

ORAL ARGUMENT NOT YET SCHEDULED**Case No. 21-1024 (consolidated with No. 21-1034)**

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

CALIFORNIA COMMUNITIES AGAINST AIR TOXICS, *et al.*,
Petitioners,

v.

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

ON PETITION FOR REVIEW OF FINAL ACTION BY THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**INTERVENOR-RESPONDENTS
AIR PERMITTING FORUM, *et al.* PROOF BRIEF**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Federal Rule of Appellate Procedure 26.1(d) and Circuit Rules 26.1 and 28(a)(1)(A), the following Certificate as to Parties, Rulings, and Related Cases is made on behalf of Intervenor-Respondents:

I. Parties and *Amici***Petitioners:**

No. 21-1024: California Communities Against Toxics, Downwinders at Risk, Environmental Defense Fund, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, and Texas Environmental Justice Advocacy Services (together “ENGO Petitioners”).

No. 21-1034: State of California, by and through Attorney General Rob Bonta and the California Air Resources Board, States of Delaware, Illinois, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington and Wisconsin, Commonwealths of Massachusetts, Pennsylvania, and Virginia, and Cities of Chicago and New York (together “State Petitioners”).

Respondents:

Nos. 21-1024 and 21-1034: United States Environmental Protection Agency (EPA) and Lee M. Zeldin, in his official capacity as Administrator of the EPA.

Intervenor:

Air Permitting Forum, American Chemistry Council, American Wood Council, Auto Industry Forum, Brick Industry Association, American Cement Association, and National Lime Association are intervenors in support of Respondents.

Amici:

Institute for Policy Integrity at New York University School of Law, *amicus curiae* in support of Petitioners.

II. Ruling Under Review

A final rule of the U.S. Environmental Protection Agency entitled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” published at 85 Fed. Reg. 73,854 (Nov. 19, 2020), JA____.

III. Related Cases

There are no related cases pending before any court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor-Respondents make the following disclosures:

The Air Permitting Forum is a trade association, within the meaning of D.C. Circuit Rule 26.1, that advocates for the appropriate implementation of the Clean Air Act and other relevant statutes on behalf of its member companies. The Air Permitting Forum also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. The Air Permitting Forum's members operate manufacturing facilities throughout the U.S. and, as a result, would be subject to the requirements at issue in the rule challenged in this case. The Air Permitting Forum 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 the Air Permitting Forum.

The American Chemistry Council ("ACC") represents companies engaged in the business of chemistry—an innovative, multibillion-dollar business that is helping solve the biggest challenges facing our nation and the world. The business of chemistry drives innovations that enable a more sustainable future, creates hundreds of thousands of manufacturing and high-tech jobs that support families and communities, and enhances safety through the products of chemistry and investment in research. ACC members work to solve some of the biggest challenges facing our

nation and our world by providing chemical, plastic, and polymer products and materials used in the institutional, consumer, commercial, and industrial sectors of the U.S. economy. ACC is committed to improved environmental, health, safety and security performance through Responsible Care[®]; common sense advocacy addressing major public policy issues; and health and environmental research and product testing.

The American Wood Council (“AWC”) is the voice of North American wood products manufacturing, an industry that provides approximately 400,000 men and women in the U.S. with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC states that it is a “trade association” within the meaning of Circuit Rule 26.1(b). AWC has no parent corporation and no publicly held company has a 10 percent or greater ownership interest in AWC.

The Auto Industry Forum represents the interests of U.S. auto and light duty truck manufacturers with respect to the appropriate implementation of the Clean Air Act as it applies to its facilities and for other relevant statutes on behalf of its member

companies. The Auto Industry Forum also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. The Auto Industry Forum's members operate auto and light duty manufacturing facilities throughout the U.S. and as a result would be subject to the requirements at issue in the memorandum challenged in this case. The Auto Industry Forum states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). The Auto Industry Forum 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 the Auto Industry Forum.

The American Cement Association ("ACA"), formerly the Portland Cement Association, founded in 1916, is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. ACA members represent 92 percent of US cement production capacity and have facilities in all 50 states. ACA promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and generally promotes economic growth and sound infrastructure investment. ACA states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). ACA has no parent corporation, and no publicly held company owns a 10 percent or greater interest in ACA.

National Lime Association (“NLA”) represents United States and Canadian commercial lime companies, suppliers to lime companies, and foreign lime companies and trade associations. NLA’s members produce more than 98 percent of commercial lime—more than 90 percent of all lime made from limestone in the United States and 100 percent of commercial lime in Canada. NLA states that it is a “trade association” within the meaning of Circuit Rule 26.1(b). NLA’s mission is to represent, protect, and promote the United States lime industry. NLA accomplishes this with a unified voice, responding and working to ensure that legislation, regulations, and standards affecting the lime industry are reasonable, practical, and mutually beneficial to the lime industry and society. NLA states that it is a “trade association” for purposes of Circuit Rule 26.1(b). NLA has no parent corporation, and no publicly held company has 10 percent or greater ownership in NLA.

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GLOSSARY

2024 Rule	“Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 89 Fed. Reg. 73,293 (Sept. 10, 2024)
CAA	Clean Air Act, 42 U.S.C. §§ 7401 <i>et seq.</i>
EPA	United States Environmental Protection Agency
Final Rule	“Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 85 Fed. Reg. 73,854 (Nov. 19, 2020).
HAP	Hazardous Air Pollutant
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
MM2A	Major MACT to Area Source, another name for the Final Rule.
NESHAP	National Emissions Standards for Hazardous Air Pollutants

INTRODUCTION

Before the 1990 amendments to the Clean Air Act, that statute's scheme for regulating emissions of "air toxics" was criticized as unworkable—with ~60 pollutants being evaluated and only six pollutants regulated in the U.S. Environmental Protection Agency's (EPA's) decade-long implementation effort. So Congress restructured §112. In 1990, Congress pivoted regulation toward two factors—type of industry ("source categories") and magnitude of emissions. Relevant here, Congress drew a fundamental distinction between larger-emitting facilities ("major sources") and smaller ones ("area sources"). A "major" source is any facility with the potential to emit at least 10 tons-per-year of any single hazardous air pollutant or 25 tons-per-year of hazardous air pollutants combined. 42 U.S.C. §7412(a)(1). Any facility with potential emissions below those thresholds is an area source. *Id.* §7412(a)(2). Additionally, Congress imposed a schedule for regulation of major sources. *Id.* §7412(e). This structured approach was set to remedy prior bureaucratic inertia.

EPA has largely succeeded in implementing this new structure, issuing in 1992 a list of source categories of "major sources" per §112(c) and a schedule for promulgating technology-based major source standards ("maximum achievable control technology" or "MACT") per §112(e)(3). *Id.* §7412(c), (e). EPA also

adopted and implemented standards for “area sources” under §112(c)(6), (d)(5) and (k), where appropriate. *Id.* §7412(c)(6), (d)(5), (k).

This case presents the limited question of whether Congress’s line-drawing decision between major and area sources must add a time-bar nowhere found in the statute. Petitioners’ claim that after a compliance date has passed (or a different date—a standard’s effective date), a facility is forever locked into being a major source for that standard, no matter how low its emissions become. That’s why, back in the 1990s, EPA coined the moniker “once-in-always-in” for this policy. In the Final Rule, 85 Fed. Reg. 73,854 (Nov. 19, 2020), JA___, EPA realized the error in “once-in-always-in,” recognizing two things. First, EPA found “once-in-always-in” contrary to statutory language. EPA also realized that the “once-in-always-in” policy disincentivized companies from reducing emissions and implementing pollution prevention. Pollution prevention is a fundamental pillar of the Clean Air Act, as reflected in §101(c)’s goal of pollution prevention and the simultaneously-enacted Pollution Prevention Act, 42 U.S.C. §13101 (1990). The Pollution Prevention Act recognized emissions reduction opportunities are “often not realized because [of obstacles posed by] existing regulations” and made it the “national policy of the United States” to prevent pollution at its source. *Id.* §13101(a)(3), (b)

By Petitioners’ reading, a facility with a permit limiting its emissions well below the major source thresholds but that previously had potential emissions above

those levels must *forever* comply with the major source §112 standard(s) that applied before the source became an area source. Under their approach, it would not matter if a company limited emissions to one *pound*. It would still be subject to major source standards because, at some point, it could have emitted at major source levels. Under their scheme, Petitioners freely admit, major sources can simultaneously be subject to area source standards and area sources can likewise be subject to major source standards. That surprising result is both inconsistent with the statutory language and runs counter to the approach of other relevant Clean Air Act regulatory programs that also do not have time restrictions.

The Final Rule applies the statute correctly after EPA had taken a wrong interpretive turn in the 1990s (a wrong turn aligned with Petitioners' viewpoint). The Final Rule asserts this unremarkable proposition: an area source must be regulated as an area source, and a major source must be regulated as a major source. That is what Clean Air Act §112 demands and what EPA's rules now require.

Petitioners characterize the Final Rule as a "get-out-of-jail-free card" such that facilities will now ramp-up their emissions to levels far above levels imposed under previously applicable major source standards. Petitioners' claims are baseless and belied by the rulemaking record. EPA carefully investigated that theoretical possibility and, having reviewed the best available evidence, concluded that claims of emissions increases would not materialize. EPA engineers with extensive

experience in these regulations conducted a detailed study evaluating dozens of sources that actually reclassified from major to area sources and also the potential actions of facilities that had been historically emitting below major source thresholds that would be good candidates for reclassification. That study concluded that companies that actually reclassified did not increase their emissions and that industry more broadly would be very unlikely to increase emissions based on of the Final Rule being litigated here. *See EPA, Review of Reclassification Actions for the Rule “Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act,”* (Aug. 2020), No. EPA-HQ-OAR-2019-0282-0648, JA ___ - ___.

Petitioners offer no evidence or analysis to the contrary.

The petitions for review should be denied.

STATUTES AND RULES

Intervenor-Respondents’ incorporate by reference Respondents’ Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

Intervenor-Respondents incorporate by reference Respondents’ Statement of the Case, highlighting certain points below.

I. The Clean Air Act §112 air toxics program is two programs in one, in that it defines and separately regulates major sources and area sources.

When Congress overhauled Clean Air Act §112’s air toxics program in the 1990 Amendments, it engaged in a line-drawing exercise, marking a fundamental

distinction between larger-emitting facilities (called “major sources”) and smaller-emitting facilities (called “area sources”). 42 U.S.C. §7412(a)(1)-(2). Unlike the version of §112 that pre-dated the 1990 Amendments, Congress structured the new §112 program like many other parts of the statute, distinguishing between major and minor (for §112, called area) sources.¹ A major source is any facility with the potential to emit at least 10 tons-per-year of any single hazardous air pollutant or 25 tons-per-year of all hazardous air pollutants combined. 42 U.S.C. §7412(a)(1). Any facility below those thresholds is an area source. *Id.* §7412(a)(2).

The major/area source distinction pervades the statute. First, EPA must separately identify categories of major sources and categories of area sources for which emissions standards must be established. *Id.* §7412(c)(1). EPA must regulate every category of major sources. *Id.* But EPA is authorized to list and regulate a category of area sources only if specified findings are made. *Id.* §7412(c)(3), (c)(6), (k)(3).

Next, EPA must establish emissions standards for major sources and area sources. *Id.* §7412(d)(1) (“The Administrator shall promulgate regulations

¹ *See, e.g.*, 42 U.S.C. §7479(1) (major emitting facilities subject to Prevention of Significant Deterioration permitting program have potential emissions of at least 100 or 250 tons-per-year; sources under those thresholds not covered); 42 U.S.C. §7602(j) (overarching definitional provision—major stationary source/major emitting facility emit potential emissions at least 100 tons-per-year); 42 U.S.C. §7661(2) (defining the types of major sources subject to the Title V operating permits program based on potential emissions).

establishing emissions standards for each category or subcategory of major sources and area sources”), *id.* §7412(d)(2) (emissions standards must reflect what is “achievable for new or existing sources in the category or subcategory to which such emission standard applies”). In establishing those standards, EPA is authorized in most cases to set less stringent emissions standards for area sources than for major sources, generally reflecting the fact that controls for sources with lower overall emissions are less cost-effective for those with a larger footprint. *Id.* §7412(d)(5). Given their larger emissions, within eight years after the initial MACT standards, EPA must conduct a “residual risk” assessment for major source category standards and, as necessary, set risk-based emissions standards to provide an ample margin of safety. *Id.* §7412(f)(2). Such a review is not always required for area sources. *Id.* §7412(f)(5).

Lastly, Congress established an “area source program” because “emissions of hazardous air pollutants from area sources may individually, or in the aggregate, present significant risks to public health in urban areas.” *Id.* §7412(k)(1). Under that program, EPA must list and regulate enough area source categories to “assure that sources accounting for 90 per centum or more of the aggregate emissions of [at least 30 hazardous air pollutants presenting the greatest risk] are subject to standards pursuant to [Clean Air Act §112(d)].” *Id.* §7412(k)(3)(B)(ii). Major sources are not subject to that program because, as noted above, EPA must set emissions standards

for all categories of major sources, whereas EPA's authority and obligation to regulate area sources is more limited.

EPA's Clean Air Act §112 regulatory program faithfully implements the statutory dichotomy between major sources and area sources. For example, EPA has developed and maintained a list of major source categories and a separate list of area source categories. *See* [National Emission Standards for Hazardous Air Pollutants \(NESHAP\) | US EPA](#), [National Emissions Standards for Hazardous Air Pollutants - Area Source Standards | US EPA](#). EPA also has promulgated standards for each major source category based on data and information derived from major sources in the source category. Similarly, EPA has promulgated emissions standards for each area source category using data and information from area sources in the source category.

Importantly, the applicability of each emissions standard for major sources clearly is limited only to major sources in the source category. *See, e.g.*, 40 C.F.R. §63.100(b)(3) (applicability of the major source standard for certain chemical manufacturing operations is limited to operations “located at a plant site that is a major source”); *id.* §63.440(a) (major source standard for paper plants applies to operations “located at a plant site that is a major source”).

Likewise, applicability of each emissions standard for area sources is limited only to area sources in the source category. *See, e.g., id.* §63.11393(a) (area source

standard for acrylic fiber production applies to operations that are “an area source of hazardous air pollutant (HAP) emissions”); *id.* §63.11494(a)(1) (chemical manufacturing area source rule applies to operations “located at an area source of hazardous air pollutant (HAP) emissions”); *id.* §63.11193 (area source standard for industrial boilers applies to units “located at, or is part of, an area source of hazardous air pollutants (HAP)”).

EPA sometimes promulgates a rule that includes emissions standards for both major sources and area sources. But when it does so, EPA is careful to separately delineate the requirements applicable to major sources from those applicable to area sources. *See, e.g., id.* §§63.360(i), 63.363(a), 63.364(a)(4), 63.366(b)(8)-(9), 63.366(c)(8)-(9), and 40 C.F.R. pt. 63, subpt. O Tbls. 3, 4, 5 (separate requirements for area sources under standard for commercial ethylene oxide sterilizers).

EPA has not promulgated an emissions standard for a major source category that requires a major source subject to the standard to continue complying with the standard if it becomes an area source. The reverse also is true—EPA has not promulgated an emissions standard for an area source category that requires an area source subject to the standard to continue complying with the standard if it becomes a major source. EPA’s Clean Air Act §112 emissions standards thus do not embody any “once-in-always-in” concept.

II. Congress rescinded EPA's 2024 regulation that constrained the Final Rule.

After the change of Presidential administration that followed the 2020 Final Rule promulgation, EPA proposed to amend the Final Rule to address “significant concern[s]” raised but not addressed in that rulemaking. 88 Fed. Reg. 66,336, 66,342 (Sept. 27, 2023), JA ___, JA ___. Among other things, EPA addressed the interplay between the Final Rule and Clean Air Act §112(c)(6).

In relevant part, Clean Air Act §112(c)(6) states:

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) [of this section].

42 U.S.C. § 7412(c)(6). EPA summarized that provision as “requir[ing] the EPA to take action with respect to seven specific, persistent, bioaccumulative HAP.” 89 Fed. Reg. 73,293, 73,295 (Sept. 10, 2024) (“2024 Rule”), JA ___, JA ___. EPA asserted that:

CAA section 112(c)(6) requires the EPA to address the seven specific HAPs in two steps. First, CAA section 112(c)(6) requires the EPA to identify and list the source categories that account for 90% of the total emissions of the seven HAPs. Next, CAA section 112(c)(6) requires the EPA to ‘assur[e]’ that those sources remain subject to the standards the EPA established under CAA sections 112(d)(2) and (d)(4).

Id. at 73,295, JA____. Given that perceived obligation, EPA amended the Final Rule to “include a requirement that sources subject to certain major source NESHAP used to meet the Agency’s obligations under [Clean Air Act §112(c)(6)] for seven specific persistent and bioaccumulative pollutants must remain subject to those NESHAP even if the sources reclassify to area source status.” *Id.* at 73,293, JA____. Thus, a source subject to any of 33 major source standards was required to remain subject to that standard, even if the source reclassified from being a major source to an area source. *See id.* at 73,307 (40 C.F.R. §63.1(c)(6)(iii)) , JA____. That requirement significantly limited the Final Rule’s scope.

On June 20, 2025, President Trump signed into law a resolution of disapproval under the Congressional Review Act, 5 U.S.C. §§801 *et seq.*, that rescinded the 2024 rule. Pub. L. No. 119-20, 139 Stat. 71 (2025). EPA subsequently issued a rule that reversed the 2024 amendments to the Final Rule regulatory text. 91 Fed. Reg. 58 (Jan. 2, 2026), JA____.

Another consequence of the rescission of the 2024 rule under the Congressional Review Act is that the rule “may not be reissued in substantially the same form, and a new rule that is substantially the same ... may not be issued” unless specifically authorized by subsequent law. 5 U.S.C. §801(b)(2).

SUMMARY OF ARGUMENT

The core of Petitioners' argument is that Clean Air Act §112(i)(3)(A) requires a source to forever comply with any Clean Air Act §112 emissions standard that ever has applied to the source. In other words, the statute imposes a "once in, always in" obligation. That argument fails at every turn.

First, Clean Air Act §112(i)(3)(A), in relevant part, simply prohibits a facility owner from operating in violation of any Clean Air Act §112 emissions standard currently "applicable to [the] source." Petitioners wish it required more (*i.e.*, that a source must forever comply with any standard ever applicable to the source), but it simply does not.

Second, Petitioners invoke contextual arguments in support of their "once in, always in" interpretation of §112(i)(3)(A), arguing the statute must be construed to attain "the maximum reduction in emissions which can be achieved." ENGO Br. at 5. Petitioners' aspirations cannot substitute for the actual text of the statute.

The statutory text unambiguously defines "major source" and "area source" based only on potential to emit. The definitions contain no time constraint and certainly do not impose a "once in, always in" obligation. Indeed, by stating the definitions of "major source" and "area source" in the present tense, Congress signaled that a given source's status may change depending on potential emissions at any given time.

Under §112's broader context, EPA must separately list major source categories and area source categories according to differing criteria. EPA also must separately regulate major source categories and area source categories according to differing criteria. And in all cases, standards are established for source *categories* and not for individualized sources.

Under that structure, a given source's characteristics dictate whether it belongs to a particular source category and thus is subject to that source category's standards. If a source reclassifies from major to area status, the source categories to which the source belongs change (major source categories to corresponding area source categories) and the standards to which the source is subject also change (from applicable major source to applicable area source standards).

Under the Clean Air Act's plain terms, a source may reclassify from major source to area source status and, when it does so, the standards that apply change.

STANDING

To the extent that Intervenor-Respondents must demonstrate standing, that showing is easily met. Intervenor-Respondents have standing under the doctrine of associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020). Many of Intervenor-Respondents' members operate manufacturing facilities that are subject to source category

emissions standards under Clean Air Act §112. Intervenor-Respondents' members would be harmed by vacatur of the Final Rule because that would cause major source standards to continue to apply if major sources become area sources, particularly to the extent that they have already obtained and relied upon reclassification.

Accordingly, Intervenor-Respondents' members are the object of the Rule and therefore would have standing to sue in their own right. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (“[T]here is ordinarily little question that the action or inaction has caused [parties subject to government regulation] injury.”). This Court has held that “[t]he ‘threatened loss’ of [a] favorable action [by an agency] constitutes a ‘concrete and imminent injury’” justifying intervention of right to defend that action, satisfying not only the injury requirement but the causation and redressability requirements of Article III. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (ECF No. 1722115) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003), *abrogated on other grounds by Institutional Shareholder Servs., Inc. v. SEC*, 142 F.4th 757 (D.C. Cir. 2025)).

Several of the Intervenor-Respondent associations actively participated in the numerous rulemakings culminating in the Final Rule, and in submitting comments on the Proposed Rules that preceded the Final Rule identified how the “once-in-always-in” policy was detrimental and how correcting it would eliminate applicability for some members of the Clean Air Act Title V operating permits

program and would incentivize pollution reduction and save substantial administrative burdens and costs.² This directly demonstrates standing.

This action is also germane to the purposes of Intervenor-Respondents to advocate on their members' behalf in court, particularly in challenges to rulemakings under the Act. *Hunt*, 432 U.S. at 333; *see also, e.g., Healthy Gulf v. U.S. Dep't of the Interior*, 152 F.4th 180, 190 (D.C. Cir. 2025) (“Germaneness requires ‘pertinence between litigation subject and organizational purpose.’”) (indirectly quoting *Humane Soc’y of U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)); *Hodel*, 840 F.2d at 58 (germaneness requirement is “undemanding”). For example, ACA, ACC, AIF, APF, BIA, and AWC are intervenor-respondents in *Environmental Defense Fund v. EPA*, No. 18-1149 (and consolidated cases) (D.C. Cir.) and filed a final form brief in that case March 27, 2026 (ECF No. 2165878).

² *See, e.g.,* Comments of the U.S. Chamber of Commerce, National Association of Manufacturers, American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest and Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Wood Council, Brick Industry Association, Council of Industrial Boiler Owners, National Oilseed Processors Association, Plastics Industry Association, Portland Cement Association [now known as American Cement Association], the Air Permitting Forum, and the Auto Industry Forum on EPA, *Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act, Proposed Rule*, 84 Fed. Reg. 36,304 (July 26, 2019) at 13 (Nov. 1, 2019), EPA-HQ-OAR-2019-0282-0437 (“Industry Coalition Comments”), JA ___; *see also* Comments of National Lime Association, *id.*, EPA-HQ-OAR-2019-0282-0334.

Finally, neither the arguments asserted, nor the relief requested, require the participation of individual members in the lawsuit, as Petitioners seek only vacatur of the Final Rule. *See, e.g., United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 146 F.4th 1144, 1157 (D.C. Cir. 2025).

ARGUMENT

Petitioners offer an assortment of arguments they assert demonstrates that Congress intended to freeze in place the determination of major and area source status forever. None hold water.

I. Contrary to Petitioners’ claims, §112(i)(3)(A) does not “require compliance, regardless of post compliance emissions changes.”

The core of both sets of Petitioners’ challenges to the Final Rule is that Clean Air Act §112(i)(3)(A) requires that once a major source emissions standard applies to a facility, the standard must continue to apply even if the facility becomes an area source—*i.e.*, Clean Air Act §112(i)(3)(A) imposes a “once-in-always-in” obligation. Petitioners argue that the Final Rule violates that requirement by providing that currently applicable major source emissions standards no longer apply to a source if the source becomes an area source. Petitioners’ argument is wrong. It is based on a fatally contorted interpretation of Clean Air Act §112(i)(3)(A) and a fundamental misinterpretation of the statutory context in which that provision operates.

A. Clean Air Act §112(i)(3)(A) requires compliance with emissions standards applicable to a source—nothing more and nothing less.

Clean Air Act §112(i)(3)(A) states:

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

According to Petitioners, “[t]hat provision thereby sets a cut-off—the ‘effective date’—‘after’” which compliance is required, regardless of post-compliance emissions changes.” ENGO Br. at 17, *accord* State Br. at 25 (§112(i)(3)(A) requires “continued compliance with MACT standards ‘after the effective date’ of those standards”). Petitioners assert that “after the effective date of a standard applicable to a source, *that* source must [forever after] comply with *that* standard.” ENGO Br. at 18 (emphasis in original). In other words, Clean Air Act §112(i)(3)(A) creates a “once-in-always-in” compliance obligation. Petitioners’ interpretation asks more of the words of Clean Air Act §112(i)(3)(A) than they can deliver.

The phrase at issue here is at the beginning of Clean Air Act §112(i)(3)(A): “After the effective date of any emissions standard, limitation, or regulation promulgated under this section and applicable to a source, no person may operate

such source in violation of such standard, limitation, or regulation....” That phrase naturally breaks down into three pieces.

First, the phrase includes a time component—“[a]fter the effective date of any emissions standard, limitation, or regulation.” Second, the phrase specifies which sources are covered—those to which the given emissions standard, limitation, or regulation applies (*i.e.*, “applicable to a source”). Third, the phrase imposes a prohibition on operating in violation of the standard, limitation or regulation.

Taken together, the phrase plainly prohibits a source currently subject to a Clean Air Act §112 emissions standard from violating that standard. Full stop.

But Petitioners’ argument requires that those words do much more. They claim that language imposes the further obligation that once an emissions standard applies to a source, that source must forevermore comply with the standard—even if changes are made at the source that cause the standard to no longer be “applicable to [the] source.” But that interpretation only works if words that Congress did not write appear in Clean Air Act §112(i)(3)(A) or are inferred to exist.

For example, Petitioners’ interpretation might work if the statute read:

After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source **on the effective date**, no person may **ever after** operate such source in violation of such standard, limitation or regulation....

Or it might work if the statute specified that:

After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable **at any point in time** to a source, no person may operate such source in violation of such standard, limitation or regulation....

Congress also might have chosen to be abundantly clear by adding a sentence to the end of Clean Air Act Section 112(i)(3)(A):

This prohibition on violating an emissions standard, limitation or regulation applies at all times after such standard, limitation or regulation first becomes applicable to a source, regardless of any changes made to the source.

But no such additional words appear in the statute, and such words cannot be inferred to exist to accomplish the policy outcome preferred by Petitioners. *Cares Cmty. Health v. DHHS*, 944 F.3d 950, 961 (D.C. Cir. 2019) (Policy arguments cannot “overcome [a] statute’s plain language, which is our primary guide to Congress’ preferred policy.”) (citation omitted). Again, Petitioners simply ignore that Congress required the standard to also be “applicable” to the source. As explained, Congress could have said “applicable at any point in time” but chose not to do so.

Petitioners’ argument is ironic because they accuse EPA of improperly inferring meaning from the definitions of “major source” and “area source” that they claim does not exist. ENGO Br. at 23 (“EPA’s blinkered reliance on the ‘lack of a reference to the compliance date’ in the major source definition is ... misplaced....”); State Br. at 24 (“EPA’s reliance on silence in definitional terms is particularly

misplaced.”). So, it seems they believe that inferences can be acceptable, but only if the inferences support their interpretation and not EPA’s.

But more importantly, Petitioners are wrong—the lack of a time component in the definitions of “major source” and “area source” is highly probative here, particularly in contrast to the time component that is built into the definitions of “new source” and “existing source,” 42 U.S.C. §7412(a)(4), (10). As EPA observed in the Final Rule,

[t]he contrast between the temporal distinction in the contrasting definitions of existing and new sources on the one hand, and the absence of any temporal dimension to the contrasting definitions of major and area sources on the other, is further evidence that Congress did not intend to place a temporal limitation on a source’s ability to be classified as an area source (including a source’s ability to be classified as an area source through the permitting authority’s ‘considering controls’ that may have been imposed after the source was initially classified as major).

85 Fed. Reg. at 73,859, JA ___; accord *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (“[W]here 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 and purposely in the disparate inclusion or exclusion.”) (citation omitted). Also, as EPA points out in its brief, use of the present tense in the definitions of “major source” and “area source” is another factor weighing in favor of placing no time restriction on reclassifications from major to area. EPA Br. at 11-

12. These clear indicators of meaning cannot be overcome by the contorted interpretation of Clean Air Act §112(i)(3)(A) advanced by Petitioners.

The Final Rule also points out that Petitioners' "once in, always in" interpretation of Clean Air Act §112(i)(3)(A) "would produce some results that are clearly incorrect." 85 Fed. Reg. at 73,860, JA ____. For example, EPA explains that if:

a source's applicable requirements are determined at the point in time that a source first becomes subject to CAA section 112 requirements, then an area source would continue to be subject to area source requirements even if that source increased its potential to emit above either of the major source thresholds.

Id.

Petitioners counter by asserting "that sources increasing their emissions must comply with MACT standards does not mean that sources can escape standards when, after compliance, their emissions fall." ENGO Br. at 31. Petitioners also cite *Michigan v. EPA*, 576 U.S. 743, 757 (2015) ("*Michigan*") for the proposition that "EPA's 'preference for symmetry cannot trump an asymmetrical statute.'" ENGO Br. at 31.

The reference to "asymmetry" is perplexing. Seemingly, the "asymmetry" Petitioners purport to identify is their assertion that the statute requires some sources (*i.e.*, those reclassifying from area-to-major or major-to-area) to comply with both area and major source standards, while it requires other sources (those not

reclassifying) to comply only with applicable major source standards or applicable area source standards.

As the Final Rule points out, such “asymmetry” is nonsensical and evidences that Petitioners’ interpretation cannot be correct. Moreover, *Michigan* is inapposite. That case interpreted §112(n)(1)(A), which requires EPA to make particularized findings before regulating power plants under §112. 42 U.S.C. §7412(n)(1)(a). The Court concluded that “the whole point of having a separate provision about power plants” is to “treat[] power plants *differently* from other stationary sources.” *Michigan*, 576 U.S. at 756. Thus, the “asymmetry” in that case was the separate treatment of power plants versus all other sources. Here, no such “asymmetry” exists because no express statutory provision imposing a “once in, always in” exists. Instead, all sources are regulated according to the standards that apply at any given time.

Petitioners’ approach also creates illogical results in that it would allow a facility to be a “major source” and an “area source” under §112 simultaneously. To illustrate, EPA issued major source standards from about 1995 to 2015. Consider a facility that has two source categories onsite: (1) steel pickling (an industrial process to remove contaminants from steel before it is made into finished product), subject to major source standards, 40 C.F.R. Part 63, Subpart CCC, with a June 22, 2001 compliance date, 40 C.F.R. §63.1160(a), and (2) an industrial boiler providing power

to the plant, with a first substantive compliance date of March 21, 2014, *id.* §63.11196(a). Under Petitioners' interpretation, if the facility was "major" on June 22, 2001 but, in 2009, employed pollution prevention to reduce emissions below major source levels, that facility would be a major source for the steel pickling source category and an area source for the boiler source category. The ability to be a major and area source at the same time is simply inconsistent with the Clean Air Act.

Petitioners' argument also would produce other inexplicable results. For example, a given chemical manufacturing plant sometimes is used to produce a range of different products. The plant may occupy different source categories depending on the product being made at any given time. Under Petitioners' approach, such facilities would always be simultaneously subject to every major source standard that ever applied to the facility, even if they eliminated a product and thus were no longer part of the source category. That makes no sense.

Petitioners also assert that a "once in, always in" requirement exists because this Court has held that the "statute 'unambiguously limit[s] EPA's discretion to remove sources' from categories listed for regulation 'once they have been added to it.'" ENGO Br. at 32 (quoting *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008)). But Petitioners stretch the meaning of that holding past the breaking point. That case involved an EPA rule where, among other things, the Agency purported to delist a Clean Air Act §112 major source category (the power plant source category)

on the grounds that the original listing decision was made in error. This Court held that the delisting was improper because EPA did not follow the express source category delisting procedure specified in Clean Air Act §112(c)(9). *New Jersey*, 517 F.3d at 581. That case had nothing to do with the question of whether a “source” may move in and out of a listed source category as a result of changes to the source. Rather, that case focused on EPA’s authority to delist an entire “source category.” *New Jersey* thus lends no support to Petitioners’ position.

In sum, Clean Air Act §112(i)(3)(A) requires compliance with emissions standards currently applicable to a source—nothing more and nothing less. The statute speaks for itself.

B. The Final Rule is in keeping with the structure and purposes of Clean Air Act §112.

Petitioners seek to bolster their interpretation of Clean Air Act §112(i)(3)(A) by arguing that absence of a “once-in-always-in” requirement would “fundamentally restructure the regulatory regime” by nullifying statutory provisions intended to drive hazardous air pollutant emissions to the lowest possible levels. ENGO Br. at 2, State Br. at 25-26. Petitioners rest their argument on three Clean Air Act §112 provisions:

Section 112(d)(2): That provision states that technology-based emissions standards must achieve the “maximum degree of reduction in emissions,” including a prohibition on emissions where warranted. 42 U.S.C. §7412(d)(2). Petitioners argue that absence of a “once-in-always-in” obligation would improperly allow affected sources that

reclassify from major source to area source status to avoid major source standards that require deeper emissions reductions than corresponding area source standards. ENGO Br. at 19, State Br. at 25-27.

Section 112(f)(2): That provision requires a residual risk review and the imposition of more stringent emissions standards if needed to address unacceptable remaining risk. 42 U.S.C. §7412(f)(2). Petitioners argue that absence of a “once-in-always-in” obligation allows sources that reclassify from major source to area source status to avoid major source standards that are revised under CAA §112(f) to impose more stringent risk-based standards. ENGO Br. at 20-21, State Br. at 27-30.

Section 112(d)(6): That provision requires EPA to review existing standards at least every 8 years and revise the standards when warranted by advances in emissions control methods. 42 U.S.C. §7412(d)(6). Petitioners argue that absence of a “once-in-always-in” obligation would allow sources that reclassify from major source to area source status to evade more stringent major source standards imposed under that provision. State Br. at 27-30.

Contrary to Petitioners’ arguments, none of those provisions requires or implies that once a source becomes subject to a given emissions standard, that standard must forever after apply to that source even after changes are made to the source that cause the source to no longer belong to the regulated source category (for example, by reclassifying from major source to area source status). Instead, each deals with establishing or revising emissions standards applicable to a given source category or subcategory. And because EPA is required to separately list major source categories and area source categories, 42 U.S.C. §7412(c)(1), and is required to set separate emissions standards for categories of major sources and categories of area

sources, *id.* §7412(c)(2), it follows that Clean Air Act Sections 112(d)(2), (f)(2), and (d)(6) must be interpreted to preserve that fundamental regulatory structure.

In particular, Clean Air Act §112(d)(2) requires EPA to establish technology-based emissions standards for “sources *in the category or subcategory to which such emission standard applies.*” 42 U.S.C. §7412(d)(2) (emphasis added). That provision states the obvious: standards under that provision only apply to sources that belong to the given category or subcategory. The express requirement to regulate categories and subcategories of sources cannot be interpreted as imposing the source-specific requirement that once a source is subject to a rule, it must forever be subject to that rule even if changes are made to the source that cause it to no longer belong to the given category or subcategory. It is best read to achieve the opposite effect. That is, when a major source becomes an area source, it no longer belongs to any major source category. Thus, standards for major source categories no longer apply to that source because such standards apply only to sources “in the category.”

Similarly, where warranted, Clean Air Act §112(f)(2) requires EPA to establish risk-based emissions standards for a “category or subcategory” of sources. 42 U.S.C. §7412(f)(2). That provision cannot be read to impose any source-specific “once-in-always-in” obligation. Instead, it plainly just requires EPA to review and, as warranted, revise source-category-specific emissions standards. That in no way

requires or implies that a particular major source that ceases to belong to a major source category because it becomes an area source has any ongoing obligation to comply with the major source standard.

Lastly, Clean Air Act §112(d)(6) requires periodic review and possible revision of “emission standards.” That provision does not apply to individual sources, much less mandate that once a source becomes subject to an emissions standard, it must forever comply with that standard even if changes are made to the source that cause it to no longer belong to the given source category or subcategory. Instead, it clearly just requires EPA to review and possibly revise existing emissions standards at least every eight years.

While it is indeed true that under those three provisions EPA can (and sometimes does) impose exceedingly stringent emissions standards, the authority to do so does not *sub silentio* carry with it a mandate that such standards must always apply to an affected source, regardless of whether the source is later modified such that it is no longer in the regulated source category. And those provisions certainly do not change the plain meaning of Clean Air Act §112(i)(3)(A), which simply prohibits a source currently subject to an emissions standard from violating that standard.

Notably, site-wide HAP emissions must be considered in determining if a facility is a major or area source. *Nat’l Mining Ass’n v. EPA*, 59 F. 3d 1351, 1357

(D.C. Cir. 1995). And facilities are often comprised of multiple regulated source categories such that the emissions from that source category, even if at area source levels, are regulated because collectively they are part of a major source. This further illustrates that the fears of Petitioners will not be realized. Many complex major source facilities (such as chemical plants or petroleum refineries) are regulated under multiple major source standards. Such facilities would not as a general matter have any reasonable prospect of reducing sitewide potential emissions below major source thresholds. A prohibition on emissions imposed under an applicable major source standard at such a facility would have the full intended effect. A case in point is the widely applicable major source standard for industrial process cooling towers (“IPCT”), which prohibits the use of chromium treatment chemicals. 40 C.F.R. §63.402 (“No owner or operator of an IPCT shall use chromium-based water treatment chemicals in any affected IPCT”). In other words, contrary to Petitioners’ argument, EPA’s authority to impose a prohibition on emissions is not remotely a dead letter as a result of the Final Rule.

In the end, Petitioners’ aspiration for permanently applicable emissions standards simply is not realized in the words or structure of the statute.

Not surprisingly, none of the dozens of emissions standards that EPA has issued over the 35-year life of the Clean Air Act §112 air toxics program embody Petitioners’ “once-in-always-in” interpretation, even though the once-in-always-in

policy was not codified anywhere in the regulations when those standards were issued. *Supra* at 8-9. As required by statute, EPA has faithfully distinguished between major source categories and area source categories and consistently required that standards for major sources must apply only to major sources and standards for area sources must apply only to area sources. Thus, on the face of EPA's emissions standards, a source that ceases to be a major source is no longer subject to previously applicable standards for major sources. Similarly, an area source that becomes a major source is no longer subject to previously applicable standards for area sources. If Petitioners had wanted it any other way, they should have said so when those emissions standards were promulgated.³

II. The record demonstrates that Petitioners' claims that the Final Rule causes large emissions increases are fallacious.

Petitioners assert as an unassailable fact that the Final Rule will result in significant emissions increases from sources that avail themselves of the rule. ENGO Br. at 1-2, State Br. at 3. Tellingly, they do so notwithstanding the extensive analysis that EPA conducted in support of the Final Rule showing that is not the case.

³ To the extent that Petitioners believe that reclassified area sources nonetheless warrant regulation under §112(d), the statute provides a remedy. Petitioners may file a rulemaking petition with EPA under the Administrative Procedure Act seeking such regulation. If EPA denies such a petition, that denial would be a final agency action subject to judicial review. 42 U.S.C. §7607(b); 5 U.S.C. §553(e).

Petitioners neither challenge nor seek to rebut EPA's analysis.⁴ Petitioners fail to acknowledge, much less rebut, the many actual examples of the effect of the Final Rule submitted by commenters on the proposal. These comments show that, in the real world, the Final Rule will reduce administrative burdens, in virtually all cases will not result in emissions increases, and often will result in emissions decreases.

A. EPA conducted a thorough analysis using the best available evidence and concluded that the impact of the Final Rule on emissions should be small.

Before making a final decision, EPA conducted a two-part analysis to determine the effects of the rule. First, and most importantly, EPA identified 69 facilities that had transitioned from major source to area source status during the period from January 2018 to February 2020 (which is when the “once-in-always-in” policy was first rescinded by way of an EPA interpretive memo). 85 Fed. Reg. at 73,879, JA____. EPA determined that 68 of those 69 sources “achieved and maintain area source status by operating the emission controls or continuing to implement the practices they used to comply with the major source NESHAP requirements.” *Id.* at

⁴ Even if the statutory language was not controlling (it is), EPA is not required to prove that no emissions increase would ever occur as a result of its policy. Rather, it is required to analyze the relevant issues and articulate a reasoned explanation of its chosen path. *Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It clearly met that burden here. Moreover, EPA is not subject to a heightened burden to justify the Final Rule merely because it represents a change in policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

73,880, JA____. EPA concluded that it “expect[s] *no emissions increases* due to reclassification for these sources.” *Id.* (emphasis added). That conclusion is particularly compelling because it “provided a representation of the potential real-world impacts on emissions by looking at the facts and circumstances of actual reclassification actions.” *Id.* at 73,879, JA____.

Second, EPA conducted a broader “illustrative emissions impact analysis” covering 72 source categories. *Id.* at 73,881, JA____. EPA considered a range of factors in that analysis, including:

backstop measures from regulatory and technological limits, as well as limitations on growth for economic reasons[;] . . . whether [reclassified sources] would be subject to the same NESHAP requirements as before reclassification (which would be the case where the area source requirements are the same as the major source requirements), whether new area source NESHAP requirements will be applicable and how they impact emissions, whether there are NSPS requirements that apply to the source and control emissions at the same levels as the major source NESHAP requirements, and whether there are [Prevention of Significant Deterioration/New Source Review/State Implementation Plan] requirements the effect of which will continue to control HAP emissions to the same extent[; and] . . . whether the measures used by the source to reduce emissions could be reversed or discontinued if sources were to reclassify to area source status . . . include[ing] but [] not limited to changes in coating/adhesive formulations, fuel combustion technologies, and some level of backstop for emissions from add-on control technologies.

Id.

EPA concluded in the “illustrative analysis” that “65 source categories will either not be impacted by [the Final Rule] or are unlikely to experience any

emissions changes.” *Id.* EPA further concluded that “some facilities in seven [other] source categories ... could increase emissions if they were to reclassify and were allowed to reduce operation of adjustable add-on controls.” *Id.* EPA estimated that the net change in emissions from those seven source categories is a possible nationwide increase of 692 to 729 tons-per-year. *Id.* at 73,881-82 n.31, JA ___ - ___.⁵ That possible increase would be the aggregate of facilities “located across the United States.” *Id.* at 73,822, JA ___. By way of comparison, total annual hazardous air pollutant emissions in the United States based on EPA’s 2020 National Emissions Inventory is 4.5 to 5.0 million tons.⁶ Thus, the possible nationwide increase in hazardous air pollutant emissions would be a tiny fraction (less than 0.02%) of total emissions.

Of course, §112 pollutants vary in characteristics (*e.g.*, toxicity) and this may affect the potential impact of a given amount of emissions near a facility. To assess such possibilities, EPA took the extra step of analyzing potential impacts on two

⁵ Commenters explained that in its efforts to be conservative, EPA had made numerous simplifying assumptions that inflated the possible emissions increases from certain industry sectors. For example, they pointed out that facilities that transition from major to area source status: (1) often must continue to operate emissions controls for other reasons (*e.g.*, emissions controls are required under state permits; (2) for facilities with actual emissions near the major source thresholds, continued operation of existing emissions controls would be needed to achieve and maintain area source status; and (3) there often is a powerful economic incentive not to emit materials with economic value. Industry Coalition Comments, EPA-HQ-OAR-2019-0282-0437 at 15.

⁶ See EPA [2020 NEI Data Retrieval Tool](#).

representative subpopulations: (1) residents of Indian country; and (2) low-income and minority populations. EPA concluded that it “expects there will be no additional impact from reclassification to most areas of Indian country” and “expects there will be no additional impact to most” demographically disadvantaged communities. 85 Fed. Reg. at 73,882, JA ____.

All in all, EPA concluded that its “analysis of the reclassifications of 69 sources and the illustrative emissions impact analysis of 72 source categories, this final rule could result in both emissions reductions and increases from a broad array of sources located in different geographic areas.” *Id.* That is far from the emissions jailbreak that Petitioners predict. And EPA’s thorough analysis and corresponding conclusions explain why Petitioners opted not to directly challenge the Final Rule based on its predicted effect on emissions and exposure.

B. Commenters submitted numerous real-world examples showing that the Final Rule will encourage and result in emissions reductions at many facilities.

Real-world examples submitted by numerous commenters on the proposed rule squarely rebutted Petitioners’ concern about hypothetical emissions increases. Petitioners present no evidence challenging those examples’ validity or any evidence suggesting they are outliers from the expected behavior of industry as a whole. The following seven examples are typical:

1. A manufacturing company reported that the rule “would lead it to investigate adding additional [emissions] controls or making process changes at facilities that have emissions slightly higher than the major source MACT threshold.” Industry Coalition Comments at 13, JA____. “This company has explored changes to resin and pressing technologies that would reduce HAP emissions, as well as potential [emissions] control equipment upgrades to aging systems, that would make the facility eligible to become an area source.” *Id.* Without the Final Rule, “the company would have no incentive to take such steps.” *Id.*

2. Another manufacturing company “has estimated that the reduced administrative burden it would face as a result of reclassifying as an area source would save the company approximately a quarter of a million dollars annually.” *Id.* “That company has planned to allocate that surplus savings to developing renewable resources projects, including solar power projects, which, in turn, would promote reduced HAP emissions from the source by reducing on-site power production needs.” *Id.*

3. Intervenor National Lime Association has a member company, Mississippi Lime Company, that reclassified from major to area in 2018. EPA acknowledged that the Mississippi Lime Facility in Verona, Kentucky, was initially authorized to construct two kilns. EPA, Emissions Technical Support Document at

76-77 (May 2019), EPA-HQ-OAR-2019-0282-0180, (“Emissions TSD”), JA ___ - ___; 85 Fed. Reg. at 73,880, JA ___. It was originally permitted as a major source but ultimately decided to only build one kiln, therefore putting its actual emissions below 10 tons-per-year of hydrochloric acid. Emissions TSD at 76, JA ___. HAP emissions from the facility did not increase as a result of reclassification since the facility was already under the threshold when operating with only one kiln. *Id.* Adopting Petitioners’ argument would be particularly unfair in this circumstance because the Mississippi Lime Facility never emitted major source amounts of hazardous air pollutants yet would forever be subject to major source standards.

4. The City of Columbia (Missouri) Municipal Power Plant Facility became an area source after conversion of two boilers from coal to woody biomass. *Id.* at 66, JA ___. That lower-emitting fuel permanently reduced hazardous air pollutant emissions. *Id.*

5. The MidAmerican Energy Company Riverside Generating Station in Iowa, reclassified from major to area by obtaining a permit limiting natural gas usage in a boiler. *Id.* at 67-68, JA ___ - ___. The fuel limitation significantly reduced hazardous air pollutant emissions. *Id.* at 68, JA ___.

6. The Western Energy Alliance reported that:

We have experienced first-hand the problems with source classification that will be addressed by this proposed rule. For instance, operators who have glycol dehydrators co-located with exploration and production facilities have found that the relatively high initial

production flows trip the NESHAP major source threshold. The well then quickly drops to the emission rate of an area source, but is required to comply with the record keeping, control, and monitoring requirements of a major source for as long as the facility exists. This situation imposes years if not decades of paperwork and expenses on minor sources that EPA has considered appropriate only for much larger sources of emissions.

Comments of the Western Energy Alliance et al. at 2 (Sept. 24, 2019), EPA-HQ-OAR-2019-0282-0317, JA ____.

7. The Society of Chemical Manufacturers and Affiliates reported that:

Most add-on [emissions] controls cannot be ‘turned down.’ Such equipment systems are highly engineered and are designed to function within a specific band of conditions to effectually operate. Such systems cannot be modified significantly to run under a dampened set of conditions. Moreover, such facilities have made the upfront investments in such equipment and have integrated it into their manufacturing processes, and it would not cease to be integrated or utilized following reclassification to area source status.

Society of Chemical Manufacturers and Affiliates at 4 (Sept. 24, 2019), EPA-HQ-OAR-2019-0282-0292, JA ____.

The docket contains many other real-world examples supporting EPA’s analysis that facilities will *not* maximize emissions upon reclassifying to area status. As shown, many facilities need significant reductions in actual hazardous air pollutant emissions to reclassify. The Final Rule thus creates strong incentives for reducing emissions to be eligible to reclassify. Many others choose to continue operating (or have other legal requirements for) high-efficiency controls post-

reclassification, meaning no material emission impact. While emissions increases aren't *impossible*, record evidence shows that would be the rare exception.

III. Congressional rescission of EPA's 2024 rule restricting the Final Rule is inconsistent with Petitioners' position and demonstrates Congressional support for the Final Rule.

State Petitioners assert the Final Rule “cannot be reconciled with EPA’s approach to regulating the seven persistent and bio-accumulative pollutants under section 112(c)(6) and EPA’s failure to explain how it will now be able to comply with that obligation is arbitrary and capricious.” State Br. at 30. This ignores that in 2024, EPA “reconciled” the Final Rule with its then-perceived obligations under §112(c)(6) by placing significant restrictions on the Final Rule’s scope. 89 Fed. Reg. 73,293, JA____. That rule was reversed via a resolution of disapproval under the Congressional Review Act, Pub. L. No. 119-20, 139 Stat. 71 (2025), with the consequence that EPA is prohibited from promulgating a substantially similar rule in the future. 5 U.S.C. §801(b)(2). Thus, the “reconciliation” that State Petitioners seek is precluded by law. Their argument is meritless.

The reversal of EPA’s 2024 Rule has even broader implications relevant to this case. The clear effect of the reversal was to eliminate restrictions imposed on the Final Rule by the 2024 Rule and return to the *status quo*, which was the Final Rule as originally promulgated. In other words, the effect of the legislation was to allow unimpeded implementation of the Final Rule now before this Court.

That raises the obvious question that if, as Petitioners argue, the Final Rule is not authorized under the law (*e.g.*, because Clean Air Act §112(i)(3)(A) imposes a “once-in-always-in” mandate), why would Congress and the President take action to eliminate impediments to its scope and effect? If the Final Rule is unlawful, it would seem that Congress and the President would have acceded to the 2024 Rule, which at least solves part of the problems alleged by Petitioners. But that didn’t happen. Congress and the President by law restored the Final Rule to full scope and effect.

That is strong evidence that Congress and the President ratified the legal interpretations underlying the Final Rule. *See, e.g., Cont’l Air Lines, Inc. v. Dep’t of Transp.*, 843 F.2d 1444, 1454 (D.C. Cir. 1988) (legislation enacted after an agency rule may ratify that rule if there are “indications of its intention to do so in the statute.”). At a minimum, the rescission legislation is a relevant factor for this Court to consider in assessing Petitioners’ claims. Beyond the statute’s plain language, the rescission legislation lends support to upholding EPA’s Final Rule.

IV. EPA did not “exempt ‘reclassified’ sources from MACT.”

Petitioners argue that the Final Rule “does not just move sources from major source to area source categories—it also relieves those reclassified sources of their MACT obligations.” ENGO Br. at 34. Petitioners assert that EPA “amend[ed] [the] general regulations so that reclassified sources are only ‘subject to any applicable area source ... requirements,’ and revis[ed] some standards to relieve reclassified

sources of MACT obligations.” *Id.* (citing 85 Fed. Reg. at 73,855-56, JA ___ - ___).

Petitioners badly misread the Final Rule.

To begin, Petitioners cite only a preamble discussion in which EPA summarily describes the Final Rule’s regulatory changes. That discussion does not state and in no way suggests reclassified sources are “relieved” of MACT obligations.

And, in any event, rule text governs, not EPA’s high-level summary of that text. In relevant part, the revised rule states that, “[a]fter [a reclassification from major source to area source status] becomes effective, the source is subject to any applicable area source requirements established under this part immediately, provided the compliance date for the area source requirements has passed.” 85 Fed. Reg. at 73,884-85 (40 C.F.R. §63.1(c)(6)(i)(A), as amended), JA ___ - ___. Because EPA is authorized to impose “MACT” based emissions standards on area sources, *supra* at 6, and because the amended rule provides that a reclassified area source “is subject to any applicable area source requirements,” it is clear under the amended rule that a reclassified area source must comply with applicable area source standards that impose “MACT” based emissions standards.

The notion that reclassified area sources are exempted from “MACT”-based standards is unfounded.

CONCLUSION

The petition for review should be denied.

Dated: April 17, 2026

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Intervenor-Respondents' Proof Brief complies with Fed. R. App. P. 32 and D.C. Circuit Rule 32 because it contains 9,088 words (as counted by the Microsoft Word software used to produce it) and has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 17th day of April, 2026, the foregoing Intervenor-Respondents' Proof Brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and thereby served upon all ECF-registered counsel.

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ORAL ARGUMENT NOT YET SCHEDULED

Case No. 21-1024 (consolidated with No. 21-1034)

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

CALIFORNIA COMMUNITIES AGAINST AIR TOXICS, *et al.*,
Petitioners,

v.

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

**ON PETITION FOR REVIEW OF FINAL ACTION BY THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

**INTERVENOR-RESPONDENTS'
ADDENDUM**

ADDENDUM TABLE OF CONTENTS

42 U.S.C. §7479(1) A-01
42 U.S.C. §7602(j) A-03
42 U.S.C. §7661(2) A-05

ting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

(July 14, 1955, ch. 360, title I, §168, as added Pub. L. 95-95, title I, §127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95-190, §14(a)(52), Nov. 16, 1977, 91 Stat. 1402.)

Editorial Notes

AMENDMENTS

1977—Subsec. (b). Pub. L. 95-190 substituted “(in accordance with the definition of ‘commenced’ in section 7479(2) of this title)” for “in accordance with this definition”.

§ 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.

(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 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.

(July 14, 1955, ch. 360, title I, §169, as added Pub. L. 95-95, title I, §127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95-190, §14(a)(54), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101-549, title III, §305(b), title IV, §403(d), Nov. 15, 1990, 104 Stat. 2583, 2631.)

Editorial Notes

AMENDMENTS

1990—Par. (1). Pub. L. 101-549, §305(b), struck out “two hundred and” after “municipal incinerators capable of charging more than”.

Par. (3). Pub. L. 101-549, §403(d), directed the insertion of “, clean fuels,” after “including fuel cleaning,”

which was executed by making the insertion after “including fuel cleaning” to reflect the probable intent of Congress, and inserted at end “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.”

1977—Par. (2)(C). Pub. L. 95-190 added subpar. (C).

Statutory Notes and Related Subsidiaries

STUDY OF MAJOR EMITTING FACILITIES WITH POTENTIAL OF EMITTING 250 TONS PER YEAR

Pub. L. 95-95, title I, §127(b), Aug. 7, 1977, 91 Stat. 741, directed Administrator, within 1 year after Aug. 7, 1977, to report to Congress on consequences of that portion of definition of “major emitting facility” under this subpart which applies to facilities with potential to emit 250 tons per year or more.

SUBPART II—VISIBILITY PROTECTION

Editorial Notes

CODIFICATION

As originally enacted, subpart II of part C of subchapter I of this chapter was added following section 7478 of this title. Pub. L. 95-190, §14(a)(53), Nov. 16, 1977, 91 Stat. 1402, struck out subpart II and inserted such subpart following section 7479 of this title.

§ 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

(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 pollut-

ants 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) shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) 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), including—

(A) except as otherwise provided pursuant to subsection (c), 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).

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), 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 signifi-

“(i) a party to the joint venture is a disadvantaged business concern; and

“(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

“(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

“SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.”

§ 7602. Definitions

When used in this chapter—

(a) The term “Administrator” means the Administrator of the Environmental Protection Agency.

(b) The term “air pollution control agency” means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term “interstate air pollution control agency” means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term “person” includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term “municipality” means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term “air pollutant” means any air pollution agent or combination of such agents,

including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term “Federal land manager” means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms “emission limitation” and “emission standard” mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.¹

(l) The term “standard of performance” means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term “means of emission limitation” means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term “primary standard attainment date” means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term “delayed compliance order” means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term “schedule and timetable of compliance” means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

¹ So in original.

(q) For purposes of this chapter, the term “applicable implementation plan” means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) INDIAN TRIBE.—The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.—The term “VOC” means volatile organic compound, as defined by the Administrator.

(t) PM-10.—The term “PM-10” means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS AND CTG.—The term “NAAQS” means national ambient air quality standard. The term “CTG” means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.—The term “NO_x” means oxides of nitrogen.

(w) CO.—The term “CO” means carbon monoxide.

(x) SMALL SOURCE.—The term “small source” means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) FEDERAL IMPLEMENTATION PLAN.—The term “Federal implementation plan” means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) STATIONARY SOURCE.—The term “stationary source” means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, § 302, formerly § 9, as added Pub. L. 88-206, § 1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89-272, title I, § 101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90-148, § 2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91-604, § 15(a)(1), (c)(1), Dec. 31, 1970, 84 Stat. 1710, 1713; Pub. L. 95-95, title II, § 218(c), title III, § 301, Aug. 7, 1977, 91 Stat. 761, 769; Pub. L. 95-190, § 14(a)(76), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§ 101(d)(4), 107(a), (b), 108(j), 109(b), title III, § 302(e), title VII, § 709, Nov. 15, 1990, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

Editorial Notes

CODIFICATION

Section was formerly classified to section 1857h of this title.

PRIOR PROVISIONS

Provisions similar to those in subsecs. (b) and (d) of this section were contained in a section 1857e of this title, act July 14, 1955, ch. 360, § 6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88-206.

AMENDMENTS

1990—Subsec. (b)(1) to (3). Pub. L. 101-549, § 107(a)(1), (2), struck out “or” at end of par. (3) and substituted periods for semicolons at end of pars. (1) to (3).

Subsec. (b)(5). Pub. L. 101-549, § 107(a)(3), added par. (5).

Subsec. (g). Pub. L. 101-549, § 108(j)(2), inserted at end “Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ‘air pollutant’ is used.”

Subsec. (h). Pub. L. 101-549, § 109(b), inserted before period at end “, whether caused by transformation, conversion, or combination with other air pollutants”.

Subsec. (k). Pub. L. 101-549, § 303(e), inserted before period at end “, and any design, equipment, work practice or operational standard promulgated under this chapter.”

Subsec. (q). Pub. L. 101-549, § 101(d)(4), added subsec. (q).

Subsec. (r). Pub. L. 101-549, § 107(b), added subsec. (r). Subsecs. (s) to (y). Pub. L. 101-549, § 108(j)(1), added subsecs. (s) to (y).

Subsec. (z). Pub. L. 101-549, § 709, added subsec. (z). 1977—Subsec. (d). Pub. L. 95-95, § 218(c), inserted “and includes the Commonwealth of the Northern Mariana Islands” after “American Samoa”.

Subsec. (e). Pub. L. 95-190 substituted “individual, corporation” for “individual corporation”.

Pub. L. 95-95, § 301(b), expanded definition of “person” to include agencies, departments, and instrumentalities of the United States and officers, agents, and employees thereof.

Subsec. (g). Pub. L. 95-95, § 301(c), expanded definition of “air pollutant” so as, expressly, to include physical, chemical, biological, and radioactive substances or matter emitted into or otherwise entering the ambient air.

Subsecs. (i) to (p). Pub. L. 95-95, § 301(a), added subsecs. (i) to (p).

1970—Subsec. (a). Pub. L. 91-604, § 15(c)(1), substituted definition of “Administrator” as meaning Administrator of the Environmental Protection Agency for definition of “Secretary” as meaning Secretary of Health, Education, and Welfare.

Subsecs. (g), (h). Pub. L. 91-604, § 15(a)(1), added subsec. (g) defining “air pollutant”, redesignated former subsec. (g) as (h) and substituted references to effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate for references to injury to agricultural crops and livestock, and inserted references to effects on economic values and on personal comfort and well being.

1967—Pub. L. 90-148 reenacted section without change.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1977 AMENDMENT

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

§ 7603. Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evi-

tions at which the allowances referred to in paragraph (1) shall be offered for sale in accordance with regulations promulgated by the Administrator, in consultation with the Secretary of the Treasury, within 12 months of November 15, 1990. The allowances referred to in paragraph (1) shall be offered for sale at auction in the amounts specified in table 2. The auction shall be open to any person. A person wishing to bid for such allowances shall submit (by a date set by the Administrator) to the Administrator (on a sealed bid schedule provided by the Administrator) offers to purchase specified numbers of allowances at specified prices. Such regulations shall specify that the auctioned allowances shall be allocated and sold on the basis of bid price, starting with the highest-priced bid and continuing until all allowances for sale at such auction have been allocated. The regulations shall not permit that a minimum price be set for the purchase of withheld allowances. Allowances purchased at the auction may be used for any purpose and at any time after the auction, subject to the provisions of this subchapter.

TABLE 2—NUMBER OF ALLOWANCES AVAILABLE FOR AUCTION

Year of Sale	Spot Auction (same year)	Advance Auction
1993	50,000*	100,000
1994	50,000*	100,000
1995	50,000*	100,000
1996	150,000	100,000
1997	150,000	100,000
1998	150,000	100,000
1999	150,000	100,000
2000 and after	100,000	100,000

Allowances sold in the spot sale in any year are allowances which may only be used in that year (unless banked for use in a later year), except as otherwise noted. Allowances sold in the advance auction in any year are allowances which may only be used in the 7th year after the year in which they are first offered for sale (unless banked for use in a later year).

*Available for use only in 1995 (unless banked for use in a later year).

(3) Proceeds

(A) Notwithstanding section 3302 of title 31 or any other provision of law, within 90 days of receipt, the Administrator shall transfer the proceeds from the auction under this section, on a pro rata basis, to the owners or operators of the affected units at an affected source from whom allowances were withheld under subsection (b). No funds transferred from a purchaser to a seller of allowances under this paragraph shall be held by any officer or employee of the United States or treated for any purpose as revenue to the United States or the Administrator.

(B) At the end of each year, any allowances offered for sale but not sold at the auction shall be returned without charge, on a pro rata basis, to the owner or operator of the affected units from whose allocation the allowances were withheld.

(4) Additional auction participants

Any person holding allowances or to whom allowances are allocated by the Administrator

may submit those allowances to the Administrator to be offered for sale at auction under this subsection. The proceeds of any such sale shall be transferred at the time of sale by the purchaser to the person submitting such allowances for sale. The holder of allowances offered for sale under this paragraph may specify a minimum sale price. Any person may purchase allowances offered for auction under this paragraph. Such allowances shall be allocated and sold to purchasers on the basis of bid price after the auction under paragraph (2) is complete. No funds transferred from a purchaser to a seller of allowances under this paragraph shall be held by any officer or employee of the United States or treated for any purpose as revenue to the United States or the Administrator.

(5) Recording by EPA

The Administrator shall record and publicly report the nature, prices and results of each auction under this subsection, including the prices of successful bids, and shall record the transfers of allowances as a result of each auction in accordance with the requirements of this section. The transfer of allowances at such auction shall be recorded in accordance with the regulations promulgated by the Administrator under this subchapter.

(e) Changes in sales, auctions, and withholding

Pursuant to rulemaking after public notice and comment the Administrator may at any time after the year 1998 (in the case of advance sales or advance auctions) and 2005 (in the case of spot sales or spot auctions) decrease the number of allowances withheld and sold under this section.

(f) Termination of auctions

The Administrator may terminate the withholding of allowances and the auction sales under this section if the Administrator determines that, during any period of 3 consecutive calendar years after 2002, less than 20 percent of the allowances available in the auction sub-account have been purchased. Pursuant to regulations under this section, the Administrator may by delegation or contract provide for the conduct of sales or auctions under the Administrator's supervision by other departments or agencies of the United States Government or by nongovernmental agencies, groups, or organizations.

(July 14, 1955, ch. 360, title IV, §416, as added Pub. L. 101-549, title IV, §401, Nov. 15, 1990, 104 Stat. 2626.)

Editorial Notes

REFERENCES IN TEXT

Section 79b of title 15, referred to in subsec. (a)(2)(C), was repealed by Pub. L. 109-58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974. See section 16451(1) of this title.

SUBCHAPTER V—PERMITS

§ 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.

(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.

(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 authorized by the Administrator to carry out a permit program under this subchapter.

(July 14, 1955, ch. 360, title V, §501, as added Pub. L. 101-549, title V, §501, Nov. 15, 1990, 104 Stat. 2635.)

§ 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), 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 parts¹ C or D of subchapter I, 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

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit

¹ So in original. Probably should be “part”.

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 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 subparagraphs² (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 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

² So in original. Probably should be “clauses”.