% of max.								
III .....	.....	25–50% of max.								
IV .....	.....	Max capacity ..								

TABLE 1C—DATA SUMMARY PART C

Category	Run No.	Load % capacity	$\Theta_1$	$\Theta_2$	$\Theta_3$	$CO_{_1}$	$CO_{_2}$	$CO_{_3}$	$CO_T$
			Startup time.	Steady state time	End time	Startup CO emission	Steady state CO emission	End CO emission	Total CO emission
			min	min	min	g	g	g	g
I .....	.....	<15% of max							
II .....	.....	16–24% of max							
III .....	.....	25–50% of max							
IV .....	.....	Max capacity							

TABLE 1D—DATA SUMMARY PART D

Category	Run No.	Load % capacity	$E_1$	$E_2$	$E_3$	$E_{1\_g/kg}$	$E_{2\_g/kg}$	$E_{3\_g/kg}$
			Startup PM	Steady state PM	End PM	Startup PM emission index	Steady state PM emission index	End PM emission index
			g	g	g	g/kg fuel	g/kg fuel	g/kg fuel
I .....	.....	<15% of max						
II .....	.....	16–24% of max						
III .....	.....	25–50% of max						
IV .....	.....	Max capacity						

TABLE 1E—LABEL SUMMARY INFORMATION

MANUFACTURER:			
MODEL NUMBER:			
ANNUAL EFFICIENCY RATING: .....	$\eta_{avg}$ .....	.....	(Using higher heating value).
PARTICLE EMISSIONS: .....	$E_{avg}$ .....	.....	GRAMS/HR (average). LBS/MILLION Btu/hr OUTPUT.

TABLE 2—ANNUAL WEIGHTING

Category	Weighting factor ( $F_i$ )	$\eta_{del,i} \times F_i$	$E_{g/MJ,i} \times F_i$	$E_{g/kg,i} \times F_i$	$E_{lb/MMBtu Out,i} \times F_i$	$E_{g/hr,i} \times F_i$
I .....	0.437					
II .....	0.238					

TABLE 2—ANNUAL WEIGHTING—Continued

Category	Weighting factor ( $F_i$ )	$\eta_{del,i} \times F_i$	$E_{g/MJ,i} \times F_i$	$E_{g/kg,i} \times F_i$	$E_{lb/MMBtu Out,i} \times F_i$	$E_{g/hr,i} \times F_i$
III .....	0.275					
IV .....	0.050					
Totals .....	1.000					

Figure 1. Schematic of Equipment Test Setup

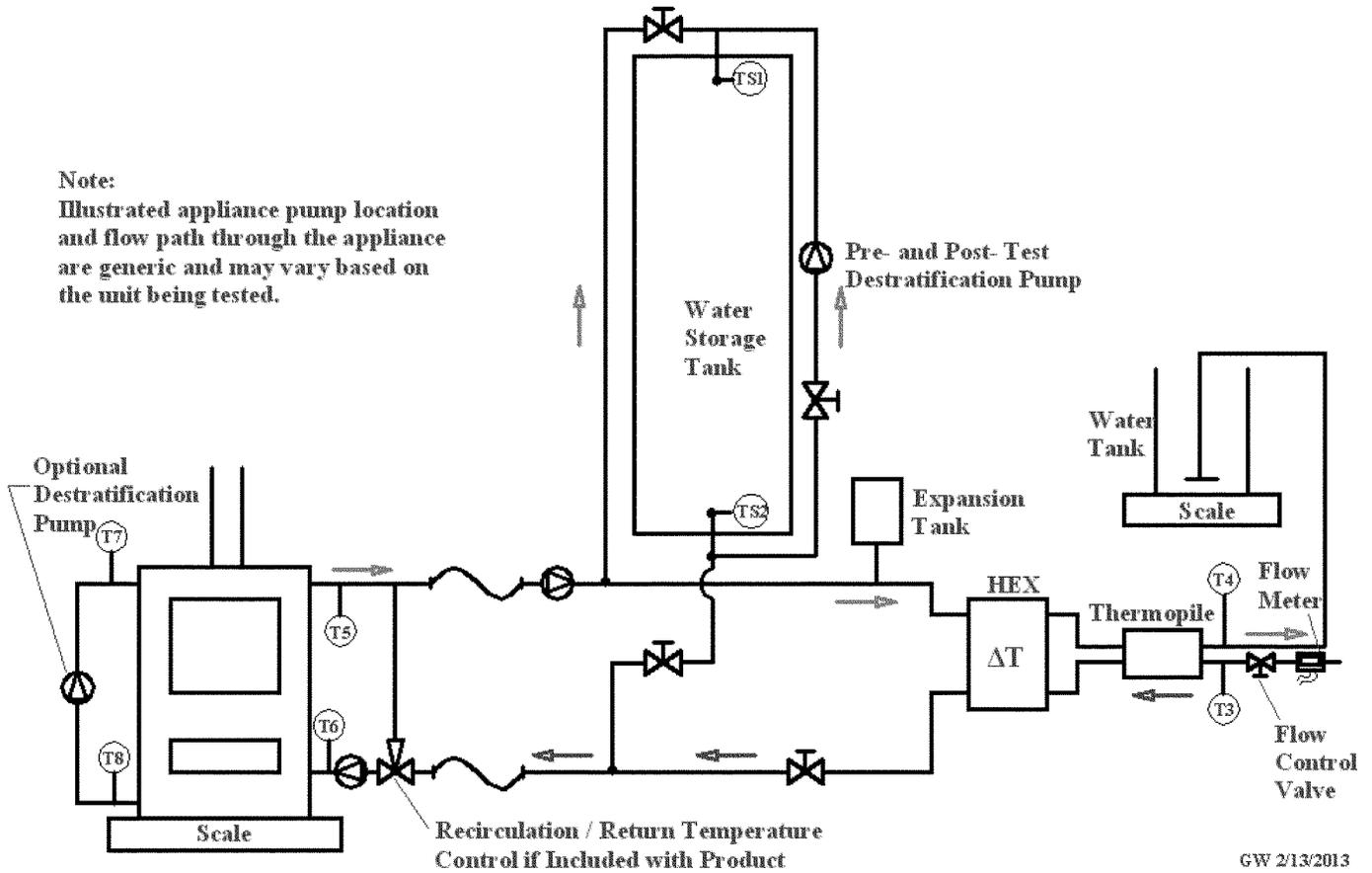
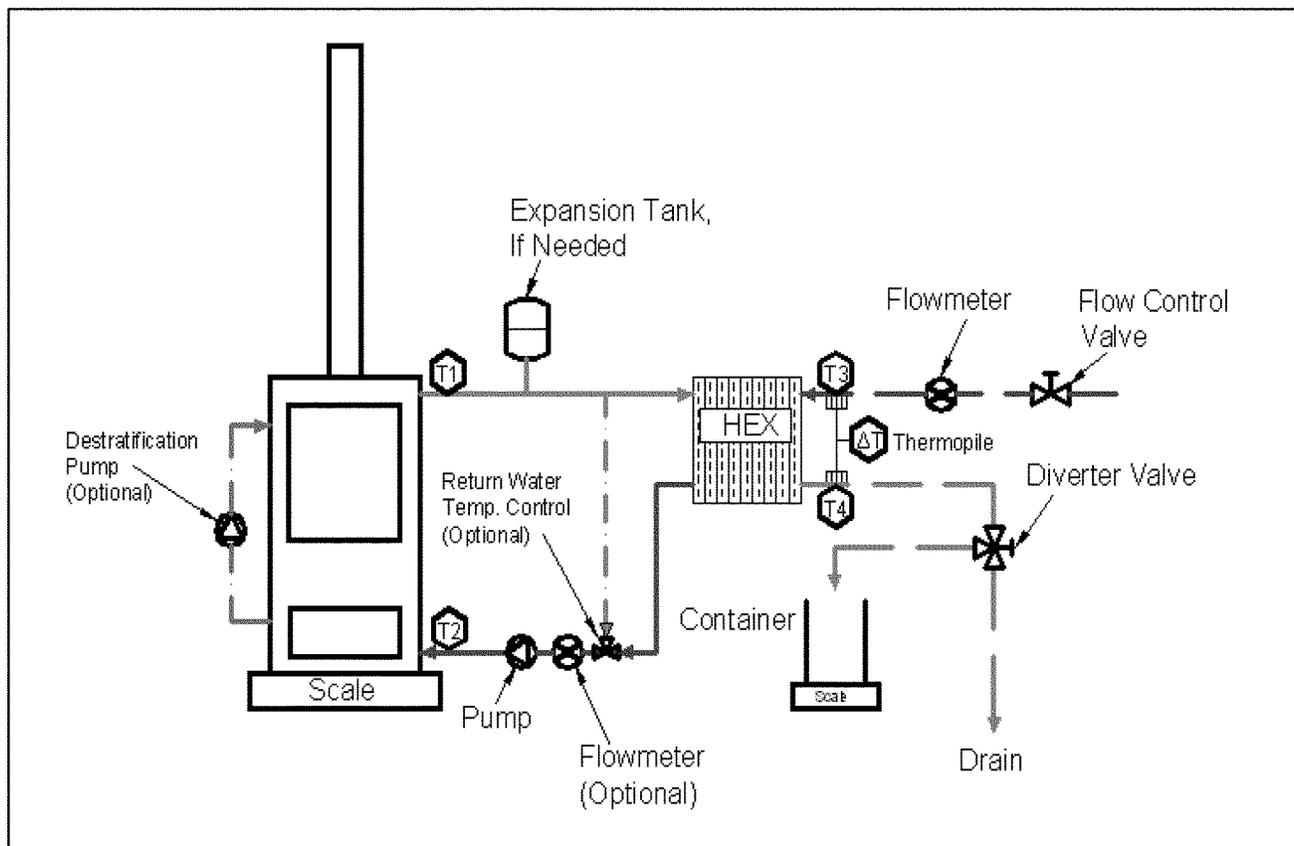


Figure 2. Schematic of Test Equipment Set-up



Note: Illustrated appliance pump location and flow path through the appliance.

■ 7. Revise Appendix I to Part 60 to read as follows:

**Appendix I to Part 60—Owner’s Manuals for Wood-Burning Heaters Subject to Subparts AAA, QQQQ, and RRRR of Part 60**

**1. Introduction**

The purpose of this appendix is to provide specific instructions to manufacturers for compliance with the owner’s manual provisions of subparts AAA, QQQQ, and RRRR of this part.

**2. Instructions for Preparation of Wood Heater Owner’s Manuals**

**2.1 Introduction**

Although the owner’s manuals do not require premarket approval, EPA will monitor the contents to ensure that sufficient information is included to provide heater operation and maintenance information affecting emissions to consumers. The purpose of this section is to provide instructions to manufacturers for compliance with the owner’s manual provisions of § 60.536(f) of subpart AAA that applies to wood heaters, § 60.5478(f) of subpart QQQQ that applies to hydronic heaters and forced-air furnaces, and § 60.5490(g) of subpart RRRR that applies to masonry heaters. A checklist of topics and illustrative language

is provided as instructions. Owner’s manuals should be tailored to specific wood heater models, as appropriate.

**2.2 Topics Required To Be Addressed in Owner’s Manual**

- (a) Wood heater description and compliance status;
- (b) Tamper warning;
- (c) Catalyst information and warranty (if catalyst equipped);
- (d) Fuel selection;
- (e) Achieving and maintaining catalyst light-off (if catalyst equipped);
- (f) Catalyst monitoring (if catalyst equipped);
- (g) Troubleshooting catalytic equipped heaters (if catalyst equipped);
- (h) Catalyst replacement (if catalyst equipped);
- (i) Wood heater operation and maintenance; and
- (j) Wood heater installation: achieving proper draft.

**2.3 Sample Text/Descriptions**

(a) The following are example texts and/or further descriptions illustrating the topics identified above. Although the regulation requires manufacturers to address (where applicable) the ten topics identified above, the exact language is not specified. Manuals should be written specific to the model and design of the wood heater. The following

instructions are composed of generic descriptions and texts.

(b) If manufacturers choose to use the language provided in the example, the portion in italics should be revised as appropriate. Any manufacturer electing to use the EPA example language will be considered to be in compliance with owner’s manual requirements provided that the particular language is printed in full with only such changes as are necessary to ensure accuracy.

Example language is not provided for certain topics, since these areas are generally heater specific. For these topics, manufacturers should develop text that is specific to the operation and maintenance of their particular products.

**2.3.1 Wood Heater Description and Compliance Status**

Owner’s Manuals must include:

- (a) Manufacturer and model;
- (b) Compliance status (exempt, 1990 std., 2015 std., etc.); and
- (c) Heat output range.

Exhibit 1—Example Text covering (a), (b), and (c) above:

“This manual describes the installation and operation of the Brand X, Model 0 catalytic equipped wood heater. This heater meets the U.S. Environmental Protection Agency’s emission limits for wood heaters sold after January 1, 2015. Under specific test

conditions this heater has been shown to deliver heat at rates ranging from 8,000 to 35,000 Btu/hr.”

### 2.3.2 Tamper Warning

The following statement must be included in the owner's manual for catalyst-equipped units:

“This wood heater contains a catalytic combustor, which needs periodic inspection and replacement for proper operation. It is against the law to operate this wood heater in a manner inconsistent with operating instructions in this manual, or if the catalytic element is deactivated or removed.”

### 2.3.3 Catalyst Information

The following information must be included with or supplied in the owner's and warranty manuals:

- (a) Catalyst manufacturer and model;
- (b) Catalyst warranty details; and
- (c) Instructions for warranty claims.

Exhibit 2—Example Text covering (a), (b), and (c):

“The combustor supplied with this heater is a Brand Z, Long Life Combustor. Consult the catalytic combustor warranty also supplied with this wood heater. Warranty claims should be addressed to:

Stove or Catalyst Manufacturer \_\_\_\_\_

Address \_\_\_\_\_

Phone # \_\_\_\_\_

2.3.3.1 This section should also provide clear instructions on how to exercise the warranty (how to package for return shipment, etc.).

### 2.3.4 Fuel Selection

Owner's manuals must include:

- (a) Instructions on acceptable fuels; and
- (b) Warning against inappropriate fuels.

Exhibit 3—Example Text covering (a) and (b):

“This heater is designed to burn natural wood only. Higher efficiencies and lower emissions generally result when burning air dried seasoned hardwoods, as compared to softwoods or to green or freshly cut hardwoods.

DO NOT BURN:

- Treated Wood
- Coal
- Garbage
- Cardboard
- Solvents
- Colored Paper
- Trash

Burning treated wood, garbage, solvents, colored paper or trash may result in release of toxic fumes and may poison or render ineffective the catalytic combustor. Burning coal, cardboard, or loose paper can produce soot, or large flakes of char or fly ash that can coat the combustor, causing smoke spillage into the room, and rendering the combustor ineffective.”

### 2.3.5 Achieving and Maintaining Catalyst Light-Off

Owner's manuals must describe in detail proper procedures for:

- (a) Operation of catalyst bypass (stove specific),
- (b) Achieving catalyst light-off from a cold start, and

(c) Achieving catalyst light-off when refueling.

2.3.5.1 No example text is supplied for describing operation of catalyst bypass mechanisms (Item (a) above) since these are typically stove-specific. Manufacturers must provide instructions specific to their model describing:

(1) Bypass position during startup;

(2) Bypass position during normal operation; and

(3) Bypass position during reloading.

Exhibit 4—Example Text for Item (b):

“The temperature in the stove and the gases entering the combustor must be raised to between 500° to 700°F for catalytic activity to be initiated. During the startup of a cold stove, a medium to high firing rate must be maintained for about 20 minutes. This ensures that the stove, catalyst, and fuel are all stabilized at proper operating temperatures. Even though it is possible to have gas temperatures reach 600°F within 2 to 3 minutes after a fire is started, if the fire is allowed to die down immediately it may go out or the combustor may stop working. Once the combustor starts working, heat generated in it by burning the smoke will keep it working.”

Exhibit 5—Example Text for Item (c):

“REFUELING: During the refueling and rekindling of a cool fire, or a fire that has burned down to the charcoal phase, operate the stove at a medium to high firing rate for about 10 minutes to ensure that the catalyst reaches approximately 600 °F.”

### 2.3.6 Catalyst Monitoring

Owner's manuals must include:

(a) Recommendation to visually inspect combustor at least three times during the heating season;

(b) Discussion on expected combustor temperatures for monitor-equipped units; and

(c) Suggested monitoring and inspection techniques.

Exhibit 6—Example Text covering (a), (b) and (c):

“It is important to periodically monitor the operation of the catalytic combustor to ensure that it is functioning properly and to determine when it needs to be replaced. A non-functioning combustor will result in a loss of heating efficiency, and an increase in creosote and emissions. Following is a list of items that should be checked on a periodic basis:

- Combustors should be visually inspected at least three times during the heating season to determine if physical degradation has occurred. Actual removal of the combustor is not recommended unless more detailed inspection is warranted because of decreased performance. If any of these conditions exists, refer to Catalyst Troubleshooting section of this owner's manual.

- This catalytic heater is equipped with a temperature probe to monitor catalyst operation. Properly functioning combustors typically maintain temperatures in excess of 500 °F, and often reach temperatures in excess of 1,000 °F. If catalyst temperatures are not in excess of 500 °F, refer to Catalyst Troubleshooting section of this owner's manual.

- You can get an indication of whether the catalyst is working by comparing the amount of smoke leaving the chimney when the smoke is going through the combustor and catalyst light-off has been achieved, to the amount of smoke leaving the chimney when the smoke is not routed through the combustor (bypass mode).

Step 1—Light stove in accordance with instructions in 3.3.5.

Step 2—With smoke routed through the catalyst, go outside and observe the emissions leaving the chimney.

Step 3—Engage the bypass mechanism and again observe the emissions leaving the chimney.

Significantly more smoke should be seen when the exhaust is not routed through the combustor (bypass mode). Be careful not to confuse smoke with steam from wet wood.”

### 2.3.7 Catalyst Troubleshooting

The owner's manual must provide clear descriptions of symptoms and remedies to common combustor problems. It is recommended that photographs of catalyst peeling, plugging, thermal cracking, mechanical cracking, and masking be included in the manual to aid the consumer in identifying problems and to provide direction for corrective action.

### 2.3.8 Catalyst Replacement

The owner's manual must provide clear step-by-step instructions on how to remove and replace the catalytic combustor. The section should include diagrams and/or photographs.

### 2.3.9 Wood Heater Operation and Maintenance

Owner's manual must include:

- (a) Recommendations about building and maintaining a fire;
- (b) Instruction on proper use of air controls;
- (c) Ash removal and disposal;
- (d) Instruction on gasket replacement; and
- (e) Warning against overfiring.

2.3.9.1 No example text is supplied for (a), (b), and (d) since these items are model specific. Manufacturers should provide detailed instructions on building and maintaining a fire including selection of fuel pieces, fuel quantity, and stacking arrangement. Manufacturers should also provide instruction on proper air settings (both primary and secondary) for attaining minimum and maximum heat outputs and any special instructions for operating thermostatic controls. Step-by-step instructions on inspection and replacement of gaskets should also be included. Manufacturers should provide diagrams and/or photographs to assist the consumer. Gasket type and size should be specified.

Exhibit 7—Example Text for Item (c):

“Whenever ashes get 3 to 4 inches deep in your firebox or ash pan, and when the fire has burned down and cooled, remove excess ashes. Leave an ash bed approximately 1 inch deep on the firebox bottom to help maintain a hot charcoal bed.”

“Ashes should be placed in a metal container with a tight-fitting lid. The closed container of ashes should be placed on a noncombustible floor or on the ground, away

from all combustible materials, pending final disposal. The ashes should be retained in the closed container until all cinders have thoroughly cooled.”

Exhibit 8—Example Text covering Item (e):  
“DO NOT OVERFIRE THIS HEATER”

“Attempts to achieve heat output rates that exceed heater design specifications can result in permanent damage to the heater and to the catalytic combustor if so equipped.”

2.3.10 Wood Heater Installation:

Achieving Proper Draft

Owner’s manual must include:

(a) Importance of proper draft;  
(b) Conditions indicating inadequate draft;  
and

(c) Conditions indicating excessive draft.  
Exhibit 9—Example Text for Item (a):

“Draft is the force which moves air from the appliance up through the chimney. The amount of draft in your chimney depends on the length of the chimney, local geography, nearby obstructions, and other factors. Too much draft may cause excessive temperatures in the appliance and may damage the catalytic combustor. Inadequate draft may

cause backpuffing into the room and ‘plugging’ of the chimney or the catalyst.”

Exhibit 10—Example Text for Item (b):  
“Inadequate draft will cause the appliance to leak smoke into the room through appliance and chimney connector joints.”

Exhibit 11—Example Text for Item (c):  
“An uncontrollable burn or a glowing red stove part or chimney connector indicates excessive draft.”

[FR Doc. 2014–00409 Filed 1–31–14; 8:45 am]

**BILLING CODE 6560–50–P**

From: Henderson, Kelly <khenderson@nrdc.org>  
To: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: Automatic reply: Side-by-side draft on methane  
Date: Mon Feb 03 2014 09:20:23 EST  
Attachments:

---

I am out of the office on Monday February 3rd and not checking email. If you need immediate assistance, please contact Sam Beckerman (sbeckerman@nrdc.org). I will respond to your email on Tuesday.

From: Jeremy Magliaro </o=lawnet/ou=first administrative group/cn=recipients/cn=jeremymagliaro>  
To: Lisa M. Burianek </o=lawnet/ou=first administrative group/cn=recipients/cn=lisaburianek>; Lemuel Srolovic </o=lawnet/ou=first administrative group/cn=recipients/cn=lsrolovi>  
Cc:  
Bcc:  
Subject: RE: EarthJustice.pdf - Adobe Acrobat Standard  
Date: Mon Feb 03 2014 12:58:23 EST  
Attachments: Letter to DEC Commissioner Martens Port of Albany Crude Oil Shipments 01.30.14.pdf

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The copy attached includes the exhibits. Sierra Club provided without solicitation.

From: Lisa M. Burianek  
Sent: Monday, February 03, 2014 10:01 AM  
To: Jeremy Magliaro; Lemuel Srolovic  
Subject: FW: EarthJustice.pdf - Adobe Acrobat Standard

From: Angela Houle [mailto:amhoule@gw.dec.state.ny.us]  
Sent: Friday, January 31, 2014 10:17 AM  
To: Alison Crocker; Jeff Gregg; Lisa Wilkinson  
Subject: EarthJustice.pdf - Adobe Acrobat Standard

Angela Houle  
New York State Department of Environmental Conservation  
Office of General Counsel  
625 Broadway  
Albany, NY 12233-1500  
518-402-9507 phone  
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Document ID: 0.7.691.588103-000001

Owner: Jeremy Magliaro </o=lawnet/ou=first administrative  
group/cn=recipients/cn=jeremymagliaro>

Filename: Letter to DEC Commissioner Martens Port of Albany Crude Oil Shipments 01.30.14.  
pdf

Last Modified: Mon Feb 03 12:58:23 EST 2014

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# EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

**Via Overnight Mail**

January 30, 2014

Hon. Joseph J. Martens  
Commissioner  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1010

**Re: Global Companies LLC Port of Albany Crude Oil Shipments: Request to Withdraw Notice of Complete Application, Rescind Negative Declaration and Issue Positive Declaration, Revoke Prior Permit Modification, and Comply With Environmental Justice Policy**

Dear Commissioner Martens:

Earthjustice submits this letter on behalf of Sierra Club Atlantic Chapter, the Ezra Prentice Homes Tenants' Association, the Center for Biological Diversity, Riverkeeper, Inc., Natural Resources Defense Council, Environmental Advocates of New York, Catskill Mountainkeeper, Albany City Council President Carolyn McLaughlin, Albany City Councilmember Leah Golby, Albany City Councilmember Dorcey Appliers, Albany City Councilmember Judd Krasher, Albany City Councilmember Vivian Kornegay, Albany County Legislator Bryan M. Clenahan, Albany County Legislator Doug Bullock, People of Albany United for Safe Energy, MoveOn.Org Capital Region Council, Transition Albany, Save the Pine Bush, Bethlehem Neighbors for Peace, Restore Our Waterfront, Occupy Albany, the Muslim Solidarity Committee, and the Solidarity Committee of the Capital Region to request that the New York State Department of Environmental Conservation ("DEC" or "Department") take immediate action to address the environmental and public health and safety threat posed by massive rail shipments of volatile crude oil into the Port of Albany. Within the past year, over one billion gallons of explosive Bakken crude oil has been shipped into the Port by rail; hundreds of crude oil rail cars are being stored just feet away from homes and playgrounds; and long lines of crude oil rail cars routinely stretch for miles along Route 787 through the heart of downtown Albany. All of this has occurred without the thorough environmental review required by state law, and without any attempt to engage the residential communities that are bearing the brunt of this unprecedented industrial activity as required by the Department's Environmental Justice Policy.

For the reasons set forth in this letter, we urge DEC to require a full environmental impact statement and environmental justice analysis and process for (1) the pending application by Global Companies, LLC ("Global") for a modification of the Clean Air Act Title V Air Facility Permit ("Title V Permit") for Global's Port of Albany Terminal, and (2) the prior modification to the Title V Permit, approved by DEC in November 2012, which allowed Global to double the throughput of Bakken crude oil at the Albany Terminal.

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In 2011, the Department determined that Global's Albany Terminal operations potentially affect an environmental justice area within the meaning of DEC's Environmental Justice Policy, Commissioner's Policy 29, Environmental Justice and Permitting (March 19, 2003) ("CP-29"). This determination was reiterated by the Department on July 25, 2013. We respectfully bring to your attention the fact that, despite these determinations, neither Global nor DEC have complied with the environmental justice policies and procedures set forth in CP-29 regarding either Global's November 2011 Title V Permit modification or Global's pending Title V Permit modification.

Specifically, Global has failed to prepare and submit to DEC – much less implement – a written Public Participation Plan as required by CP-29. Moreover, the Department issued a Notice of Complete Application despite the fact that CP-29 explicitly requires that a Public Participation Plan be prepared and submitted to DEC before an application potentially affecting an environmental justice community can be considered complete. Additionally, the Department has failed to conduct a coordinated review with the City of Albany Planning Board as required by CP-29. As a result of the joint failure by Global and DEC to comply with the Department's Environmental Justice Policy, the neighboring environmental justice communities and their elected officials were not provided with adequate notification or information regarding Global's prior and current proposals to significantly increase dangerous industrial activities at the Albany Terminal. Consequently, the neighboring environmental justice communities bearing a disproportionate share of the environmental and public health risks from Global's industrial operations have been excluded from the permit review process, and the health and safety concerns of families living within feet of those operations have been neither solicited nor considered.

Additionally, neither Global nor DEC has addressed the broader concerns of those who live and work in Albany regarding the potentially catastrophic environmental and public health consequences of an accident involving Global's Bakken crude oil shipments or the newly proposed import of (what we believe to be) tar sands oil. As discussed in detail below, the recent epidemic of derailments and explosions involving Bakken crude rail shipments make clear that a similar accident at or near the Albany Terminal could have horrific consequences. The proximity of the Albany Terminal to thousands of homes and to downtown Albany – and the concentration at the Terminal of hundreds of tank rail cars carrying Bakken crude – make it likely that an accident will result in serious loss of human life and destruction of homes and businesses. Moreover, the location of the Albany Terminal in the floodplain of the Hudson River and the massive transfers of crude oil at the Terminal onto river barges create a serious threat of long-term and potentially irreversible environmental harm in the event of an explosion or spill, particularly one involving viscous tar sands oil.

In light of these concerns, we respectfully request that the Department withdraw its Notice of Complete Application regarding Global's application for a Title V Permit modification unless and until Global and the Department comply with the requirements of CP-29, and unless and until Global specifically identifies the origin and type of crude oil that it seeks to heat. Upon information and belief, Global is applying for new heating capability at the Albany Terminal in order to import, store and transfer tar sands oil. Because tar sands oil has potentially significant

adverse environmental impacts that are different in type and degree from oil currently handled at the Albany Terminal, and because the Albany Terminal is located in the floodplain of the Hudson River and is adjacent to or directly upstream of several areas designated as Significant Coastal Fish and Wildlife Habitats, Global should be required to fully evaluate and avoid or mitigate those potential impacts as required by the State Environmental Quality Review Act, Environmental Conservation Law Article 8 ("SEQRA").

Because Global and the Department have failed to comply with CP-29 and have failed to address the environmental impacts associated with the proposed handling of tar sands oil, we also request that the Department rescind the Negative Declaration previously issued for the proposed modification to the Title V Permit and issue a Positive Declaration requiring that an environmental impact statement be prepared as required by SEQRA.

We also respectfully request that the Department exercise its authority under the Uniform Procedures Act and the Department's implementing regulations to revoke the November 2012 modification to Global's Title V Permit because (i) Global made materially false and inaccurate statements in its permit application claiming that the doubling of throughput of crude oil would result in no additional train traffic at the Albany Terminal; (ii) significant and material new information has become available since the prior Title V Permit modification demonstrating that Bakken crude oil poses significant environmental and public health and safety threats that were not considered or addressed in the prior modification; and (iii) Global and DEC failed to comply with CP-29 during the prior Title V Permit modification.

We respectfully submit that the above actions are necessary and proper in order to fulfill the directives set forth in Executive Order 125 issued by Governor Cuomo on January 29, 2014, Directing the Department of Environmental Conservation, the Department of Transportation, the Division of Homeland Security and Emergency Services, the Department of Health, and the New York State Energy Research and Development Authority to Take Action to Strengthen the State's Oversight of Shipments of Petroleum Products ("Executive Order 125"), annexed hereto as Exhibit A. Executive Order 125 requires, among other things, that DEC and the other agencies named in the Order submit a report to the Governor by April 30, 2014 that includes:

- (i) a summary of the State's readiness to prevent and respond to rail and water accidents involving petroleum products;
- (ii) recommendations concerning statutory, regulatory, or administrative changes needed at the State level to better prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge;
- (iii) recommendations concerning the role that local governments across the State have in protecting their communities and their residents from spill of petroleum products shipped by rail and water; and
- (iv) recommendations concerning enhanced coordination between the State and federal agencies in order to improve the State's capacity to prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship and barge.

Exhibit A at 2.

The Executive Order's requirement that DEC and the other named agencies assess the State's readiness to prevent and respond to rail and water accidents involving petroleum products and make recommendations concerning ways to better prevent and respond to accidents makes clear that a comprehensive review of crude oil operations at the Albany Terminal, and the environmental and public health and safety risks posed by those operations, must be conducted and included in the report to the Governor. In fact, Executive Order 125 specifically references the significant increase in shipments of Bakken crude oil to the Albany Terminal as grounds for requiring the report. *See* Exhibit A at 1 ("there has been a significant expansion in the use of the Port of Albany in the distribution and transportation of crude oil and other petroleum products by rail, ship and barge"). The most expedient, thorough, and publicly accountable way to conduct such a comprehensive review is through an environmental impact statement ("EIS") prepared pursuant to SEQRA. Consequently, we urge the Department to immediately suspend its review of Global's pending application, revoke the prior permit modification, issue a Positive Declaration requiring Global to prepare an EIS concerning all aspects of its Albany Terminal operations, and ensure that the requirements of the Department's Environmental Justice Policy are complied with by Global and Department staff.

#### **I. DEC's Environmental Justice Policy**

The Department's Environmental Justice Policy "provides guidance for incorporating environmental justice concerns into the [DEC] environmental permit review process and the DEC application of the State Environmental Quality Review Act." CP-29 at 1. The policy was issued to address "the lack of meaningful public participation by minority or low-income communities in the permit process; the unavailability or inaccessibility of certain information to the public early in the permit process; and the failure of the permit process to address disproportionate adverse environmental impacts on minority and low-income communities." *Id.* In order to address these concerns, CP-29 establishes "the general policy of DEC to promote environmental justice and incorporate measures for achieving environmental justice into its programs, policies, regulations, legislative proposals and activities." *Id.* at 2. Furthermore, CP-29 provides that "[t]his policy is specifically intended to ensure that DEC's environmental permit process promotes environmental justice." *Id.* (emphasis added).

CP-29 defines "environmental justice" as:

the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

*Id.* at 3.

CP-29 directs that, upon receipt of a permit application subject to the policy, DEC must conduct a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area and determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area. *Id.* at 7. Where a potential environmental justice area is identified by the preliminary screen, DEC must provide the applicant with relevant information on environmental justice. *Id.* at 8.

The centerpiece of CP-29 is its requirement for enhanced public participation for actions potentially affecting an environmental justice area. The policy provides that, “[w]here a potential environmental justice area is identified by the preliminary screen, *the applicant shall submit a written public participation plan as part of its complete application.*” *Id.* at 8; (emphasis added). The policy requires that, at a minimum, the Public Participation Plan identify stakeholders, including nearby residents, local elected officials, community-based organizations, and community residents; provide for distribution and posting of written information on the proposed action and permit review process; provide for public information meetings to keep the public informed about the proposed action and permit review process; and establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent information. *Id.* The applicant is also required to submit a report summarizing progress on implementing the plan, all substantive concerns raised, all resolved and outstanding issues, the components of the plan yet to be implemented, and an expected timeline for completing the plan. Upon completion of the plan, the applicant must submit a written certification that it has complied with the plan, including an updated status report. *Id.*

CP-29 also requires that where a potential environmental justice area is identified by the preliminary screen, a full environmental assessment form must be completed for Type I and Unlisted actions, and specifies that “DEC shall coordinate the review of the action with the other involved state and local agencies.” *Id.* at 9.

## II. Global’s Massive Increase in Industrial Operations at the Albany Terminal

On or about November 14, 2011, Global submitted an application for a Title V Permit modification to allow it to double crude oil storage and loading capabilities at the Albany terminal to 1.8 million gallons calculated on a 12-month rolling basis. By letter dated December 14, 2011, DEC requested additional information regarding the proposed change in terminal operations and the potential environmental impacts associated with the requested permit modification. The DEC letter also notified Global that the requested permit modification “is considered to be a major modification with respect to your Air permit *and your facility is located within an area that has been identified as a potential Environmental Justice area . . . Therefore, as part of the review process for this proposed modification, you will need to address CP-29 as it relates to your proposal.*” Letter from Angelo Marcuccio, DEC Environmental Analyst to Thomas Keefe, Global Companies, LLC (Dec. 14, 2011) (“Marcuccio Letter”) at 2 (emphasis added). A copy of the Marcuccio Letter is annexed as Exhibit B.

Global responded to the Marcuccio Letter by letter dated March 2, 2012 from its consultant, Ingalls & Associates, LLP, stating that the proposed terminal modifications included reconfiguring an existing intermodal rail yard to permit offloading of petroleum products via rail,

expansion of Global's existing rail loading/unloading rack, and expansion of the existing marine loading terminal. Letter from Ameila Leonard, Environmental Specialist, Ingalls & Associates, LLP, to Angelo Marcuccio, DEC (March 2, 2012) ("Ingalls Letter"), annexed hereto (without attachments) as Exhibit C, at 1. The Ingalls Letter stated that construction activities associated with the proposed modifications would disturb approximately seven acres of land at the Albany terminal. *Id.* at 2.

Despite the fact that Global was seeking to double crude oil throughput at the Albany Terminal and that the increase would require 7 to 10 additional barges per month, Global made the remarkable claim that "future train traffic will be almost identical to existing train traffic." *Id.* at 3. As discussed below, this claim constitutes a materially false and inaccurate statement within the meaning of 6 NYCRR § 621.13(a)(1).

With respect to the environmental justice issue raised in the Marcuccio Letter, Global responded as follows:

While we recognize that the requested permit modification is considered to be a major modification with respect to the Air Permit, and that the Albany Terminal is located within a potential Environmental Justice Area, no potential adverse environmental impacts related to the proposed action are likely to affect the area. In fact, the project will likely result in environmental benefits for residents of the area of concern. As a result, no further EJ review is required of the proposed project based on the preliminary screening criteria detailed in CP-29.

*Id.* at 4.

This statement is flawed in several respects. First, the claim that "no potential adverse environmental impacts related to the proposed action are likely to affect the [environmental justice] area" is contradicted by the fact that the application sought a massive expansion of operations at Global's Albany terminal, with the attendant increased risk of fire, explosion and spills. Second, the claim that the project would result in environmental benefits for nearby residents is lacking in credibility, to say the least, and was made without any effort to solicit the views of the affected neighboring community. Third, even if Global's environmental claims were true, the statement that no further environmental justice review was required by CP-29 is simply wrong. CP-29 requires an enhanced public participation plan to be prepared, submitted and implemented if a potential environmental justice area is identified by the preliminary screen, regardless of an applicant's claim that the area will not be adversely affected by the project. *See* CP-29 at 8 ("Where a potential environmental justice area is identified by the preliminary screen, *the applicant shall submit a written public participation plan as part of its complete application*") (emphasis added).

Unfortunately, the Department apparently never questioned Global's environmental claims and failed to correct Global's misinterpretation of CP-29. As a result, no Public Participation Plan was prepared by Global, and the enhanced public participation requirements of CP-29 were ignored. Despite CP-29's clear mandate that a written Public Participation Plan must be submitted before an application may be deemed complete, the Department issued a

Notice of Complete Application, ignoring Global's failure to comply with this key requirement.<sup>1</sup> See Notice of Complete Application (July 25, 2012), annexed hereto as Exhibit D.

On or about July 25, 2012, the Department announced in the Environmental Notice Bulletin ("ENB") that it had prepared a draft Title V Permit approving Global's application and that the Department had issued a Negative Declaration for the project. ENB Region 4 Completed Applications Albany County (July 25, 2012), annexed hereto as Exhibit E. Despite that fact that Global had stated in its application that building permits for the proposed project were required from the City of Albany, see Exhibit C at 2, the Department's ENB notice stated that no coordinated review had been performed. *Id.* This was in derogation of CP-29's explicit requirement that projects potentially affecting environmental justice areas be subject to coordinated review. CP-29 at 9. Indeed, the ENB notice makes no mention of the fact that Global's proposed project had been determined by DEC to potentially affect an environmental justice area and was therefore subject to the requirements of CP-29. See Exhibit E.

Subsequently, on or about June 1, 2013, Global submitted another application to modify its Title V Permit to expand the capabilities at the Albany Terminal to include the storage of heated petroleum products. The proposed project involves the installation of seven gas-fired boilers, reconfiguration of an existing intermodal rail yard to allow offloading of those heated petroleum products, and the installation of emission controls in one tank (Tank 33) to allow for the storage of crude oil. By Notice of Incomplete Application dated July 25, 2013, DEC notified Global that "[t]he facility is located within a potential Environmental Justice area . . . Please provide a response indicating how the applicant is proposing to comply with the Department's Environmental Justice and Permitting Policy, CP-29." DEC Notice of Incomplete Application (July 25, 2013) (emphasis added), annexed hereto as Exhibit F.

By letter dated September 6, 2013, Global responded to the Notice of Incomplete Application through its consultant, EnviroSpec Engineering, PLLC. With respect to the environmental justice issue, Global again misinterpreted and misapplied CP-29:

The nearest residences to the proposed project are located approximately 800 feet northwest of Kenwood Yard on Franklin Street. The Port area has been industrialized for many years and Global's activities do not alter the character of the area, nor do any emissions, noise or lighting conditions substantially change the status quo that has existed to the east of the Interstate. The attached Expanded Narrative addresses environmental concerns associated with the proposed heated product project, including a traffic analysis, visual analysis, noise analysis and a

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<sup>1</sup> This error was compounded by the Department's conclusion in its subsequent Notice of Complete Application that "[i]t has been determined that the proposed project is not subject to CP-29." The basis for DEC's about-face on the applicability of CP-29 was not explained. There is no indication that DEC had concluded that its preliminary screening analysis was in error, nor is there any reference to any provision of CP-29 supporting the revised determination of CP-29 inapplicability. In fact, the determination directly contradicts DEC's initial determination on December 14, 2011 that the project was subject to CP-29, and DEC's reiteration of that determination in July 2013 (discussed below).

review of odor control at the Terminal. As the Expanded Narrative indicates, the proposed project will not have any adverse environmental impacts. As a result, no further environmental justice analysis is required, consistent with the methodology for conducting a preliminary screen found in DEC Policy CP-29.

Letter from Nicole Brower, PE, Envirospec Engineering, PLLC, to Karen M. Gaidasz, DEC Region 4 (Sept. 6, 2013), annexed hereto as Exhibit G, at 2.

Global apparently relied on this self-serving analysis to justify its failure to comply with the requirement of CP-29 that a Public Participation Plan be prepared and implemented – a requirement that applies regardless of the applicant’s claim (made without any input from the affected communities) that neighboring environmental justice communities will not be adversely affected by the proposed project.

On November 21, 2013, the Department issued a Notice of Complete Application and subsequently published notice of the application, together with notification that a Negative Declaration had been issued for the proposed modification, in the ENB. *See* ENB Region 4 Completed Applications Albany County (Dec. 31, 2013) annexed hereto as Exhibit H. DEC issued the Notice of Complete Application even though Global had again failed to comply with CP-29’s requirement that a Public Participation Plan be submitted as part of its application. Also, as was the case with the prior permit modification, DEC failed to conduct the coordinated review required by CP-29. *See id.* at 2.

### **III. The Notice of Complete Application Should Be Withdrawn**

Because neither Global nor the Department has complied with the requirements of CP-29, the Notice of Complete Application should be withdrawn. As noted above, once the preliminary screen has identified an environmental justice community, the applicant must prepare and submit a Public Participation Plan as part of its application. CP-29 at 8. This requirement applies regardless of an applicant’s claims that its project will have no adverse impact on the identified environmental justice community. Because Global has failed to submit a written Public Participation Plan, its application is incomplete and the Notice of Complete Application was erroneously issued.

### **IV. The Negative Declaration Should Be Rescinded and a Positive Declaration Issued**

As Global acknowledges in its application, the need for installation of new heating processes at the Albany Terminal is the result of the viscosity of the new product (which Global has not identified) that will be coming into the Terminal. Upon information and belief, the new product will include crude oil extracted from tar sands in western Canada. Neither Global nor the Department has adequately addressed the potential adverse environmental and human health impacts that may result from an accident involving tar sands oil. In fact, those potential impacts make clear that the issuance of a Negative Declaration for this project was in error.

The impacts of a spill of tar sands oil could be disastrous. Unlike oil from other sources, tar sands oil often arrives into the United States from Canada as diluted bitumen, “a highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas liquid condensate.”<sup>2</sup> A leak or spill of diluted bitumen presents an elevated risk to the environment and public safety. The chemicals used to dilute the bitumen are hazardous and more likely to ignite or explode than conventional crude. An explosion of diluted bitumen may produce hydrogen sulfide, a highly toxic gas which can cause suffocation. Diluted bitumen also contains benzene, polycyclic aromatic hydrocarbons, and other toxins that can affect the human central nervous system.<sup>3</sup>

In addition, a spill of tar sands oil into water is extremely difficult to clean up because bitumen sinks, placing waterways and sources of drinking water at greater risk. More than three years after the spill of tar sands oil into Talmadge Creek and the Kalamazoo River in Michigan, the river’s bottom sediment remains contaminated and the U.S. Environmental Protection Agency estimates that 180,000 gallons of oil have yet to be recovered.<sup>4</sup> Health impacts ranging from headaches to chronic coughing have been reported by individuals living close to the Kalamazoo River.<sup>5</sup>

The potential environmental impacts associated with a tar sands oil explosion or spill meet the criteria for significance set forth in DEC’s SEQRA regulations. Specifically, they meet the criteria in 6 NYCRR §§ 617.7(c)(1)(i) (“a substantial adverse change in existing air quality, ground or surface water quality”); 617.7(c)(1)(ii) (“other significant adverse impacts to natural resources”); 617.7(c)(1)(v) (“the impairment of . . . existing community or neighborhood character”); and 617.7(c)(1)(vii) (“the creation of a hazard to human health”).

Moreover, the SEQRA regulations require that the significance of a likely consequence be assessed in connection with its setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude, and number of people affected. 6 NYCRR § 617.7(c)(3). Here, the effects of a potential spill or explosion could be catastrophic, given the close proximity of Global’s Albany Terminal to residential housing, the Hudson River, and to the Normanskill, Paps cane Marsh and Creek, Shad and Schermerhorn Islands, and Schodack, Houghtaling Islands and Schodack Creek Significant Coastal Fish and Wildlife Habitats. For these reasons, the Department erred in issuing a Negative Declaration. See *Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (2009) (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *Riverhead Bus. Imp. Dist. Mgmt. Ass’n, Inc. v. Stark*, 253 A.D.2d 752, 753 (2d Dep’t 1998) (annulling town board’s negative declaration because possible release of toxic or hazardous materials into groundwater

<sup>2</sup> Natural Resources Defense Council, *Tar Sands Pipelines Safety Risks*, 5 (Feb. 2011).

<sup>3</sup> *Ibid.*

<sup>4</sup> U.S. Environmental Protection Agency, *Dredging Begins on Kalamazoo River* (Aug. 2013), available at [http://www.epa.gov/region05/enbridgespill/pdfs/enbridge\\_fs\\_201308.pdf](http://www.epa.gov/region05/enbridgespill/pdfs/enbridge_fs_201308.pdf).

<sup>5</sup> CBC News, *Enbridge’s Kalamazoo cleanup dredges up 3-year-old oil spill* (Sept. 6, 2013), available at <http://www.cbc.ca/news/politics/enbridge-s-kalamazoo-cleanup-dredges-up-3-year-old-oil-spill-1.1327268>.

and potential for accidental release or explosion were significant effects requiring preparation of an EIS); *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625 (Sup. Ct. Erie County 2004) (holding that city council violated SEQRA by failing to take “hard look” at hospital’s helipad proposal because it failed to consider potential danger to surrounding neighborhood of fire and explosion of liquid oxygen tanks); *see also Gov’t of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 50 (D.D.C. 2010) (“It may be that the risk of a breach is low given the pipeline’s construction, but that is not an excuse . . . to refuse entirely to analyze the consequences. When the degree of potential harm could be great, *i.e.*, catastrophic, the degree of analysis and mitigation should also be great”) (emphasis in original); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1033 (9th Cir. 2006) (requiring preparation of an EIS due to “events with potentially catastrophic consequences ‘even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason’”) (internal citations omitted); *Tri-Valley Cares v. Dep’t of Energy*, 203 F. App’x 105, 107 (9th Cir. 2006) (holding that potential terrorist attack on proposed biological weapons laboratory required to be considered as part of National Environmental Policy Act environmental assessment).

Moreover, because Global failed in its application for a modification to the Title V Permit to specifically identify that it is proposing to import, for the first time, tar sands oil to the Albany Terminal, this constitutes discovery of “new information” and a “change in circumstance . . . not previously considered” providing grounds for rescission of the Negative Declaration. *See* 6 NYCRR §§ 617.7(f)(1)(ii) and (iii). The SEQRA regulations specifically allow rescission of a Negative Declaration “at any time prior to [an agency’s] decision to undertake, fund or approve an action.” 6 NYCRR § 617.7(f). Since no final decision on Global’s application has been made, rescission of the Negative Declaration is permissible and appropriate.

**V. The Department Should Revoke the November 2012 Permit Modification Based on Global’s False and Inaccurate Statements, the Availability of Material New Information Regarding Bakken Crude Oil, and the Failure to Comply With CP-29**

DEC’s regulations implementing the Uniform Procedures Act authorize the Department to revoke a permit if there are “materially false or inaccurate statements in the permit application or supporting papers,” or based on “newly discovered material information . . .” 6 NYCRR §§ 621.13(a)(1) and (4). In this case, both grounds exist for initiating a permit modification with respect to the Title V Permit modification approved by DEC in November 2012. Additionally, neither Global nor the Department complied with the requirements of CP-29 during the prior Title V permit modification, and the prior permit modification should be revoked for this reason as well.

**A. Materially False and Inaccurate Statements**

As noted above, in its application materials for the prior Title V Permit modification, Global repeatedly claimed that its doubling of crude oil throughput at the Albany Terminal would result in no increase in rail traffic. *See* Exhibit C at 2-3 (“future train traffic will be almost identical to existing train traffic”); *id.* at 5 (“the project will result in no increase in rail traffic”).

It is perplexing how this claim could have gone unquestioned by DEC. It defies credibility that Global could *double* the throughput of crude oil at the Albany Terminal without *any* increase in rail traffic – particularly since Global also predicted a “substantial decrease” in truck traffic. *Id.* at 2-3. Moreover, Global’s acknowledgement in its application that an additional 7 to 10 barges would be required each month to handle the increased throughput should have raised red flags concerning its specious assertion that all of this additional crude oil would arrive at the Albany Terminal without any increase in rail traffic.

In any event, Global’s claim appears to be demonstrably false. As anyone who lives or works in Albany or has traveled along Route 787 can attest, Global’s expansion of crude oil throughput appears to have vastly increased rail traffic at and near the Albany Terminal. Hundreds of tank rail cars are routinely parked directly adjacent to the Ezra Prentice Homes and in the Port of Albany rail yard, and lines of tank cars stretch for miles on the tracks running along Route 787 through the heart of downtown Albany and right past DEC headquarters. Indeed, the vast increase in rail traffic at the Albany Terminal is specifically recognized in Executive Order 125. *See* Exhibit A at 1 (“there has been a significant expansion in the use of the Port of Albany in the distribution and transportation of crude oil and other petroleum products by rail, ship and barge . . .”). Photographs depicting the tank rail car congestion and its proximity to homes and downtown Albany are annexed hereto as Exhibit I.

To put it bluntly, Global knew or should have known that doubling the throughput at the Albany Terminal would likely result in a significant increase in rail traffic. Its statements to the contrary were thus materially false and inaccurate, and provide grounds for DEC to revoke the prior permit modification in order to fully evaluate the environmental justice, environmental, and public health and safety impacts associated with the increased rail traffic.

#### B. Material New Information

Even if Global’s claims regarding rail traffic were true, DEC should revoke the prior permit modification based on material new information regarding the dangers associated with rail transport of highly flammable, explosive Bakken crude oil. Multiple derailments in the last six months of trains carrying Bakken crude oil have resulted in enormous conflagrations of burning crude, millions of gallons of oil spilled into nearby water bodies, and, in a single accident, significant loss of human life. As Executive Order 125 recognizes, “Bakken crude oil has a lower flashpoint and is therefore more prone to ignite during a rail accident.” Exhibit A at 1. The environmental and public safety issues associated with Global’s massive shipments of highly volatile Bakken crude oil were not addressed in the prior permit modification. Those issues must be addressed now before a potentially catastrophic accident occurs in the heart of downtown Albany.

Currently, hundred-car trains are carrying Bakken crude<sup>6</sup> southward along the western shore of Lake Champlain and to the Port of Albany, and are also converging on Albany and the

<sup>6</sup> Anderson, Eric, “Warning issued for crude oil: Agency says Bakken shale variety fire risk may be higher,” *Albany Times Union*, Jan. 2, 2014, available at <http://www.timesunion.com/business/article/Warning-issued-for-crude-oil-5109728.php#photo-5674154>.

Hudson River Valley from west-east rail lines. This volatile cargo has been the cause of numerous recent environmental and public safety incidents, including:

- the fiery derailment of a train at Casselton, North Dakota;<sup>7</sup>
- the evacuation of a New Brunswick town following a derailment and fire;<sup>8</sup>
- a train derailment in Pickens County, Alabama,<sup>9</sup> that caused an explosion and fire and spilled oil into a wetland feeding the Tombigbee River;<sup>10</sup> and
- on July 6, 2013, one of the worst train accidents ever in North America occurred at Lac-Mégantic, Quebec, when a 72-tanker<sup>11</sup> train carrying Bakken crude careened, unmanned, into town in the middle of the night, killing 47 people and incinerating the downtown area. Roughly 1.6 million gallons of crude oil spilled from the train, some of it reaching the lake that served as the focal point for this popular tourist town. Oil has been found as far as 74 miles downstream from the spill site.<sup>12</sup>

Earlier this month, in response to the recent spate of blazing derailments of trains carrying Bakken crude, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a rare safety alert,<sup>13</sup> stating that crude oil produced in the Bakken region may be more flammable and therefore more dangerous than other types of crude oil. The alert included a reminder to emergency responders that light sweet crude, such as that from the Bakken region, has a flash point of below 73° F, and therefore “pose[s] significant fire risk if released from the package in an accident.”

Unfortunately PHMSA’s alert does nothing to reduce the risk of another disastrous derailment of a train carrying Bakken crude. While the recent North Dakota and Alabama wrecks occurred outside of populated areas and resulted in no human injuries, the consequences of a derailment in downtown Albany could be equally catastrophic as the Lac-Mégantic incident. And whether a derailment occurs in a town or in a rural area, spilled crude threatens surface and groundwater sources, wetlands, streams, rivers, and lakes, and other sensitive wildlife habitats.

<sup>7</sup> Nunez, Christina, “N.D. Oil Train Fire Spotlights Risks of Transporting Crude,” *National Geographic Daily News*, Dec. 31, 2013, available at <http://news.nationalgeographic.com/news/energy/2013/12/131231-north-dakota-oil-train-fire/>; see also Executive Order 125, Exhibit A at 1 (referencing the Casselton accident).

<sup>8</sup> Ho, Solarina, “Evacuation Ordered as Train Carrying Crude Oil Derails, Catches Fire 35 Miles From Caribou,” *Bangor Daily News*, Jan. 7, 2014, available at <http://bangordailynews.com/2014/01/07/news/world-news/evacuation-ordered-as-train-derails-catches-fire-in-new-brunswick/?ref=latest>.

<sup>9</sup> Karlamangla, Soumya, “Train in Alabama Oil Spill Was Carrying 2.7 Million Gallons of Crude,” *Los Angeles Times*, Nov. 9, 2013, available at <http://articles.latimes.com/2013/nov/09/nation/la-na-nn-train-crash-alabama-oil-20131109>.

<sup>10</sup> “Train carrying oil derails, explodes in Alabama,” *Al Jazeera America*, Nov. 8, 2013, available at <http://america.aljazeera.com/articles/2013/11/8/train-carrying-ilderailsexplodesinalabama.html>.

<sup>11</sup> McNish, Jacquie and Grant Robertson, “The Deadly Secret Behind the Lac-Mégantic Inferno.” *The Globe and Mail*, Dec. 3, 2013, available at <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-hazardous-history-of-the-oil-that-levelled-lac-megantic/article15733700/?page=all>; see also Executive Order 125, Exhibit A at 1 (referencing the train derailment in Lac-Mégantic).

<sup>12</sup> Beaudin, Monique, “Lac-Mégantic Oil Spill Even Worse Than First Feared, Investigation Shows.” *Montreal Gazette*, Oct. 22, 2013, available at <http://www.montrealgazette.com/news/Mégantic+spill+even+worse+than+first+feared+investigation+shows/9063521/story.html>.

<sup>13</sup> “Preliminary Guidance from Operation Classification,” PHMSA, (Jan. 2, 2014), available at [http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1\\_2\\_14%20Rail\\_Safety\\_Alert.pdf](http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf).

The environmental and public safety concerns associated with Bakken crude shipments into the Port of Albany are heightened by the rapid and significant increase in those shipments. In the last two years, the “Port of Albany has become a major transshipment point for Bakken crude.”<sup>14</sup> In addition to crude oil shipments on the Canadian Pacific line, CSX Transportation and Burlington Northern Santa Fe also ship Bakken crude by rail through the Albany area.<sup>15</sup> Moreover, plans are in the works to further escalate the amount of Bakken crude moving through upstate New York, as Albany and the Hudson River corridor become a major transportation funnel for oil shipped from the western United States and Canada to East Coast refineries.<sup>16</sup> As much as one-quarter of the shale oil being produced in North Dakota may now be moving by rail to the Port of Albany.<sup>17</sup>

The threat of derailment is not merely speculative. More oil was spilled due to train derailments in 2013 than in the previous 40 years combined.<sup>18</sup> Given the significant increase in crude oil rail traffic, the question is not *whether* a derailment will occur in the Albany area, but *when* it will occur.

Global’s prior false and inaccurate claims regarding the lack of increased rail traffic, together with the material new information concerning the dangers posed by Bakken crude, provide ample grounds for DEC to initiate a permit modification which should fully evaluate the environmental and public safety issues raised by Global’s massive increase in shipments of Bakken crude oil into the Port of Albany. Such a permit modification would provide the Department with a new opportunity to conduct a SEQRA review which almost certainly would require preparation of an environmental impact statement.

The potential environmental impacts associated with an accident involving Bakken crude oil meet the criteria for significance set forth in DEC’s SEQRA regulations. Specifically, they meet the criteria in 6 NYCRR §§ 617.7(c)(1)(i) (“a substantial adverse change in existing air quality, ground or surface water quality”); 617.7(c)(1)(ii) (“other significant adverse impacts to natural resources”); 617.7(c)(1)(v) (“the impairment of . . . existing community or neighborhood character”); and 617.7(c)(1)(vii) (“the creation of a hazard to human health”).

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<sup>14</sup> Anderson, *supra*, at note 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Anderson, Eric, “Hudson Valley’s Crude Pipeline: Rail Traffic for Oil Delivery to East Coast Refineries through Albany Area is Rising,” *Albany Times-Union*, Feb. 28, 2013, available at <http://www.timesunion.com/business/article/Hudson-Valley-s-crude-pipeline-4318641.php>.

<sup>17</sup> Anderson, Eric, “Oil Shipments are Albany-bound: North Dakota Crude Will Be Shipped by Rail to Port, Loaded on Barges,” *Albany Times-Union*, Aug. 8, 2012, available at <http://www.timesunion.com/business/article/Oil-shipments-are-Albany-bound-3773979.php>.

<sup>18</sup> Tate, Curtis, “More oil spilled from trains in 2013 than in previous 4 decades,” MSN News, Jan. 21, 2014, available at <http://news.msn.com/us/more-oil-spilled-from-trains-in-2013-than-in-previous-4-decades>.

Moreover, as noted above, the SEQRA regulations require that the significance of a likely consequence be assessed in connection with its setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude, and number of people affected. 6 NYCRR § 617.7(c)(3). Here, the effects of a potential spill or explosion could be catastrophic, given the fact that hundreds of rail cars sit in the rail yard at the Albany Terminal and on the tracks leading to the Terminal running through downtown Albany along heavily traveled Route 787, as well as the close proximity of residential housing, the Hudson River, and several Significant Coastal Fish and Wildlife Habitats. *See Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *Riverhead Bus. Imp. Dist.*, 253 A.D.2d at 753 (annulling town board's negative declaration because possible release of toxic or hazardous materials into groundwater and potential for accidental release or explosion were significant effects requiring preparation of an EIS); *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625 (holding that city council violated SEQRA by failing to take "hard look" at hospital's helipad proposal because it failed to consider potential danger to surrounding neighborhood of fire and explosion of liquid oxygen tanks); *see also Gov't of the Province of Manitoba*, 691 F. Supp. 2d at 50 ("It may be that the risk of a breach is low given the pipeline's construction, but that is not an excuse . . . to refuse entirely to analyze the consequences. When the degree of potential harm could be great, i.e., catastrophic, the degree of analysis and mitigation should also be great") (emphasis in original); *San Luis Obispo Mothers for Peace*, 449 F.3d at 1033 (requiring preparation of an EIS due to "events with potentially catastrophic consequences 'even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason'") (internal citations omitted); *Tri-Valley Cares*, 203 F. App'x at 107 (holding that potential terrorist attack on proposed biological weapons laboratory required to be considered as part of National Environmental Policy Act environmental assessment).

### C. Failure to Comply With CP-29

As noted above, despite the fact that the Department informed Global in December 2011 that its proposal to double crude oil throughput at the Albany Terminal would potentially affect an identified environmental justice community, neither Global nor DEC complied with the requirements of CP-29. *See Exhibit B*. No written public participation plan was prepared by Global, and the enhanced public participation requirements of CP-29 were ignored. Despite the fact that CP-29 clearly requires that, for projects for which an environmental justice community has been identified, a written public participation must be submitted before an application can be deemed complete, the Department noticed Global's application as complete in the absence of such a plan. *See CP-29 at 8; Exhibit D*. Moreover, despite the fact that Global notified the Department in its application that the proposed project required building permits from the City of Albany, DEC failed to conduct a coordinated review as required by CP-29. *See Exhibit C at 2; CP-29 at 9*. The failure of Global and DEC to comply with the Department's Environmental Justice Policy completely undermined the purposes of the Policy by denying the affected environmental justice community adequate notice of Global's proposed project and depriving that community of the opportunity to evaluate and voice their concerns about the project. Accordingly, to remedy this failure, we ask that you revoke the November 2012 permit modification and require Global and Department staff to comply with CP-29.

## VI. Conclusion

For the reasons set forth herein, we respectfully request that the Department (i) withdraw the Notice of Complete Application for the pending Title V Permit modification so that Global and DEC can comply with the requirements of CP-29; (ii) rescind the Negative Declaration for the pending Title V Permit modification and issue a Positive Declaration because tar sands oil has potentially significant adverse environmental impacts that are different in type and degree from oil currently handled at the Albany terminal, and because the Albany terminal is located in the floodplain of the Hudson River; and (iii) initiate a permit modification for Global's Albany Terminal based on Global's materially false and inaccurate statements in its prior permit application and based on material new information concerning the environmental and public safety hazards posed by rail shipment of Bakken crude oil. We believe these measures are necessary and prudent in order for the Department to comply with the letter and intent of Executive Order 125.

Thank you for the opportunity to submit these comments.

Sincerely,



Christopher Amato  
Staff Attorney

C: Hon. Andrew M. Cuomo, Governor  
Hon. Neil D. Breslin, Senator, 44th Senate District  
Hon. John T. McDonald, III, Assemblyman, 108<sup>th</sup> Assembly District  
Hon. Patricia Fahy, Assemblywoman, 109<sup>th</sup> Assembly District  
Hon. Kathy M. Sheehan, Mayor, City of Albany  
Hon. Daniel McCoy, Albany County Executive  
Basil Seggos, Deputy Secretary for the Environment  
Hon. Judith Enck, EPA Regional Administrator  
Marc Gerstman, DEC Executive Deputy Commissioner  
Ed McTiernan, DEC General Counsel  
Melvin Norris, Director, DEC Office of Environmental Justice

# Exhibit A

Governor Andrew M. Cuomo

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## Directing DEC, DOT, DHSES, DOH, and NYSERDA to Strengthen the State's Oversight of Shipments of Petroleum Products

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### Directing The Department of Environmental Conservation, The Department of Transportation, The Division of Homeland Security and Emergency Services, The Department of Health, and The New York State Energy Research and Development Authority to Take Action to Strengthen the State's Oversight of Shipments of Petroleum Products

WHEREAS, on July 6, 2013, a train derailment in Lac-Mégantic, Québec involving tank cars carrying crude oil caused the devastation of an entire community, the deaths of 47 persons, and the evacuation of thousands; and

WHEREAS, on December 30, 2013, a train derailment in Casselton, North Dakota caused 18 tank cars carrying crude oil to be punctured, spilling more than 400,000 gallons of crude oil into the environment, and causing a fire which resulted in the evacuation of more than one thousand Casselton residents; and

WHEREAS, rail cars transporting crude oil traverse 1,000 miles of New York State's 3,500-mile freight rail network, from Western New York along the Mohawk River and its communities to the Port of Albany, and from Canada across the border at Rouse's Point along Lake Champlain and through communities to the Port of Albany, where it is then transported south by rail, ship, and barge on or along the Hudson River and along or through New York communities to refineries in mid-Atlantic states; and

WHEREAS, much of the increase in the volume of crude oil transported is due to increased production from the Bakken formation in North Dakota, Montana, and Canada, which, due to lack of pipeline capacity, must be transported by rail; and

WHEREAS, historically, rail transport of crude oil is safer and more environmentally protective than truck transport; and

WHEREAS, there has been a significant expansion in the use of the Port of Albany in the distribution and transportation of crude oil and other petroleum products by rail, ship, and barge for shipment on and along the Hudson River and along or through our communities to out-of-state refineries and storage facilities; and

WHEREAS, the increase in frequency and numbers of rail cars, ships, and barges carrying crude oil and other petroleum products through hundreds of New York communities increases the public's vulnerability to a serious accident; and

WHEREAS, New York's waterways, including the Hudson River, Mohawk River, and Lake Champlain, on or along which rail cars, ships, and barges travel, are unique ecological, cultural, economic, natural, and recreational resources upon which millions of New Yorkers rely, which makes these waterways especially vulnerable to spills of crude oil and other petroleum products; and

WHEREAS, Bakken crude oil has a lower flashpoint and is therefore more prone to ignite during a rail accident; and

WHEREAS, the U.S. Department of Transportation (USDOT) is in the process of designating new safety standards and requirements for rail tank cars and evaluating potential new rules for the transportation of flammable liquids; and

WHEREAS, recognizing the value of these efforts, New York nevertheless cannot await the final outcome of these federal assessments before taking action; and

WHEREAS, New York is preempted by federal law from regulating rail freight transportation and rail car safety standards, and the navigation of vessels operating on the State's navigable waterways; and

**WHEREAS**, the New York State Department of Environmental Conservation (DEC) has jurisdiction over air permitting, oil spill response, and storage of petroleum products in bulk tanks; and

**WHEREAS**, the New York State Department of Transportation (DOT) has jurisdiction to inspect freight rail track and equipment; and

**WHEREAS**, the New York State Division of Homeland Security and Emergency Services (DHSES) provides assistance and support to local entities relating to emergency planning, training, and response to incidents, including petroleum spills and fires; and

**WHEREAS**, the New York State Department of Health (DOH) assesses and monitors the human exposure and public health impact of petroleum spills and fires, advises on the safe handling of hazardous materials and the cleanup of such materials, and provides public information on health impacts and protective measures; and

**WHEREAS**, the New York State Energy Research and Development Authority (NYSERDA) acts as a central clearinghouse for energy resource information, monitors and regularly reports on liquid fuel supply and market trends, and maintains data on major liquid fuel storage terminals;

**NOW, THEREFORE, I, Andrew M. Cuomo**, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby direct that:

1. DEC, DHSES, DOT, and DOH shall promptly petition USDOT, the U.S. Department of Energy (USDOE), the U.S. Department of Homeland Security (USDHS), and the U.S. Coast Guard (USCG) to upgrade tanker car and rail line safety, assess federal agency needs and risks, and pre-deploy appropriate spill response equipment and resources to protect New York State's communities, residents, land, and waterways from accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge; and
2. DEC and DHSES, working with DOT, DOH, and NYSERDA, shall, in consultation with USDOT, USDOE, USCG, and USDHS, conduct an assessment of the State's spill prevention and response rules and inspection programs governing the transportation of crude oil and other petroleum products by rail, ship, and barge; and
3. On or about April 30, 2014, DEC and DHSES, with DOT, DOH, and NYSERDA, shall submit to me a consolidated report summarizing the State's existing capacity to prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge; and
4. This consolidated report shall include but shall not be limited to: (i) a summary of the State's readiness to prevent and respond to rail and water accidents involving petroleum products; (ii) recommendations concerning statutory, regulatory, or administrative changes needed at the State level to better prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge; (iii) recommendations concerning the role that local governments across the State have in protecting their communities and their residents from spills of petroleum products shipped by rail and water; and (iv) recommendations concerning enhanced coordination between the State and federal agencies in order to improve the State's capacity to prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge.

G I V E N under my hand and the Privy Seal of the  
State in the City of Albany this twenty-  
eighth day of January in the year two  
thousand fourteen.

BY THE GOVERNOR

Secretary to the Governor

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[Contact Webmaster](#)

# **Exhibit B**

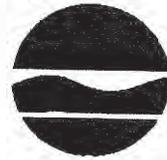
**New York State Department of Environmental Conservation**

**Division of Environmental Permits, Region 4**

1130 North Westcott Road, Schenectady, New York 12306-2014

Phone: (518) 357-2069 • FAX: (518) 357-2460

Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Joe Martens  
Commissioner

December 14, 2011

Thomas Keefe  
Global Companies, LLC  
800 South Street  
PO Box 9161  
Waltham, MA 02454-9161

Re: DEC Application #4-0101-00112/00029  
Global Companies - Albany Terminal  
Air Title V permit modification application  
City of Albany, Albany County

Dear Mr. Keefe:

We reviewed the Title V permit modification application that Envirospec Engineering, PLLC submitted to the Department on your behalf on November 14, 2011. The application indicates that Global Companies proposes to modify the current Air Title V permit for this facility by expanding the crude oil storage and loading capabilities at the terminal by increasing the marine crude loading throughput to 1,850 million gallons of crude calculated on a 12-month rolling basis. Further, a second vapor combustion unit is also proposed for installation at the marine loading dock. Lastly, Global is also requesting to load 100 million gallons of distillates at a new rail loading area.

As part of the overall permit application review process the Department is required to evaluate the potential environmental impacts that the proposed modification may have, and to assure that the project meets the requirements of the Department of State Coastal Consistency Policy. In order for us to do so, and to continue with our review of the application, please provide the following information:

1. A site plan of the facility that shows the location of the proposed new Vapor Combustion Unit (VCU).
2. Please provide the manufacturer's specifications (model number, etc.) for the VCU to be installed at the marine dock unit.
3. Please provide details of the VCU including its dimensional height, width, color and what the final height would be after installation. Please indicate whether installation of the unit will involve new ground disturbance or will it occur on a previously disturbed area, or mounted on a building or other structure. Confirm that the new unit would not be in the flood plain or that Global Companies has received approval from the City of Albany to locate the new unit at its proposed location. A few photos showing the area where the VCU will be installed that are taken from different directions would be very helpful in determining how well the new unit will fit in with the surrounding features.

Thomas Keefe, Global Companies

Page 2

December 14, 2011

4. Please provide the same type of information for the new rail yard area such as dimensions of the area to be disturbed, photos, and any structures to be constructed, flood plain status, etc.
5. Describe and quantify any proposed increase in rail, truck, and barge traffic that would result from the increase in the amounts of crude oil and distillates proposed to be handled at this facility.
6. Describe current hours of operation and any changes that would occur should the proposed modification be approved.
7. Please discuss and quantify any increases in noise levels that would occur in the neighborhood as a result of the new rail operations and expanded marine operations. Noise levels should be evaluated based on the levels that would occur at the property line. Noise will be evaluated in accordance with the DEC Noise Policy, which is available for review on the DEC website.
8. Please discuss potential issues with regard to odors that would be associated with the operation of the new rail area and at the marine facility.
9. Please provide MSDS sheets for the crude oil products to be handled at the facility and specifics on the additives that will be stored in the tanks.

10. Environmental Justice Policy -

The permit modification you are proposing is considered to be a major modification with respect to your Air permit and your facility is located within an area that has been identified as a potential Environmental Justice area. NYS DEC Commissioner's Policy 29 (CP-29) provides guidance for incorporating environmental justice concerns into the New York State Department of Environmental Conservation (DEC) environmental permit review process and the DEC application of the State Environmental Quality Review Act. The policy is written to assist DEC staff, the regulated community, and the public in understanding the requirements and review process.

Therefore, as part of the review process for this proposed modification, you will need to address CP-29 as it relates to your proposal. Details of the policy and procedures may be found on the Department's website.

Should you have any questions about the information requested in this letter, please feel free to contact Donald Welsted at 518-357-2359 or me at 357-2446.

Sincerely,



Angelo Marcuccio  
Environmental Analyst

cc: Don Welsted, Div. of Air, Region 4  
Gianna Aiezza, P.E., Envirospec Engineering, PLLC

# Exhibit C



2603 Guildardland Avenue  
Schenectady  
New York 12306

t.518.393.7725  
f.518.393.2324

info@ingallsllp.com  
www.ingallsllp.com

March 2, 2012

New York State Department of Environmental Conservation  
Division of Environmental Permits, Region 4  
1130 North Westcott Road  
Schenectady, New York 12306  
Attn: Andy Marcuccio

**Re: Global Companies LLC – Albany Terminal  
Air Title V Permit Modification Application  
City of Albany, Albany County, New York  
NYSDEC Application #4-0101-00112/00029**

Dear Mr. Marcuccio:

We are in receipt of your letter to Thomas Keefe of Global Companies, LLC, dated December 14, 2011 with comments regarding a Title V permit application previously submitted by Envirospec Engineering, PLLC on November 14, 2011. Prior to responding to your comments, please allow me to further describe the proposed project, as previous application materials inaccurately described it as construction of a new rail yard rather than the reconfiguration of an existing railyard.

The project consists of three elements: 1) reconfiguration of an existing intermodal rail yard to allow offloading of petroleum products via rail, 2) expansion of Global's existing rail loading/unloading rack (Rack 2) to allow loading of additional distillate product onto railcars and 3) expansion of an existing marine loading facility, including installation of a second vapor combustion unit (VCU).

The project involves proposed changes to the existing Canadian Pacific Railroad (CP) "Kenwood Yard," which is located on the western side of Church Street, northwest of the Global terminal. Until February 2012, Canadian Pacific operated the northern portion of the Kenwood Yard as an intermodal facility where shipping containers were brought in via freight train and transferred to tractor trailer trucks via large gantry container cranes for distribution. The intermodal facility operated 24 hours a day, and typically performed between 25,000 and 36,000 rail-truck transloading movements or "lifts" per year. In conjunction with the proposed project, Global intends to lease the portion of the Kenwood Yard which is currently owned and operated by CP. In January 2012, CP's intermodal operations were moved to another site to allow construction of the proposed offloading facility. Upon receiving the necessary approvals, Global plans to reconfigure the yard to allow offloading of petroleum via rail in place of the existing intermodal operations. This will entail reconfiguring the tracks in the Kenwood Yard and installing secondary containment, pumps, piping and stormwater conveyances to allow offloading of petroleum products from rail cars into existing tanks at the adjacent Global terminal. In addition, Global plans to expand its existing marine loading facility to enable it to load additional barges. Emissions from this activity will be controlled through installation of a second VCU along the shoreline immediately north of the existing marine loading dock.

Ingalls & Associates, LLP  
consulting, civil & environmental engineering

FOIL 140072 008600



In response to your comments, we offer the following:

**Comment 1:** *(Please provide) A site plan of the facility that shows the location of the proposed new Vapor Combustion Unit (VCU).*

**Response 1:** Please see the attached "Marine VCU #2 Site Plan, Global Companies LLC", prepared by Ingalls & Associates, LLP and dated February 13, 2012.

**Comment 2:** *Please provide the manufacturer's specifications (model number, etc.) for the VCU to be installed at the marine dock unit.*

**Response 2:** Please see the attached schematics prepared by John Zink Company, LLC.

**Comment 3:** *Please provide details of the VCU including its dimensional height, width, color, and what the final height would be after installation. Please indicate whether installation of the unit will involve new ground disturbance or will it occur on a previously disturbed area, or mounted on a building or other structure. Confirm that the new unit would not be in the floodplain or that Global Companies has received approval from the City of Albany to locate the new unit at its proposed location. A few photos showing the area where the VCU will be installed that are taken from different directions would be very helpful in determining how well the new unit will fit in with the surrounding features.*

**Response 3:** Please see the attached schematics prepared by John Zink Company, LLC for height and width dimensions. The unit will be placed on a concrete pad which will be constructed immediately north of the existing VCU. As with the existing VCU, the additional VCU will be located within the floodplain. A NYS Licensed Surveyor of Ingalls & Associates has already completed the elevation certificate, which will be submitted to the City of Albany with the request for building permit. Given that the proposed unit is almost a duplicate of the existing unit, and that the City previously approved the existing unit, we expect the City will approve the proposed unit as well. Verification of their approval will be obtained upon receipt of the building permit, as the City does not have a separate floodplain permit process. I have attached several photos of the existing VCU and the area immediately north of the existing unit, where the second unit will be constructed.

**Comment 4:** *Please provide the same type of information for the new rail yard area such as dimensions of the area to be disturbed, photos, and any structures to be constructed, floodplain status, etc.*

**Response 4:** Please note that a new rail yard will NOT be constructed as part of this proposal. Global is simply going to be the new tenant of an existing rail yard owned and operated by Canadian Pacific. As previously noted, Global will reconfigure existing rail tracks to better suit its needs for offloading product and install secondary containment, pumps, piping and stormwater conveyances. The only structures that will be constructed in the Kenwood Yard are concrete pads for pumping equipment, and secondary containment as necessary. Building permits, including floodplain review by the City of Albany, shall be obtained as necessary prior to construction. Since the project will disturb an area of approximately seven acres, Global will submit to NYSDEC a Notice of Intent and Stormwater Pollution Prevention Plan under the SPDES General Permit for Stormwater Discharges from Construction Activity - GP-0-10-001 (PDF) along with an MS4 Acceptance Form from the City of Albany.

**Comment 5:** *Describe and quantify any proposed increase in rail, truck, and barge traffic that would result from the increase in the amounts of crude oil and distillates proposed to be handled at this facility.*

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## **Response 5:**

**Rail Traffic** – According to CP Rail, 360 trains came into and went out of Kenwood Yard during 2011, for a total of 720 train trips per year. Global estimates that one train per day will be unloaded at Kenwood Yard after the project is completed, so future train traffic will be almost identical to existing train traffic.

**Truck Traffic** – A substantial decrease in truck traffic is expected as a result of the proposed project. Until February 2012, CP Rail operated a rail-truck intermodal facility, requiring tractor trailers to transport cargo to and from Kenwood Yard. If Global leases Kenwood Yard and implements the proposed project little, if any, truck traffic will be required for facility operations, as the tanker cars will offload cargo into storage tanks. CP Rail's annual operations involved the transfer of approximately 25,000 containers (trucks) per year; once the project is implemented, truck traffic will be reduced by approximately this amount.

**Barge Traffic** – Global currently loads approximately four barges full of product per month. Given the proposed increase in throughput, loaded barges are expected to increase to approximately 14 barges per month. Currently, nearly all loading occurs onto barges that carried incoming cargos so there has not been a significant increase in barge traffic as a result of loading operations. Global anticipates continuing to operate the loading operation in this manner; however, due to the increased volume we anticipate approximately 7 – 10 additional barges per month to access the marine dock.

**Comment 6:** *Describe current hours of operation and any changes that would occur should the proposed modification be approved.*

**Response 6:** The terminal currently operates 24 hours per day, 365 days per year. No change in hours of operation is proposed.

**Comment 7:** *Please discuss and quantify any increases in noise levels that would occur in the neighborhood as a result of the new rail operations and expanded marine operations. Noise levels should be evaluated based on the levels that would occur at the property line. Noise will be evaluated in accordance with the DEC Noise Policy, which is available for review on the DEC website.*

**Response 7:** Ingalls & Associates has completed a Noise Impact Evaluation for the proposed project, utilizing a NIST-certified noise meter, in accordance with DEC Program Policy "Assessing and Mitigating Noise Impacts", dated October 6, 2000 and revised February 2, 2001. The Evaluation did not identify any noise impact related to the project. Please see attached.

**Comment 8:** *Please discuss potential issues with regard to odors that would be associated with the operation of the new rail area and at the marine facility.*

**Response 8:** Again, no new rail area is proposed. Global is simply proposing to continue use of an existing rail yard currently owned and operated by Canadian Pacific. The reconfigured rail area will be utilized to offload tanker cars via mechanical pumping systems. As the cars are emptied, ambient air is drawn into the cars therefore, offloading activities will not result in the release of fugitive vapors that would result in significant odor impacts. At the marine dock and the existing rail loading rack, the VCUs will address any potential vapors generated from loading operations. The existing VCUs at the dock and rail loading/unloading rack currently function in the same capacity to eliminate potential odors associated with transfer of products. The proposed new VCU at the marine loading area will serve to handle the additional proposed capacity.

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**Comment 9:** *Please provide MSDS sheets for the crude oil products to be handled at the facility and specifics on the additives that will be stored in the tanks.*

**Response 9:** The MSDS for sweet crude oil is attached. Sweet crude oil and ethanol are expected to be the primary products brought into the terminal via the Kenwood Yard. However, other products currently permitted at the terminal (gasoline, blendstocks and distillate products) and other renewable fuels (biodiesel) may also offloaded. Global's terminal currently has several above ground storage tanks for storage of petroleum products including: gasoline, diesel, home heating fuel, kerosene, ethanol, and crude oil. Gasoline and distillate fuel additives are currently stored in small (500 to 12,000 gallon tanks) in the immediate vicinity of the loading racks. However, the project will not result in new additives being handled at the facility, nor is it expected to result in an increase in the quantities of additives stored.

**Comment 10:** *Environmental Justice Policy – The permit modification you are proposing is considered to be a major modification with respect to your Air permit and your facility is located within an area that has been identified as a potential Environmental Justice Area. NYS DEC Commissioner's Policy 29 (CP-29) provides guidance for incorporating environmental justice concerns into the New York State Department of Environmental Conservation (DEC) environmental permit review process and the DEC application of the State Environmental Quality Review Act. The policy is written to assist DEC staff, the regulated community, and the public in understanding the requirements and review process. Therefore, as part of the review process for this proposed modification, you will need to address CP-29 as it relates to your proposal. Details of the policy and procedures may be found on the Department's website.*

**Response 10:** While we recognize that the requested permit modification is considered to be a major modification with respect to the Air permit, and that the Albany Terminal is located within a potential Environmental Justice (EJ) Area, no potential adverse environmental impacts related to the proposed action are likely to affect the area. In fact, the project will likely result in environmental benefits for residents of the area of concern. As a result, no further EJ review is required of the proposed project based on the preliminary screening criteria detailed in CP-29.

The overall land use surrounding the Global Albany Terminal and proposed Kenwood Yard lease parcel may be described as industrial and interstate highway. The site topography is generally flat and minimal vegetation is found throughout the Global terminal property and Kenwood Yard, both of which are heavily used for industrial purposes. Much of the Kenwood Yard has a gravel base, while the Global terminal is a mixture of asphalt pavement, gravel, and sparsely vegetated areas within the tank farm. The nearest residences to all proposed operations are located approximately 750' southwest of the Kenwood Yard on NYS Route 32 and approximately 800' northwest of Kenwood Yard on Franklin Street. Both nearest sensitive receptors are on the opposite side of Interstate 787 from the subject site. Interstate 787 is a major multilane highway that separates the Port of Albany from the nearest residences. The eastern boundary of the site is formed by the Hudson River, which is flanked on both the western and eastern shores by several industrial properties in the vicinity of the terminal. The closest residences to the east of the site are located on the eastern side of the Hudson River, on Riverside Avenue, and are approximately 1400 feet from the terminal. Nearby receptors were verified through use of existing surveys, aerial photographs, topographic maps and site visits.

As previously noted, the project calls for expanding the existing marine loading facility. However, potential impacts to air quality, including odors, will be fully mitigated by installation of a second VCU at the marine dock. Global conducted a DAR-1 analysis to evaluate the impacts associated with the release of Hazardous Air Pollutants (HAPs) related to the project. The DAR-1 analysis determined that there were no significant impacts

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associated with HAPs related to the project. Details of the DAR-1 Analysis were included with the Air Permit Modification.

With respect to noise, the proposed reconfiguration of the railroad tracks, and continued use of the Kenwood Yard as a rail facility will actually improve noise levels at nearby sensitive receptors. The project will eliminate the need for cranes to offload shipping containers. In their place, the reconfigured facility will use mechanical pumps to offload crude oil from tanker cars, a change that will vastly decrease the noise perceived by nearby receptors.

Additionally, as demonstrated in the attached Noise Impact Evaluation, the additive effects of having two VCUs in operation versus having a single VCU in operation will have no perceptible effect on nearby receptors. The VCUs are located immediately adjacent to the Hudson River, at the marine dock, and are approximately 2700' from the nearest residence to the west, and approximately 1900' from the nearest residence to the east. The addition of a second VCU will only cause a 3 dB increase in noise over ambient conditions at the terminal. However, given the decrease in sound pressure level over the distance between the terminal and nearest sensitive receptors, no perceptible change will be realized by any nearby sensitive receptors.

More generally, several factors completely unassociated with proposed rail and terminal activities, particularly traffic from the adjacent interstate highway, have a more significant impact on nearby receptors than the modifications proposed by Global.

As previously noted, the reconfiguration of the facility contemplated by the project will result in no increase in rail traffic and the elimination of at least 25,000 estimated truck trips per year due to the replacement of intermodal freight transfer operations with rail to fuel tank offloading operations. The project will result in approximately 7-10 additional barges accessing the marine dock; however, this is more than offset by the reduction in truck traffic, and will result in a net benefit to the surrounding community. As the above summary shows, there are no significant adverse environmental impacts related to the proposed project. In fact, the project will result in significant reductions in noise and truck traffic and so will provide environmental benefits to the surrounding community. Because the project will not result in potential adverse environmental impacts, no further environmental justice analysis is required.

Thank you in advance for your review of the above information, and issuance of the requested permit. If you have any questions or require additional information, please contact me at (518) 393-7725, ext. 109.

Sincerely,  
Ingalls & Associates, LLP

  
Antelia Leonard  
Environmental Specialist

cc: Tom Keefe, Global Companies, LLC  
Ron Kenny, Vice President of Terminal Operations, Global Companies, LLC  
Darrell Boehlke, Albany Terminal Manager, Global Companies, LLC  
I&A File: 08-093

## **Exhibit D**

**THIS IS NOT A PERMIT**



**New York State Department of Environmental Conservation  
Notice of Complete Application**

*Date:* 07/23/2012

*Applicant:* GLOBAL COMPANIES LLC  
800 SOUTH STREET  
WALTHAM, MA 02453

*Facility:* GLOBAL COMPANIES LLC - ALBANY TERMINAL  
50 CHURCH ST - PORT OF ALBANY  
ALBANY, NY 12202

*Application ID:* 4-0101-00112/00029

*Permits(s) Applied for:* 1 - Article 19 Air Title V Facility

*Project is located:* in ALBANY in ALBANY COUNTY

*Project Description:*

The Department has prepared a draft permit and has made a tentative determination to issue a modification to the Title V Air Facility Permit for the operation of the Global Companies LLC – Albany Terminal facility located at 50 Church Street in the Port of Albany, City of Albany, County of Albany, owned by Global Companies LLC.

The facility proposes to expand crude oil loading operations at the terminal by increasing the marine crude loading throughput to 1.8 billion gallons of crude, calculated on a 12-month rolling total basis. Existing tracks at the rail yard will reconfigured to facilitate off-loading of distillate product and to allow for construction of secondary containment, pumps and piping. A new vapor combustion unit will be constructed at the marine loading dock to control emissions to a 3 mg/liter limit for the marine loading operations of crude oil.

The company recalculated their facility's emission profile using existing throughput caps vapor control limits and emission netting to show that they are below the thresholds for the applicability of 6 NYCRR 231-6. The facility is major for Volatile Organic Compounds (VOC). The facility is not applicable to 40 CFR 63, Subpart R because the facility is not major for Hazardous Air Pollutants (HAP). The facility is subject to 6 NYCRR 212.10 for VOC emission standard for crude oil loading operations.

In accordance with 6 NYCRR Parts 621.7(b)(9) and 201-6.4(c), the Administrator of the United States Environmental Protection Agency (USEPA) has the authority to bar issuance of any Title V Facility Permit if it is determined not to be in compliance with applicable requirements of the Clean Air Act or 6 NYCRR Part 201.

Persons wishing to inspect the subject Title V files, including the application with all relevant supporting materials, the draft permit, and all other materials available to the DEC (the "permitting authority") that are relevant to this permitting decision should contact the DEC representative listed below. The Draft Permit and Permit Review Report may be viewed and printed from the Department web site at:  
<http://www.dec.ny.gov/chemical/32249.html>.

DEC will evaluate the application and the comments received on it to determine whether to hold a public hearing. Comments and requests for a public hearing should be in writing and addressed to the Department representative listed below. A copy of the Department's permit hearing procedures is available upon request or on the Department web site at: <http://www.dec.ny.gov/permits/6234.html>

*Availability of Application Documents:*

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

*State Environmental Quality Review (SEQR) Determination*

Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed.

*SEQR Lead Agency* None Designated

*State Historic Preservation Act (SHPA) Determination*

Cultural resource lists and map have been checked. No registered, eligible or inventoried archaeological sites or historic structures were identified at the project location. No further review in accordance with SHPA is required.

*Coastal Management*

This project is located in a Coastal Management area and is subject to the Waterfront Revitalization and Coastal Resources Act.

*DEC Commissioner Policy 29, Environmental Justice and Permitting (CP-29)*

It has been determined that the proposed action is not subject to CP-29.

*Availability For Public Comment*

Comments on this project must be submitted in writing to the Contact Person no later than 08/24/2012 or 30 days after the publication date of this notice, whichever is later.

*Contact Person*

ANGELO A MARCUCCIO  
NYSDEC  
1130 NORTH WESTCOTT RD  
SCHENECTADY, NY 12306-  
(518) 357-2069

---

**CC List for Complete Notice**

Hon. Gerald Jennings, Mayor, City of Albany

# **Exhibit E**



**NEW YORK STATE  
DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION**

## **ENB Region 4 Completed Applications 07/25/2012**

Region 4 SEQR and Other Notices

Region 4 SPDES Renewals

### **Albany County**

**Applicant:**

Global Companies LLC  
800 South Street  
Waltham, MA 02453

**Facility:**

Global Companies LLC - Albany Terminal  
50 Church St - Port of Albany  
Albany, NY 12202

**Application ID:**

4-0101-00112/00029

**Permit(s) Applied for:**

Article 19 Air Title V Facility

**Project is Located:**

Albany, Albany County

**Project Description:**

The Department has prepared a draft permit and has made a tentative determination to issue a modification to the Title V Air Facility Permit for the operation of the Global Companies LLC - Albany Terminal facility located at 50 Church Street in the Port of Albany, City of Albany, County of Albany, owned by Global Companies LLC.

The facility proposes to expand crude oil loading operations at the terminal by increasing the marine crude loading throughput to 1.8 billion gallons of crude, calculated on a 12-month rolling total basis. Existing tracks at the rail yard will be reconfigured to facilitate off-loading of distillate product and to allow for construction of secondary containment, pumps and piping. A new vapor combustion unit will be constructed at the marine loading dock to control emissions to a 3 mg/liter limit for the marine loading operations of crude oil.

The company recalculated their facility's emission profile using existing throughput caps vapor control limits and emission netting to show that they are below the thresholds for the applicability of 6 NYCRR 231-6. The facility is major for Volatile Organic Compounds (VOC). The facility is not applicable to 40 CFR 63, Subpart R because the facility is not major for Hazardous Air Pollutants (HAP). The facility is subject to 6 NYCRR 212.10

for VOC emission standard for crude oil loading operations.

In accordance with 6 NYCRR Parts 621.7(b)(9) and 201-6.4(c), the Administrator of the United States Environmental Protection Agency (USEPA) has the authority to bar issuance of any Title V Facility Permit if it is determined not to be in compliance with applicable requirements of the Clean Air Act or 6 NYCRR Part 201.

Persons wishing to inspect the subject Title V files, including the application with all relevant supporting materials, the draft permit, and all other materials available to the DEC (the "permitting authority") that are relevant to this permitting decision should contact the DEC representative listed below. The Draft Permit and Permit Review Report may be viewed and printed from the Department web site at: <http://www.dec.ny.gov/chemical/32249.html>.

DEC will evaluate the application and the comments received on it to determine whether to hold a public hearing. Comments and requests for a public hearing should be in writing and addressed to the Department representative listed below. A copy of the Department's permit hearing procedures is available upon request or on the Department web site at: <http://www.dec.ny.gov/permits/6234.html>

**Availability of Application Documents:**

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

**State Environmental Quality Review (SEQR) Determination:**

Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed.

SEQR Lead Agency: None Designated

**State Historic Preservation Act (SHPA) Determination:**

Cultural resource lists and map have been checked. No registered, eligible or inventoried archaeological sites or historic structures were identified at the project location. No further review in accordance with SHPA is required.

**Coastal Management:**

This project is located in a Coastal Management area and is subject to the Waterfront Revitalization and Coastal Resources Act.

**Opportunity for Public Comment:**

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 24, 2012*.

**Contact:**

Angelo A Marcuccio  
NYSDEC Region 4 Headquarters  
1130 North Westcott Rd  
Schenectady, NY 12306  
(518)357-2069

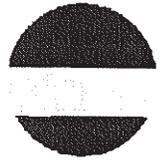
r4dep@gw.dec.state.ny.us

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Region 4 SEQR and Other Notices

Region 4 SPDES Renewals

## **Exhibit F**



**New York State Department of Environmental Conservation  
Notice of Incomplete Application - This is NOT a Permit**

*Application ID:* 4-0101-00112/00029

*Batch Number:* 714782

*Facility:* GLOBAL COMPANIES LLC - ALBANY TERMINAL  
50 CHURCH ST - PORT OF ALBANY  
ALBANY, NY 12202

*Contact:* TOM KEEFE      *Owner ID:* 1526488  
GLOBAL COMPANIES LLC  
800 SOUTH ST PO BOX 9161  
WALTHAM, MA 02454-9161

*Permit(s) Applied for:* 1 - Article 19 Air Title V Facility

*Project Location:* in ALBANY in ALBANY COUNTY

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**Your application for Permit is incomplete. The following items are required:**

Department staff have reviewed the above referenced application received on June 12, 2013 and submitted by Envirospec Engineering, PLLC on behalf of Global Companies LLC (Global). Staff have the following comments on the application:

- 1) Please include the following information in the application:
  - a) Exempt sources permit application pages.
  - b) Populate the gasoline vapor service and propane vapor service on fuel consumption spreadsheet in submitted application.
  
- 2) Please provide a completed, signed full Environmental Assessment Form (EAF) for the proposed project. It is recommended that the EAF include an expanded narrative which addresses any potentially significant environmental impacts which may result from the activity including impacts to air, noise, traffic, visual resources, etc. The EAF and expanded narrative should address all aspects of the proposed project including the reconfiguration of the existing intermodal rail yard, the additional offloading stations for heated rail cars, etc.
  
- 3) The facility is located within a potential Environmental Justice (EJ) area. A determination will need to be made as to whether the project will result in potential adverse environmental impacts that are likely to affect this potential Environmental Justice area. More information on Environmental Justice can be found on the Department's website at: <http://www.dec.ny.gov/public/333.html>. Please provide a response indicating how the applicant is proposing to comply with the Department's Environmental Justice and Permitting Policy (CP-29) (attached).
  
- 4) Please provide a list of all required permits and approvals for this project, including any local, county, state or federal permits.
  
- 5) The Department has recently been contacted about other projects that Global is contemplating, including an additional dock and associated dredging on the Hudson River and a new ethanol treatment method for the on-site wastewater treatment system. Please indicate how these projects are related to the submitted application and include them in the EAF and expanded narrative, if appropriate. For the purposes of the State Environmental Quality Review (SEQR) process, the Department needs to consider the "whole" action being contemplated by the applicant.

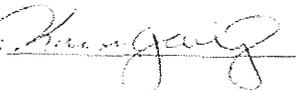
- 6) Please indicate the total area of disturbance for the entire project. If the project will disturb more than one acre of land, the applicant must comply with the State Pollutant Discharge Elimination System (SPDES) Phase II regulations for Stormwater Discharges Associated with Construction Activities.
- 7) Please include a site location map and site plan which outline the limits of disturbance for every element of the proposed project, including activities at the Terminal and the CP Kenwood Yard.
- 8) During our review of the application we consulted the New York State Historic Preservation Office (SHPO) website and determined that a portion of the project area may be located within a mapped archeo-sensitive area. The Department is required to evaluate whether a project may have an impact on significant historical structures or archeological sites pursuant to the State Historic Preservation Act (SHPA). Please provide documentation that this project has been evaluated by a qualified professional archeologist or provide a copy of correspondence from the State Historic Preservation Office (SHPO). Alternatively, if the entire project will impact only previously disturbed areas, please provide documentation which supports prior disturbance including photographs and a written description.

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cc: Don Welsted, NYSDEC R4 Division of Air  
Nicole Brower, Envirospec Engineering

*Please submit requested information by \_\_\_\_\_  
No further action can be taken until all of these materials are received.*

Contact Person:  
KAREN M GAIDASZ  
NYSDEC  
1130 NORTH WESTCOTT RD  
SCHENECTADY, NY 12306

Signature:   
Date: July 25, 2013

Telephone Number: (518) 357-2459

# CP- 29 Environmental Justice and Permitting

New York State Department of Environmental Conservation

## DEC Policy

Issuing Authority: Commissioner Erin M. Crotty

Date Issued: 3/19/03

Latest Date Revised: 3/19/03

### I. Summary:

This policy provides guidance for incorporating environmental justice concerns into the New York State Department of Environmental Conservation (DEC) environmental permit review process and the DEC application of the State Environmental Quality Review Act. The policy also incorporates environmental justice concerns into some aspects of the DEC's enforcement program, grants program and public participation provisions. The policy is written to assist DEC staff, the regulated community and the public in understanding the requirements and review process.

This policy amends the DEC environmental permit process by identifying potential environmental justice areas; providing information on environmental justice to applicants with proposed projects in those communities; enhancing public participation requirements for proposed projects in those communities; establishing requirements for projects in potential environmental justice areas with the potential for at least one significant adverse environmental impact; and providing alternative dispute resolution opportunities to allow communities and project sponsors to resolve issues of concern to the community.

This policy will promote the fair involvement of all people in the DEC environmental permit process. It will do this by training and educating DEC staff on environmental justice; providing public access to DEC permit information; incorporating environmental justice concerns into DEC's permit review process; and pursuing technical assistance grants to enable community groups in potential environmental justice areas to more effectively participate in the environmental permit review process.

This policy contains groundbreaking elements which will lead the nation in environmental justice. As such, the DEC expects that the policy will be revised regularly to account for new information in the area of environmental justice and other issues encountered during the implementation of this policy.

### II. Purpose and Background:

In 1998, various and diverse parties interested in environmental justice, including a number of environmental justice advocates and minority and low-income community representatives from across New York State, met with the DEC Commissioner to express concern over environmental justice issues. Concerns raised by interested parties included, but were not limited to: the lack of meaningful public participation by minority or low-income communities in the permit process; the unavailability or inaccessibility of certain information to the public early in the permit process; and the failure of the permit process to address disproportionate adverse environmental impacts on minority and low-income communities.

On October 4, 1999, in response to the concerns raised by parties interested in environmental justice, DEC announced a new program to address environmental justice concerns and ensure community participation in the state's environmental permitting process. DEC named an Environmental Justice Coordinator to oversee the Office of Environmental Justice and develop DEC's Environmental Justice Program, and created two staff positions in the Division of Environmental Permits. DEC also established the New York State Environmental Justice Advisory Group (Advisory Group) comprising representatives from state, local and federal government, community groups, environmental groups, and the regulated community. The Advisory Group, chaired by the Environmental Justice Coordinator, was asked to develop recommendations for an environmental justice permit policy and recommend elements for an effective environmental justice program.

On January 2, 2002, the Advisory Group submitted a report to DEC Commissioner Erin M. Crotty containing its recommendations for creating an effective environmental justice program. The report: *Recommendations for the New York State Department of Environmental Conservation Environmental Justice Program* focuses on the environmental permit process and is intended to ensure DEC's programs are open and responsive to environmental justice concerns. Additional recommendations for an environmental justice program are also included in the report.

The DEC held public meetings state-wide to solicit public comment on the Advisory Group report and accepted public comment for a period in excess of 50 days, through February 22, 2002. This policy is based on the Advisory Group report, public comment on the report and DEC staff recommendations.

On August 7, 2002, a draft of this policy was released for public review and comment. The comment period exceeded 90 days, ending on October 11, 2002. Numerous detailed comments were received by the DEC and are reflected in this policy and in the implementation of this policy.

### **III. Policy:**

It is the general policy of DEC to promote environmental justice and incorporate measures for achieving environmental justice into its programs, policies, regulations, legislative proposals and activities. This policy is specifically intended to ensure that DEC's environmental permit process promotes environmental justice. This policy supports the DEC's continued funding and implementation of environmental programs that promote environmental justice, such as urban forestry, environmental education, the "I Fish NY" program and watershed enhancement projects. This policy also encourages DEC efforts to implement other programs, policies, regulations, legislative proposals and activities related to environmental justice.

This policy shall become effective 30 days after the full text of this policy, or a summary thereof, along with information on how the full text may be obtained, has been published in the Environmental Notice Bulletin, as defined in Environmental Conservation Law 70-0105. Any application for a permit received after the effective date of this policy will be subject to the provisions of this policy.

This policy shall be reviewed at least 18 months from the effective date and revised, as necessary, to consider the policy's applicability to various DEC Programs, incorporate evolving information on environmental justice and reflect the best available environmental protection information and resources. The 18-month period shall enable DEC to further develop implementation procedures, better identify resources needed to implement the policy, and determine appropriate legislative, regulatory and policy changes that can be implemented. Thereafter, DEC shall periodically evaluate the need for further revision, as implementation experience is gained.

This policy will not be construed to create any right or benefit, substantive or procedural, enforceable by law or by equity by a party against the DEC or any right to judicial review. This policy may be subject to change at the discretion of DEC.

**A. Definitions.** For purposes of this policy, the following definitions shall apply.

1. *Census block group* means a unit for the U.S. Census used for reporting. Census block groups generally contain between 250 and 500 housing units.
2. *Environmental justice* means the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.
3. *Low-income community* means a census block group, or contiguous area with multiple census block groups, having a low-income population equal to or greater than 23.59% of the total population.
4. *Low-income population* means a population having an annual income that is less than the poverty threshold. For purposes of this policy, poverty thresholds are established by the U.S. Census Bureau.
5. *Major project* means any action requiring a permit identified in section 621.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 621.2), which is not specifically defined as minor.
6. *Minority community* means a census block group, or contiguous area with multiple census block groups, having a minority population equal to or greater than 51.1% in an urban area and 33.8% in a rural area of the total population.
7. *Minority population* means a population that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander or American Indian.

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The percent threshold relies on 2000 U.S. Census data. The percent threshold may be adjusted as U.S. Census data is revised.

8. *Potential environmental justice area* means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

9. *Rural area* means territory, population, and housing units that are not classified as an urban area. See definition for "urban area" below. For purposes of this policy, rural classifications are established by the U.S. Census Bureau.

10. *Urban area* means all territory, population, and housing units located in urbanized areas and in places of 2,500 or more inhabitants outside of an urbanized area. An urbanized area is a continuously built-up area with a population of 50,000 or more. For purposes of this policy, urban classifications are established by the U.S. Census Bureau.

**B. Policy Directives.** With respect to this policy, DEC shall:

1. Upon the effective date of this policy, provide enhanced accessibility to public permit information held by the DEC, including access to DEC permit information on the DEC Website and a toll free environmental justice hotline to enable the public to access the Office of Environmental Justice during business hours;
2. Upon the effective date of this policy, use geographic information system screening tools and U.S. Census data to identify potential environmental justice areas within New York State;
3. Upon the effective date of this policy, use enhanced public participation and public notification mechanisms, including those which are most effective in potential environmental justice areas.
4. Upon the effective date of this policy, DEC shall make guidance available to assist permit applicants in complying with the Public Participation Plan requirements of this policy. The guidance shall contain tools and information, including those that will better enable the applicant to engage community residents in potential environmental justice areas in the environmental permit review process;
5. Upon the effective date of this policy, facilitate alternative dispute resolution between permit applicants and the public to resolve conflicts in the permit review process;
6. Upon the effective date of this policy, educate permit applicants with respect to environmental justice, the environmental review process, the requirements of this policy and the methodology for identifying a potential environmental justice area by distributing information on environmental justice to permit applicants;

7. Upon the effective date of this policy, provide to interested members of the public such information on environmental justice that is provided to permit applicants. Within six months from the effective date of this policy, the DEC shall identify and begin conducting workshops to educate the public with respect to environmental justice, the environmental review process, the requirements of this policy and the methodology for identifying a potential environmental justice area;
8. Upon the effective date of this policy, establish two work groups to assist DEC to develop and incorporate critical environmental justice information into the DEC environmental review process. Each work group shall report its results to the DEC Commissioner no later than six months after the effective date of this policy. The results will be considered by the DEC Commissioner when revising this policy:
  - i. One work group shall develop recommendations for conducting a disproportionate adverse environmental impact analysis as a component of the environmental impact statement. Although the Advisory Group report recommended a basic methodology for conducting such an analysis, further definition and specific criteria are needed;
  - ii. A second work group to be established in conjunction with the New York State Department of Health, shall identify reliable sources of existing human health data and recommend means to incorporate such data into the environmental review process;
9. Within three months from the effective date of this policy, educate DEC staff with respect to environmental justice, the environmental review process and the requirements of this policy. The DEC Office of Environmental Justice shall develop a curriculum and begin implementation of formal training on environmental justice to affected staff in the Divisions of Air Resources, Solid & Hazardous Materials, Water, Environmental Permits, Public Affairs and Education, and other divisions. DEC staff charged with policy implementation have already received training;
10. Within three months from the effective date of this policy, begin conducting supplemental compliance and enforcement inspections of regulated facilities to ensure that facilities are operating in compliance with the Environmental Conservation Law. Supplemental enforcement and compliance inspections will apply to facilities located in potential environmental justice areas where there is reason to believe that such facilities are not operating in compliance with the Environmental Conservation Law;
11. Within three months from the effective date of this policy, translate information on the DEC environmental permit process for comprehension by non-English speakers. The DEC Office of Environmental Justice shall translate the following documents into Spanish: What is SEQR?; A Citizen's Guide to SEQR; The SEQR Cookbook; How to Apply for a DEC Permit; the Guide to Permit Hearings; and the Guide to Mediation Services. The DEC shall also evaluate the need for translation to other languages;
12. Within three months from the effective date of this policy, draft legislation to establish funding and criteria for a technical assistance grant program to assist the public in the permit review process. Funding for the technical assistance grant program shall be derived from the Environmental Protection Fund and may be supplemented by other funding opportunities;

13. Within six months from the effective date of this policy, draft regulations to enhance the effectiveness and strengthen the elements of this policy and address potential adverse environmental impacts that may bear disproportionately on potential environmental justice areas, including regulations to establish mandatory public participation requirements; regulations to require the electronic submission of environmental impact statements; regulations to establish additional criteria for determining significance pursuant to 6 NYCRR 617.7. The DEC will also review the list of Type I actions at 6 NYCRR 617.4, evaluate the need for amendments to include actions that may bear disproportionately on potential environmental justice areas and draft regulations based upon the evaluation;

14. Within six months from the effective date of this policy, propose draft revisions to the full environmental assessment form to, among other things, include information that can be used to identify adverse environmental impacts which bear disproportionately on potential environmental justice areas, and

15. Ensure compliance with the procedural elements of this policy.

#### **IV. Responsibility:**

The Office of General Counsel shall provide oversight to ensure compliance with this policy. Each DEC division and office affected by this policy, including those responsible for the permit programs listed in section V.A.1 of this policy, is expected to provide support to fulfill the elements of this policy.

#### **V. Procedure:**

The following procedure shall be incorporated into the DEC permit review process when the DEC serves as Lead Agency under the State Environmental Quality Review Act (SEQR). Where the DEC is not the Lead Agency under SEQR, the DEC shall implement the following procedure to the extent permitted by law, including Applicability, the Preliminary Screen, Guidance to Permit Applicants, Enhanced Public Participation, Environmental Impact Assessment, Coordinated Review and Alternative Dispute Resolution. All other requirements related to SEQR shall be strongly encouraged.

##### **A. Applicability.**

I. Except as provided for below, the policy shall apply to applications for major projects and major modifications for the permits authorized by the following sections of the Environmental Conservation Law:

- i. titles 7 and 8 of article 17, state pollutant discharge elimination system (SPDES) (implemented by 6 NYCRR Part 750 et seq.);
- ii. article 19, air pollution control (implemented by 6 NYCRR Part 201 et seq.);

- iii. title 7 of article 27, solid waste management (implemented by 6 NYCRR Part 360): including minor modifications involving any tonnage increases beyond the approved design capacity and minor modifications involving an increase in the amount of putrescible solid waste beyond the amount that has already been approved in the existing permit;
- iv. title 9 of article 27, industrial hazardous waste management (implemented by 6 NYCRR Part 373); and
- v. title 11 of article 27, siting of industrial hazardous waste facilities (implemented by 6 NYCRR Part 361).

2. This policy shall not apply to permit applications for minor modifications, except as provided above, nor to renewals, registrations or general permits.

3. Permits authorized by delegation for sources subject to the federal requirements of prevention of significant deterioration (PSD) are subject to a review process under federal regulations and will undergo an environmental justice analysis consistent with EPA policy and guidance. Sources subject to the federal requirements of PSD will also be subject to other state permits applicable under this policy which will trigger the requirements of this policy in addition to the environmental justice analysis required by EPA policy and guidance.

**B. Methodology for Conducting Preliminary Screen.** Upon receipt of an application for a permit covered by this policy, the DEC Division of Environmental Permits shall conduct a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area(s) and determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area(s).

1. **Identify Potential Adverse Environmental Impacts and Area to be Affected.** DEC staff in the Division of Environmental Permits and the affected environmental quality divisions shall identify potential adverse environmental impacts associated with the proposed action. Environmental quality program staff shall also identify the area to be affected by the potential adverse environmental impacts.

2. **Determine Whether Potential Adverse Environmental Impacts are Likely to Affect a Potential Environmental Justice Area.** An integrated geographic information system and demographic application (GIS Application), shall be used to determine whether potential adverse environmental impacts from the proposed action are likely to affect a potential environmental justice area. Using the information from section V.B.1 above, Environmental Permits staff will determine if any census block groups, meeting the GIS application thresholds for a potential environmental justice area, are within the affected area. The census block groups meeting the GIS application thresholds for a potential environmental justice area should fall substantially within the affected area. If no census block group(s) meeting the GIS application thresholds for a potential environmental justice area is identified, the proposed action is not likely to affect a potential environmental justice area and the permit review process may continue independent of the elements of this policy. If a census block group(s) meeting the GIS application thresholds for a potential environmental justice area is identified, the proposed action is likely to affect a potential environmental justice area and the remainder of these policy requirements shall be incorporated into the review process.

**C. Guidance to Permit Applicants.** Where a potential environmental justice area is identified by the preliminary screen, the DEC Division of Environmental Permits shall provide the applicant with relevant information on environmental justice. This may include a copy of this policy, the methodology for identifying a potential environmental justice area, guidance developed to implement the policy (e.g., guidance for developing and implementing a public participation plan), information on the alternative dispute resolution process and other documents as applicable.

**D. Enhanced Public Participation Plan.** Public participation in the DEC environmental permit review process means a program of activities that provides opportunities for citizens to be informed about and involved in the review of a proposed action. To ensure meaningful and effective public participation, this policy requires applicants for permits covered by this policy to actively seek public participation throughout the permit review process. Applicants are encouraged to consider implementing the public participation plan components prior to application submission.

1. Where a potential environmental justice area is identified by the preliminary screen, the applicant shall submit a written public participation plan as part of its complete application. At a minimum, the plan must demonstrate that the applicant will:

- i. Identify stakeholders to the proposed action, including residents adjacent to the proposed action site, local elected officials, community-based organizations and community residents located in a potential environmental justice area;
- ii. Distribute and post written information on the proposed action and permit review process. Information shall be presented in an easy-to-read, understandable format, using plain language and, when appropriate, public notice materials shall be translated into languages other than English for comprehension by non-English speaking stakeholders;
- iii. Hold public information meetings to keep the public informed about the proposed action and permit review status. Meetings should be held throughout the permit review process at locations and times convenient to the stakeholders to the project;
- iv. Establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent project information, including but not limited to: application material, studies, reports, meeting presentation materials and media releases. The applicant may also establish a repository on the internet.

2. As part of the public participation plan submission, the applicant shall include a report which summarizes: all progress to-date in implementing the plan; all substantive concerns raised to-date; all resolved and outstanding issues; the components of the plan yet to be implemented and an expected time line for completion of the plan.

3. Upon completion of the public participation plan, the applicant shall submit written certification that it has complied with the plan. As part of the certification, the applicant shall submit a revised report detailing activity which occurred subsequent to the initial submission of the report. The certification shall be signed by the applicant, or the applicant's agent, and submitted to DEC prior to a final decision on the application.

**E. Full Environmental Assessment Form.** Where a potential environmental justice area is identified by the preliminary screen, a full environmental assessment form shall be completed for those actions classified as Unlisted in 6 NYCRR Part 617 and meeting the applicability requirements of this policy. (A full environmental assessment form is currently required for all Type I actions.)

**F. Environmental Impact Assessment.** Under existing regulations, as part of its impact review, DEC must consider other sources of pollution or similar facility types in the project area in order to establish the baseline conditions against which project impacts will be assessed. DEC shall continue to consider sources of pollution or similar facility types in the respective airshed, watershed, or wasteshed for the project under consideration.

**G. Coordinated Review.** Where a potential environmental justice area is identified by the preliminary screen, the action is classified in 6 NYCRR Part 617 as either Type I or Unlisted and the project involves more than one agency, the DEC shall coordinate the review of the action with the other involved state and local agencies.

**H. Determining Significance.** Where the DEC is the lead agency, the Division of Environmental Permits staff based on comments from the affected environmental quality divisions, shall determine the significance of a Type I or Unlisted action, pursuant to criteria established in 6 NYCRR 617.7. If the DEC determines that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant, no further environmental justice analysis is required. If the DEC determines that the action may include the potential for at least one significant adverse environmental impact, 6 NYCRR 617.7 requires the preparation of an environmental impact statement (EIS) and the remainder of the policy requirements shall be incorporated into the review process.

**I. Scoping.** Where the DEC is the lead agency, a potential environmental justice area is identified by the preliminary screen and an EIS is required, scoping, pursuant to 6 NYCRR 617.8, shall be conducted. Scoping shall include an opportunity for meaningful and effective public participation consistent with the procedures set forth in this policy.

**J. Environmental Impact Statement Content.** Where the DEC is the lead agency, a potential environmental justice area is identified by the preliminary screen and an EIS is required, the draft EIS shall identify the potential environmental justice area to be affected, describe the existing environmental burden on the potential environmental justice area and evaluate the additional burden of any significant adverse environmental impact on the potential environmental justice area. The detail and depth of analysis for this evaluation will be identified by the DEC during the scoping process.

**K. Environmental Impact Statement Procedure.** When a draft EIS includes an evaluation of additional burdens on a potential environmental justice area, the DEC shall conduct a public hearing regarding the proposed action and shall receive comments on the draft EIS for no fewer than 60 calendar days from the first filing and circulation of the notice of complete application, or no fewer than ten calendar days following the completion of the public hearing, whichever is later.

**L. Alternative Dispute Resolution.** At any time prior to a final decision on the permit, the permit applicant and the public may voluntarily avail themselves of the alternative dispute resolution process to resolve conflict in the permit review process. Prior to issuance of the notice of public hearing, pursuant to 6 NYCRR 621.7, the parties shall be encouraged to seek alternative dispute resolution services from an independent provider. After issuance of the notice of public hearing, the parties shall be encouraged to seek alternative dispute resolution services from the DEC Office of Hearings and Mediation Services (OHMS). Where issues raised in ADR are resolved with enforceable permit conditions, the DEC shall incorporate those enforceable permit conditions into the permit. Where issues raised in ADR are resolved with conditions beyond the enforceable authority of the DEC, the conditions may be incorporated into a private agreement between the non-DEC parties and enforceable by those parties.

**M. Decision and Findings Requirement.** Consistent with existing regulations, any adverse environmental impact related to an action must be avoided or minimized to the greatest extent practicable.

Related References: New York State Environmental Conservation Law §1-0101; New York State Environmental Conservation Law §3-0301; New York State Environmental Conservation Law, article 8; New York State Environmental Conservation Law, article 70; New York State Administrative Procedure Act, article 3; Sections 616, 617, 621 and 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York; USEPA Region 2 Interim Environmental Justice Policy; U.S. Census Bureau.

# Exhibit G



16 Computer Drive West  
Albany, NY 12205  
Phone: 518.453.2203  
Fax: 518.453.2204  
www.envirospeceng.com

September 6, 2013

Karen M Gaidasz  
NYS DEC Region 4  
1130 North Westcott Rd  
Schenectady, NY, 12306-2014

Re: DEC Permit Application #4-0101-00112/00029  
Global Companies LLC - Albany, NY Terminal  
Air Title V Facility  
City of Albany, Albany County

Dear Mrs. Gaidasz;

On behalf of Global Companies, LLC (Global), Envirospec Engineering, PLLC (Envirospec) is submitting this letter in response to your comment letter dated July 25, 2013.

- Comment 1. Please include the following information in the application:
- a) Exempt Sources permit application pages.
  - b) Populate the gasoline vapor service and propane vapor service on fuel consumption spreadsheet in submitted application.
- Response 1. Please find the Exempt Sources permit application page, enclosed as Attachment 1. The fuel consumption spreadsheet submitted in the original application was populated; however, an insufficient amount of significant figures were displayed. A revised spreadsheet is enclosed as Attachment 2.
- Comment 2. Please provide a completed, signed full Environmental Assessment Form (EAF) for the proposed project. It is recommended that the EAF include an expanded narrative which addresses any potentially significant environmental impacts which may result from the activity including impacts to air, noise, traffic, visual resources, etc. The EAF and expanded narrative should address all aspects of the proposed project including the reconfiguration of the existing intermodal rail yard, the additional offloading stations for heated rail cars, etc.
- Response 2. A completed Full Environmental Assessment Form (Full EAF) is enclosed as Attachment 3, as well as an Expanded Narrative (Attachment 4). The Expanded Narrative includes an overall description of the facility and a review of the environmental impacts to traffic, noise and visual resources resulting from the project.
- Comment 3. The facility is located within a potential Environmental Justice (EJ) area. A determination will need to be made as to whether the project will result in potential adverse environmental impacts that are likely to affect this potential Environmental Justice area. More information on Environmental Justice can be found on the Department's website at:

<http://www.dec.ny.gov/public/333.html>. Please provide a response indicating how the applicant is proposing to comply with the Department's Environmental Justice and Permitting Policy (CP-29) (attached).

- Response 3. DEC Policy CP-29 provides methodology for conducting a preliminary screen to identify if a proposed project is in or near an EJ area and to determine whether potential environmental impacts are likely to affect that area. The land surrounding the Terminal is predominantly industrial, transportation corridor and Interstate Highway. Interstate 787 is a major transportation route that is active 24 hours per day with heavy passenger, small truck and large tractor trailer vehicles. There is a constant flow of heavy traffic, including large diesel fuel powered trucks that dwarf any vehicular activity at the Global Terminal. The Interstate traffic noise is constant. In addition to the industrial activity on the east side of the highway, there also exists a variety of commercial activity. This activity includes, but is not limited to: a recycling facility, wholesale distribution business, transportation services provider, management consultant, boat house and a moving and storage service. The nearest residences to the proposed project are located approximately 800 feet northwest of Kenwood Yard on Franklin Street. The Port area has been industrialized for many years and Global's activities do not alter the character of the area, nor do any emissions, noise or lighting conditions substantially change the status quo that has existed to the east of the Interstate. The attached Expanded Narrative addresses environmental concerns associated with the proposed heated product project, including a traffic analysis, visual analysis, noise analysis and a review of odor control at the Terminal. As the Expanded Narrative indicates, the proposed project will not have any adverse environmental impacts. As a result, no further environmental justice analysis is required, consistent with the methodology for conducting a preliminary screen found in DEC Policy CP-29.
- Comment 4. Please provide a list of all required permits and approvals for this project, including any local, county, state or federal permits.
- Response 4. Required permits and approvals for this project include a Title V Air Permit Modification and a local building permit.
- Comment 5. The Department has recently been contacted about other projects that Global is contemplating, including an additional dock and associated dredging on the Hudson River and a new ethanol treatment method for the on-site wastewater treatment system. Please indicate how these projects are related to the submitted application and include them in the EAF and expanded narrative, if appropriate. For the purposes of the State Environmental Quality Review (SEQR) process, the Department needs to consider the "whole" action being contemplated by the applicant.



16 Computer Drive West • Albany, NY 12205 • Phone: 518.453.2203 • Fax: 518.453.2204

*A Woman Owned Business Enterprise (WBE)*

FOIL 140072 008627

Page 2220 of 2254

- Response 5. The other projects being considered by Global are unrelated to the project submitted for the Title V Air Permit Modification. The proposed additional dock and associated dredging would increase physical dock capacity to better accommodate incoming vessels. However, dock throughput will not increase. The potential dock project is unrelated to this current project, which is for offloading and storing heated products. Moreover, the dock project is currently in the investigation phase and there are no definite plans to proceed. Global is seeking to modify existing wastewater treatment operations to more efficiently treat ethanol. The wastewater treatment work is not associated with this project.
- Comment 6. Please indicate the total area of disturbance for the entire project. If the project will disturb more than one acre of land, the applicant must comply with the State Pollutant Discharge Elimination System (SPDES) Phase II regulations for Stormwater Discharges Associated with Construction Activities.
- Response 6. A Storm Water Pollution Prevention Plan (SWPPP) currently exists for the first phase of work in Kenwood Yard and permit No. NYR10V212 was assigned. The total area of disturbance for this phase of the project is greater than one acre of land. The existing SWPPP will be amended and filed with the MS4 coordinator. The amendments are currently under development.
- Comment 7. Please include a site location map and site plan which outlines the limits of disturbance for every element of the proposed project, including activities at the Terminal and the CP Kenwood Yard.
- Response 7. The limits of disturbance are outlined in the attached site plans (Attachment 5). We have also included a site location map as Attachment 6.
- Comment 8. During our review of the application we consulted the New York State Historic Preservation Office (SHPO) website and determined that a portion of the project area may be located within a mapped archeo-sensitive area. The Department is required to evaluate whether a project may have an impact on significant historical structures or archeological sites pursuant to the State Historic Preservation Act (SHPA). Please provide documentation that this project has been evaluated by a qualified professional archeologist or provide a copy of correspondence from the State Historic Preservation Office (SHPO). Alternatively, if the entire project will impact only previously disturbed areas, please provide documentation which supports prior disturbance including photographs and a written description.
- Response 8. The project will impact only previously disturbed areas. Tank 33 is an existing tank that will be converted to store volatile petroleum products. The additional offloading stations for heated rail cars will be a reconfiguration of an already existing intermodal rail yard. The proposed boilers will be



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Page 2221 of 2254

installed in the active terminal and the rail yard, which are already developed. The locations of the proposed boilers can also be observed in the site plans (Attachment 5).

Should you have any questions please feel free to contact me at (518) 453-2203 or Tom Keefe of Global at (781) 398-4132.

Sincerely,



Nicole Brower, PE  
Project Engineer  
Envirospec Engineering PLLC

cc: Gianna Aiezza, Envirospec Engineering  
Donald Welsted, Division of Air, Region 4  
Tom Keefe, Global Companies LLC



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# Exhibit H



**NEW YORK STATE  
DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION**

## **ENB Region 4 Completed Applications 12/31/2013**

Region 4 SEQR and Other Notices

Region 4 SPDES Renewals

### **Albany County**

**Applicant:**

Global Companies LLC  
800 South St  
Waltham, MA 02453

**Facility:**

Global Companies LLC - Albany Terminal  
50 Church St - Port of Albany  
Albany, NY 12202

**Application ID:**

4-0101-00112/00029

**Permit(s) Applied for:**

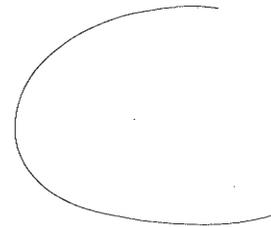
Article 19 Air Title V Facility

**Project is Located:**

Albany, Albany County

**Project Description:**

The Department has prepared a draft permit and has made a tentative determination to issue a modification to the facility's Title V Air Facility Permit to expand the capabilities at the Terminal to include the storage of heated petroleum products, including crude oil and biofuels. The heated petroleum products will be subject to the existing throughput caps in the Title V Permit; as a result, no increase to the Terminal's existing throughput caps are being requested. The products require heating to be pumped and will be heated to varying temperatures based on the viscosity of the product. The emissions from the heated petroleum products are lower than the emissions from the crude oil that is currently permitted for storage at the facility; therefore the facility's potential to emit (PTE) will not change as a result of this modification.



1/27/14

ENB Region 4 Completed Applications 12/31/2013 - NYS Dept. of Environmental Conservation

Schenectady, NY 12306

(518)357-2069

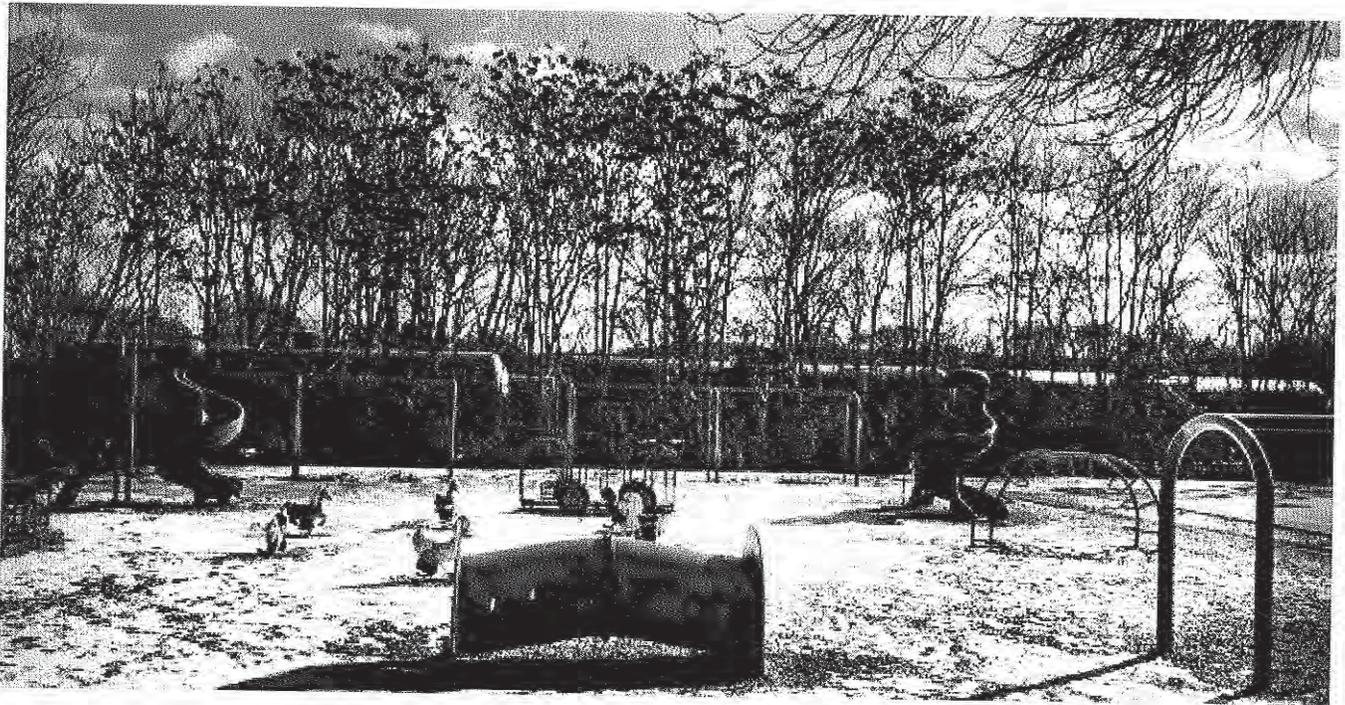
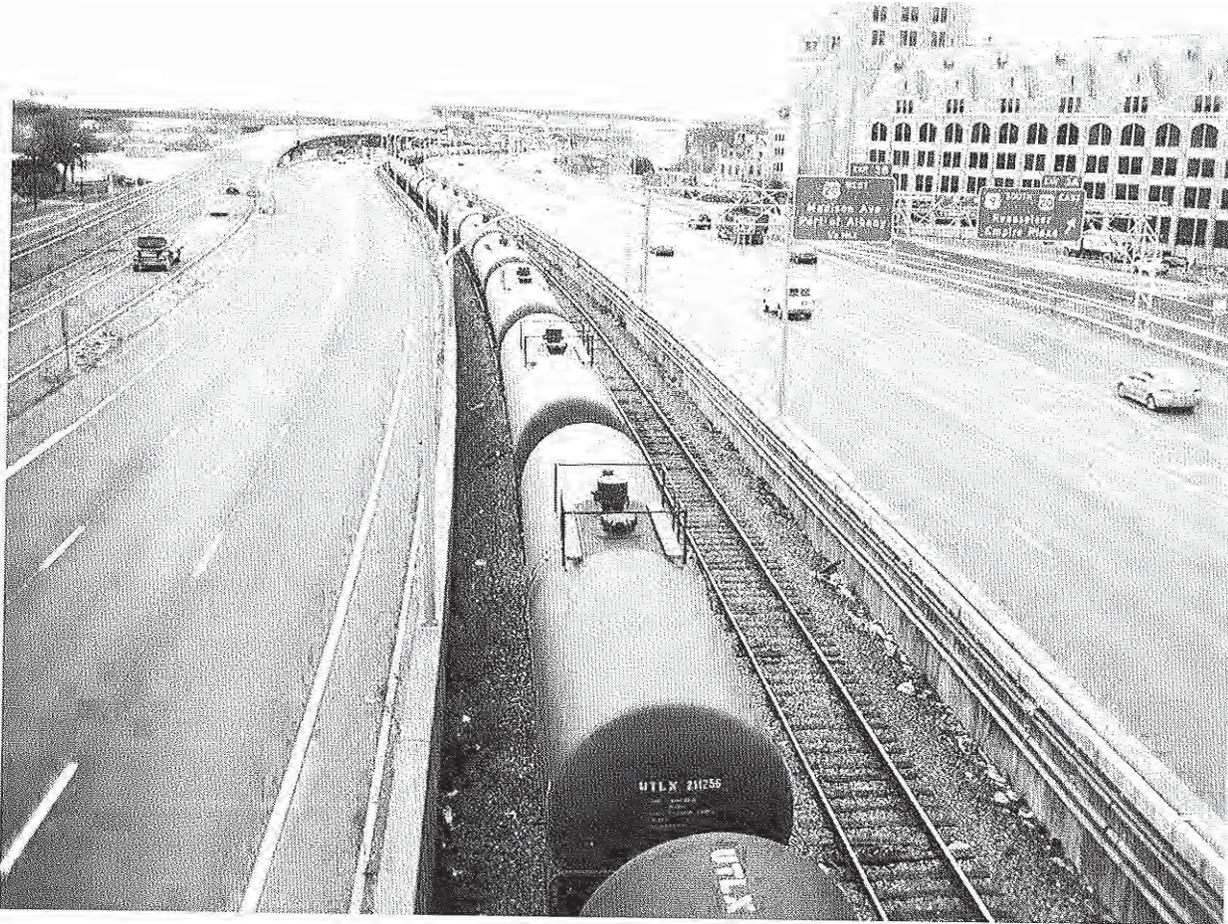
r4dep@gw.dec.state.ny.us

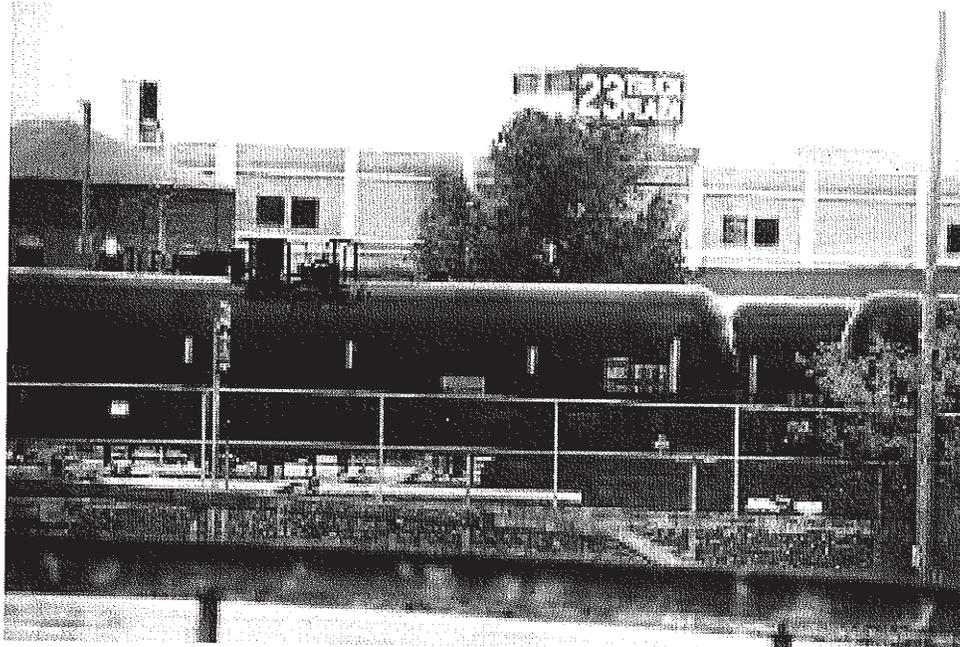
---

Region 4 SEQR and Other Notices

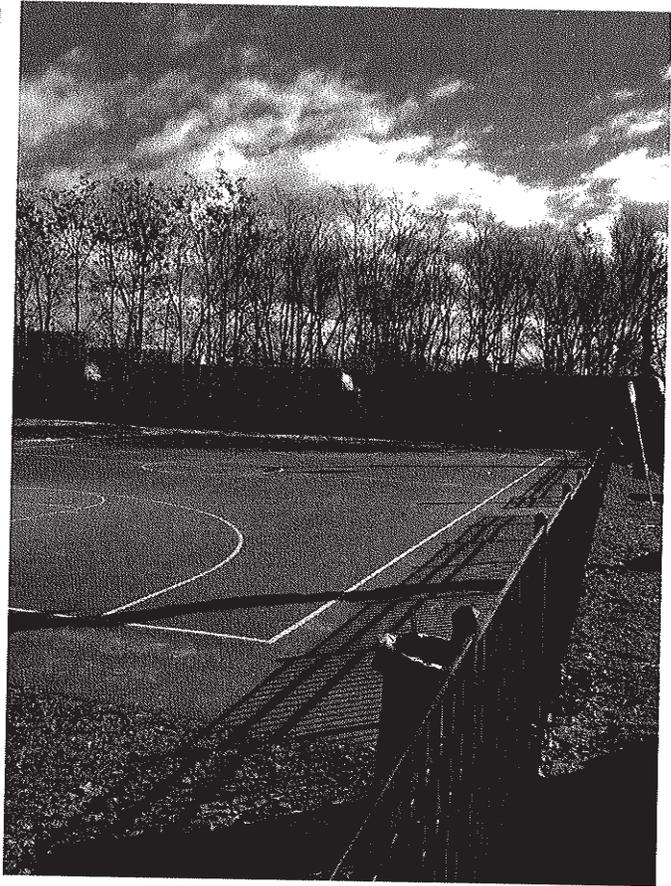
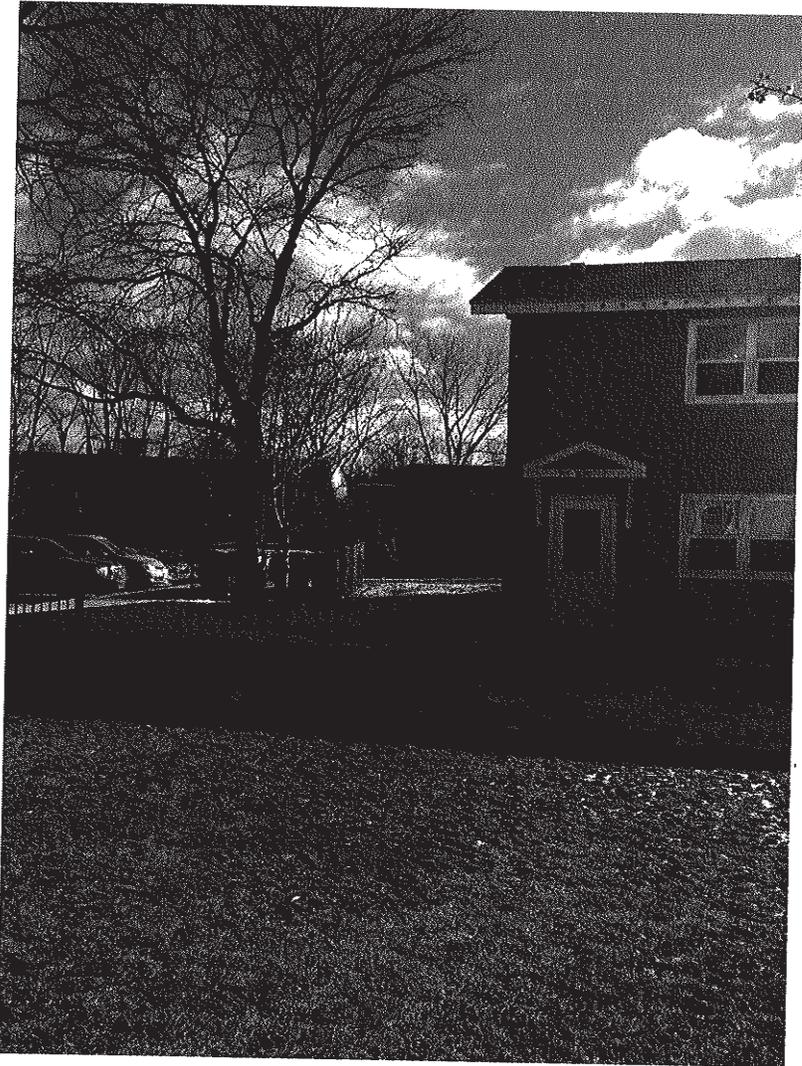
Region 4 SPDES Renewals

# **Exhibit I**

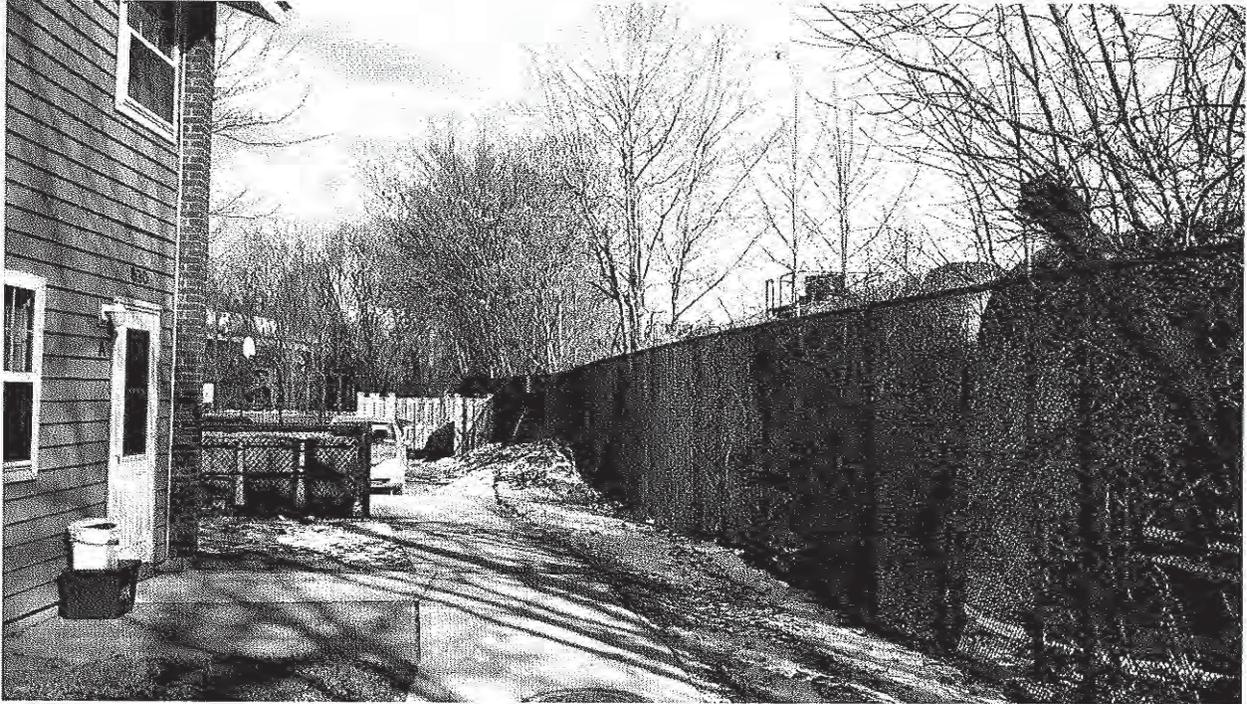












From: Rebecca Bar, Ceres <bar@ceres.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
Cc:  
Bcc:  
Subject: INCR Listing Standards Proposal Moves Forward with Global Exchanges  
Date: Mon Feb 03 2014 14:37:50 EST  
Attachments:

---

To view this email as a web page, go [here](#).

INCR a project of Ceres  
INCR Bulletin-  
February 3, 2014

#### In the News

##### Global Investor Statement Supports CCAC Methane Emissions partnership

A statement released by Institutional Investor Group on Climate Change (IIGCC) of Europe, the Investor Group on Climate Change (IGCC) of Australia/New Zealand, and INCR was issued last week at the World Economic Forum in Davos in support of the Climate and Clean Air Coalition (CCAC) Oil & Gas Methane Partnership. The statement voices investors' concern about the volume of methane - a potent greenhouse gas - emitted to the atmosphere through venting, leakage, or flaring from oil and gas production.

[Read more...](#)

#### Tools & Materials

##### World Economic Forum Global Risk Report Highlights Climate Risks

The Global Risk 2014 Report, released at the World Economic Forum in Davos, listed four climate-related risks among the top ten systemic global economic risks of highest concern in 2014. The top 10 risks include water crises, failure of climate change mitigation and adaptation, increased incidence of extreme weather events, and food crises.

[Read the full report](#)

#### Events

##### Shareholder Initiative on Climate and Sustainability (SICS) Working Group Call

Wednesday, February 5  
2:00 - 3:00 pm ET

The SICS Working Group will convene its monthly call to coordinate investors engaging with companies to foster improved sustainability and climate change-related business practices. Investors will coordinate engagements for the 2014 Proxy Season. For more information, contact Rob Berridge, Director, Shareholder Engagement, Investor Program.

## INCR Listing Standards Proposal Moves Forward with Global Exchanges

Stocks 5The INCR Sustainable Stock Exchanges Working Group met to discuss how draft global sustainability listing rule recommendations will be presented to the world's exchanges in 2014. Later this month, Ceres is planning a public launch of the INCR Listing Standards Proposal: Sustainability Disclosure Listing Standard for Global Stock Exchanges, concurrently with the World Federation of Exchanges receiving the INCR proposal and submitting it to its members for consideration during a three-month global comment period that launches at that time.

Evan Harvey, Managing Director of Corporate Sustainability at NASDAQ OMX, further provided an update to the SSE Working Group on the formation of a Sustainability Working Group within the World Federation of Exchanges (WFE). The WFE Sustainability Working Group, which is on track to be formally launched in March, will include NASDAQ, NYSE, ICE, Deutsche Borse, Johannesburg, BM&F Bovespa, Singapore, Bombay, CBOE and CME Group.

The group's primary mandate is to debate sustainability disclosure trends and expectations across the globe-including the INCR Listing Standards Proposal, to review comments from exchanges on that proposal, to gather additional research on the state of ESG reporting globally and on ESG investment products, and to make a set of recommendations on ESG disclosure to the broader exchange community that will be voted on at the 2014 WFE annual meeting.

Participants in the INCR SSE Working Group plan communication and advocacy efforts throughout 2014 to engage exchanges, investors, and regulators in this pivotal discussion. For more information, contact Tracey Rembert or Noah Klein-Markman.

Ceres is an advocate for sustainability leadership that mobilizes a powerful network of investors, companies and public interest groups to build a sustainable global economy. Ceres is a non-profit organization. All gifts are tax deductible. Ceres has received high ratings from charity watchdog groups, a reflection of our effectiveness, integrity and impact.

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Boston, MA 02111

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This email was sent to: [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

This email was sent by:

Ceres

99 Chauncy Street

Boston, MA 02111

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From: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>  
To: Jordan, Scott <jordan.scott@epa.gov>;  
'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
<eileen.mcdonough@usdoj.gov>  
Cc: 'Augenstern, Fred (AGO)'  
(fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>;  
tballo@earthjustice.org <tballo@earthjustice.org>; 'Tomas  
Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>; 'Menotti,  
David' (DMenotti@crowell.com) <dmenotti@crowell.com>;  
dchung@crowell.com <dchung@crowell.com>  
Bcc:  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Mon Feb 03 2014 16:51:09 EST  
Attachments:

---

\*Privileged and Confidential Settlement Communication\*

Eileen and Scott—Following up on our call from last Friday, I have spoken to counsel for the other state and local government petitioners. We accept, subject to formal review and approval of the consent decree by our respective managements, a settlement pursuant to which EPA would sign the final NSPS for wood heaters within 1 year of the date of publication of the proposal, i.e., by February 3, 2015. Tim Ballo will be emailing you separately with the environmental petitioners' position. Thank you for your efforts to resolve this matter.—Mike

Michael J. Myers  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]  
Sent: Friday, January 31, 2014 1:17 PM  
To: Michael J. Myers; 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); dchung@crowell.com  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

Yes. I have some information and EPA's response to Plaintiffs' latest settlement proposal.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 31, 2014 1:14 PM  
To: 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); chung@crowell.com; Jordan, Scott  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

From: Timothy Ballo <tballo@earthjustice.org>  
To: Michael J. Myers </o=lawnet/ou=first administrative group/cn=recipients/cn=michaelmyers>; Jordan, Scott <jordan.scott@epa.gov>; 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov) <eileen.mcdonough@usdoj.gov>  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us) <fred.augenstern@state.ma.us>; 'Tomas Carbonell' (tcarbonell@edf.org) <tcarbonell@edf.org>; 'Menotti, David' (DMenotti@crowell.com) <dmenotti@crowell.com>; dchung@crowell.com <dchung@crowell.com>  
Bcc:  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?  
Date: Tue Feb 04 2014 09:58:57 EST  
Attachments:

---

Eileen and Scott,

I have confirmed with all the enviro group plaintiffs that the Feb. 3 date is acceptable.

Thanks for taking on the first draft of the decree.

-Tim

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Monday, February 03, 2014 4:51 PM  
To: 'Jordan, Scott'; 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); Timothy Ballo; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); dchung@crowell.com  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

\*Privileged and Confidential Settlement Communication\*

Eileen and Scott—Following up on our call from last Friday, I have spoken to counsel for the other state and local government petitioners. We accept, subject to formal review and approval of the consent decree by our respective managements, a settlement pursuant to which EPA would sign the final NSPS for wood heaters within 1 year of the date of publication of the proposal, i.e., by February 3, 2015. Tim Ballo will be emailing you separately with the environmental petitioners' position. Thank you for your efforts to resolve this matter.—Mike

Michael J. Myers

Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
New York State Attorney General  
The Capitol  
Albany, NY 12224  
(518) 402-2594  
michael.myers@ag.ny.gov

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Sent: Friday, January 31, 2014 1:17 PM  
To: Michael J. Myers; 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); dchung@crowell.com  
Subject: RE: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

Yes. I have some information and EPA's response to Plaintiffs' latest settlement proposal.

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, January 31, 2014 1:14 PM  
To: 'McDonough, Eileen (ENRD)' (Eileen.McDonough@usdoj.gov)  
Cc: 'Augenstern, Fred (AGO)' (fred.augenstern@state.ma.us); tballo@earthjustice.org; 'Tomas Carbonell' (tcarbonell@edf.org); 'Menotti, David' (DMenotti@crowell.com); dchung@crowell.com; Jordan, Scott  
Subject: Wood Heaters NSPS/Are we going ahead with the 2 pm call?

Document ID: 0.7.691.560332

From: Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>  
To: Doniger, David (ddoniger@nrdc.org)  
<ddoniger@nrdc.org>  
Cc:  
Bcc:  
Subject: we're on the line. you joining us?  
Date: Tue Feb 04 2014 11:05:53 EST  
Attachments:

---

866-394-2346, code 4149570819

From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Chung, David <dchung@crowell.com>;  
Menotti, David <dmenotti@crowell.com>; Timothy Ballo  
<tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters  
Date: Thu Feb 06 2014 11:14:07 EST  
Attachments:

---

Attached please find a draft consent decree. The State and Environmental Plaintiffs have agreed to the date. We are still waiting to get a response from intervenors. Please review and send me any comments. Thank you.

PS: as always, this is still subject to review and approval by officials from DOJ and EPA.

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: McDonough, Eileen (ENRD)  
<eileen.mcdonough@usdoj.gov>  
To: Chung, David <dchung@crowell.com>;  
Menotti, David <dmenotti@crowell.com>; Timothy Ballo  
<tballo@earthjustice.org>; Tomas Carbonell (tcarbonell@edf.org)  
<tcarbonell@edf.org>; Michael J. Myers </o=lawnet/ou=first  
administrative group/cn=recipients/cn=michaelmyers>;  
fred.augenstern@state.ma.us <fred.augenstern@state.ma.us>  
Cc: Jordan, Scott <jordan.scott@epa.gov>  
Bcc:  
Subject: RE: Wood heaters -- sorry I forgot the attachment  
Date: Thu Feb 06 2014 11:15:00 EST  
Attachments: ENV\_DEFENSE-#670324-v1-wood\_heaters\_decree\_w-scott\_changes.DOC

---

Eileen T. McDonough

Environmental Defense Section

U.S. Dept. of Justice

202-514-3126

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From: McDonough, Eileen (ENRD)  
Sent: Thursday, February 06, 2014 11:14 AM  
To: 'Chung, David'; 'Menotti, David'; 'Timothy Ballo'; 'Tomas Carbonell (tcarbonell@edf.org)'; 'Michael J. Myers'; 'fred.augenstern@state.ma.us'  
Cc: 'Jordan, Scott'  
Subject: RE: Wood heaters

Attached please find a draft consent decree. The State and Environmental Plaintiffs have agreed to the date. We are still waiting to get a response from intervenors. Please review and send me any comments. Thank you.

PS: as always, this is still subject to review and approval by officials from DOJ and EPA.

Eileen T. McDonough

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Document ID: 0.7.691.561463-000001

Owner: McDonough, Eileen (ENRD) <eileen.mcdonough@usdoj.gov>

Filename: ENV\_DEFENSE-#670324-v1-wood\_heaters\_decree\_w-scott\_changes.DOC

Last Modified: Thu Feb 06 11:15:00 EST 2014

---

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al.,	)	
	)	
Plaintiffs,	)	Civil Action
	)	No. 13 -1553 (GK)
v.	)	
	)	and consolidated case
GINA MCCARTHY, Administrator,	)	
Environmental Protection Agency, and	)	Civil Action
ENVIRONMENTAL PROTECTION AGENCY,	)	No. 13 -1555 (GK)
	)	
Defendants.	)	
_____	)	

**CONSENT DECREE**

WHEREAS, Plaintiffs, the States of New York, Connecticut, Maryland, Oregon, Rhode Island, and Vermont; the Commonwealth of Massachusetts; and Puget Sound Clean Air Agency (jointly referred to as “State Plaintiffs”), filed Civil Action No. 13-1553 (GK) pursuant to Clean Air Act (“CAA”) section 304(a)(2), 42 U.S.C. § 7604(a)(2), against Defendants Gina McCarthy, Administrator, and the United States Environmental Protection Agency (jointly referred to as “EPA”);

WHEREAS, Plaintiffs, American Lung Association; Environmental Defense Fund; Clean Air Council; and Environment and Human Health, Inc. (jointly referred to as “Environmental Plaintiffs”), filed Civil Action No. 13-1555 (GK) pursuant to Clean Air Act (“CAA”) section 304(a)(2), 42 U.S.C. § 7604(a)(2), against EPA;

WHEREAS, the Court consolidated Civil Action Nos. 13-1553 and 13-1555 (GK);

WHEREAS, the Court granted the motion to intervene as Plaintiff filed by the Hearth, Patio & Barbecue Association (“Association Plaintiff”);

WHEREAS, the complaints filed by the State, Environmental, and Association Plaintiffs each allege that EPA failed to perform a nondiscretionary duty under CAA section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B) to, at least every 8 years, review and, if appropriate, revise the new performance standards for new residential wood heaters that were promulgated by EPA in 1988. 40 C.F.R. Part 60, Subpart AAA (“Wood Heater NSPS Standards”).

WHEREAS, it is in the interest of the public, the parties, and judicial economy to resolve claims without further litigation;

WHEREAS, the State, Environmental, and Association Plaintiffs and EPA (jointly referred to as “Parties”) have agreed to a settlement of all claims asserted by all Plaintiffs in their Complaints, without any admission or adjudication of fact or law, which they consider to be a just, fair, adequate and equitable resolution of said claims;

WHEREAS, the Court finds and determines that the settlement represents a just, fair, adequate and equitable resolution of said claims;

WHEREAS, by entering into this Consent Decree, the State, Environmental, and Association Plaintiffs do not waive any claims and EPA does not waive any defenses, on any grounds, related to any matters asserted in this action that are not resolved by this Decree;

NOW THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has jurisdiction over the claims set forth in the Complaints in these consolidated actions and may order the relief contained in the Consent Decree. Venue is proper in the District of Columbia.

2. No later than February 3, 2015, EPA shall sign a Federal Register notice taking final action with respect to the Wood Heater NSPS Standards, 40 C.F.R. Part 60, Subpart AAA,

with such modifications as EPA deems appropriate under CAA section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B).

3. EPA shall deliver to the Office of the Federal Register for publication the notices of proposed and final rulemaking covered by this Decree no later than ten business days after signature of such notices. Following such delivery, EPA shall not take any action (other than as necessary to correct any typographical error or other errors in form) to delay or otherwise interfere with publication of such notices in the Federal Register. In addition, EPA shall make available copies of said notices to the State, Environmental, and Association Plaintiffs within five business days after signature.

4. The deadline in Paragraph 2 above may be extended by written stipulation executed by counsel for EPA, and the State, Environmental, and Association Plaintiffs and filed with the Court, or by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by any Plaintiff and reply by EPA.

5. EPA agrees that the State, Environmental, and Association Plaintiffs are entitled to recover costs of litigation (including attorneys' fees) ("litigation costs") incurred in this matter pursuant to 42 U.S.C. § 7604(d). The deadline for the filing of any motion for litigation costs for activities performed prior to the lodging of this decree with the Court is hereby extended for a period of 120 days. During this time the Parties shall seek to resolve informally any claim for litigation costs, and if they cannot reach a resolution, the State, Environmental, and Association Plaintiffs may seek such litigation costs from the Court. The Court shall retain jurisdiction to resolve any request for litigation costs. The State, Environmental, and Association Plaintiffs reserves their right to seek litigation costs for any work performed after the lodging of this Consent Decree. EPA does not concede that the State, Environmental, and Association Plaintiffs

will be entitled to fees for any work performed after the lodging of the Consent Decree, and the parties reserve all claims and defenses with respect to any future costs of litigation claim.

6. The State, Environmental, and Association Plaintiffs and EPA shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

7. The State, Environmental, and Association Plaintiffs and EPA agree that this Consent Decree shall constitute a complete and final settlement of all claims that the State, Environmental, and Association Plaintiffs asserted against the United States, including EPA, under any provision of law, in State of New York, et al. v. EPA, Case No. 1:13-cv-1553-GK (and consolidated case). The State, Environmental, and Association Plaintiffs therefore discharge and covenant not to sue the United States, including EPA, for such claims. The Parties agree that this discharge and covenant not to sue shall not apply to any claim that may arise if any final rule signed pursuant to Paragraph 2 is vacated or withdrawn. EPA retains all rights and defenses, including jurisdictional challenges, in the event any such claim is filed by the State, Environmental, and Association Plaintiffs.

8. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any final actions contemplated by this Consent Decree. EPA's obligation to perform the action specified by Paragraph 2 does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

9. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law or to waive or limit any claim or defense, on any grounds, related to any final action EPA may take with respect to the rulemakings identified in Paragraph 2 of this Consent Decree.

10. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any final decision made by EPA pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Court of Appeals pursuant to 42 U.S.C. § 7607(b)(1). Nothing in this Consent Decree shall be construed to waive any remedies or defenses the Parties may have under 42 U.S.C. § 7607(b)(1).

11. The Parties recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

12. Any notices required or provided for by this Consent Decree shall be made in writing or by email and sent to the following:

For State Plaintiffs:

Michael Myers  
New York State Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
Email:Michael.Myers@ag.ny.gov

Scott Norman Koschwitz  
State of Connecticut  
Office of the Attorney General  
P.O. Box 120  
55 Elm Street

Hartford, CT 06141-0120  
Email:Scott.Koschwitz@ct.gov

Mary E. Raivel  
Office of the Attorney General of Maryland  
Maryland Department of the Environment  
1800 Washington Boulevard Suite 6048  
Baltimore, MD 21230  
Email:Mary.Raivel@maryland.gov

Frederick D. Augenstern  
Office of the Attorney General  
1 Ashburton Place 18th Floor  
Boston, MA 02108  
Email:Fred.Augenstern@state.ma.us

Paul Andrew Garrahan  
Oregon Department of Justice  
Natural Resources Section, General Counsel Division  
1515 SW Fifth Avenue Suite 400  
Portland, OR 97239  
Email:Paul.Garrahan@doj.state.or.us

Gregory Stage Schultz  
Rhode Island Department of Attorney General  
Civil Unit 150 South Main Street  
Providence, RI 02903  
Email:Gschultz@riag.ri.gov

Thea Schwartz  
State of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
Email:Tschwartz@atg.state.vt.us

Laurie Halvorson  
Puget Sound Clean Air Agency  
1904 Third Avenue Suite 105  
Seattle, WA 98101  
Email:Laurieh@pscleanair.org

For Environmental Plaintiffs:

Timothy D.Ballo  
Earthjustice  
1625 Massachusetts Avenue, NW Suite 702  
Washington, DC 20036  
Email: Tballo@earthjustice.org

For Association Plaintiff:

David E. Menotti  
David Y. Chung  
Crowell & Moring, LLP  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004  
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Dchung@crowell.com

For Defendant:

Eileen T. McDonough  
Environmental Defense Section  
U.S. Department of Justice  
P.O. Box 7611  
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eileen.mcdonough@usdoj.gov

Scott Jordan  
U.S. Environmental Protection Agency  
William Jefferson Clinton North Building  
1200 Pennsylvania Avenue, NW  
Mail Code: 2344A  
Washington, D.C. 20460  
jordan.scott@epa.gov

13. In the event of a dispute among the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. The parties shall meet and confer to attempt to resolve the dispute. If the Parties

cannot reach an agreed-upon resolution after ten (10) business days following receipt of the written notice, any Party may move the Court to resolve the dispute.

14. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of court shall be properly filed unless the Party seeking to enforce this Consent Decree has followed the procedure set forth in Paragraph 13.

15. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation (including reasonable attorneys' fees). After EPA's obligations under Paragraphs 1 and 2 have been completed, EPA may move to have this Consent Decree terminated. Sierra Club shall have 14 days in which to respond to such motion.

16. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by the Parties and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

17. The undersigned certify that they are fully authorized by the Party or Parties they represent to bind that Party or those Parties to the terms of this Consent Decree.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
HON. GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE

SO AGREED:

For State Plaintiffs:

/s/ Michael Meyers  
Michael Myers  
New York State Attorney General  
Environmental Protection Bureau

The Capitol  
Albany, NY 12224  
Email:Michael.Myers@ag.ny.gov

/s/ Scott Norman Koschwitz  
Scott Norman Koschwitz  
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/s/ Mary E. Raivel  
Mary E. Raivel  
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Maryland Department of the Environment  
1800 Washington Boulevard Suite 6048  
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/s/ Frederick D. Augenstern  
Frederick D. Augenstern  
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1 Ashburton Place 18th Floor  
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/s/ Paul Andrew Garrahan  
Paul Andrew Garrahan  
Oregon Department of Justice  
Natural Resources Section, General Counsel  
Division  
1515 SW Fifth Avenue Suite 400  
Portland, OR 97239  
Email:Paul.Garrahan@doj.state.or.us

/s/ Paul Andrew Garrahan  
Paul Andrew Garrahan  
Rhode Island Department of Attorney General  
Civil Unit 150 South Main Street  
Providence, RI 02903  
Email:Gschultz@riag.ri.gov

/s/ Thea Schwartz  
Thea Schwartz

State of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
Email: Tschwartz@atg.state.vt.us

/s/ Laurie Halvorson  
Laurie Halvorson  
Puget Sound Clean Air Agency  
1904 Third Avenue Suite 105  
Seattle, WA 98101  
Email: Laurieh@psc Cleanair.org

For Environmental Plaintiffs:

/s/ Timothy D. Ballo  
Timothy D. Ballo  
Earthjustice  
1625 Massachusetts Avenue, NW Suite 702  
Washington, DC 20036  
Email: Tballo@earthjustice.org

For Association Plaintiff:

/s/ David E. Menotti  
David E. Menotti  
David Y. Chung  
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1001 Pennsylvania Avenue, NW  
Washington, DC 20004  
Email: Dmenotti@crowell.com  
Dchung@crowell.com

For Defendant:

Robert G. Dreher  
Acting Assistant Attorney General

/s/ Eileen T. McDonough  
Eileen T. McDonough  
Environmental Defense Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
eileen.mcdonough@usdoj.gov

Scott Jordan  
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