ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1180 (and consolidated cases)

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

ARIPPA, *et al.*,
Petitioners,
v.

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

On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 24,218 (Apr. 30, 2015)

OPENING BRIEF OF INDUSTRY PETITIONERS

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Dated: December 6, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and Amici Curiae

These cases involve the following parties:

Petitioners:

No. 15-1180: ARIPPA

No. 15-1191: Utility Air Regulatory Group

No. 15-1192: Chesapeake Climate Action Network, Clean Air Council, Downwinders at Risk, and Environmental Integrity Project

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1180, 15-1191 and 15-1192) and Gina McCarthy, Administrator for the United States Environmental Protection Agency (in No. 15-1192).

Intervenors and *Amici Curiae:*

Chesapeake Bay Foundation; Chesapeake Climate Action Network; Clean Air Council; Downwinders at Risk; Environmental Integrity Project are Intervenors in support of Respondents in Nos. 15-1180 and 15-1191.

The Utility Air Regulatory Group is an Intervenor-Respondent in support of Respondents in No. 15-1192.

There are no Intervenors in support of Petitioners.

(B) Ruling Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled "Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards; Final Action," published at 80 Fed. Reg. 24,218 (Apr. 30, 2015) (JA____).

(C) Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of the following related case that, as of the time of filing, has appeared before this Court:

(1) *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd, Michigan v. EPA*, 135 S.Ct. 2699 (2015) (No. 12-1100 and consolidated Nos. 12-1101, 12-1102, 12-1147, 12-1170, 12-1172, 12-1173, 12-1174, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1194, 12-1195, 12-1196).

Counsel is aware of the following related case that, as of the time of filing, is currently before this Court:

(1) *Murray Energy Corp. v. EPA*, No. 16-1127 (and consolidated cases) regarding EPA's "Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units," and published on April 25, 2016, at 81 Fed. Reg. 24,420.

Recognizing the relationship between the instant case and *Murray Energy Corp.*, this Court has ordered that the two cases be scheduled for argument on the same day and before the same panel. Order at 2, *ARIPPA v. EPA*, No. 15-1180, and *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Aug. 29, 2016), ECF No. 1632520.

Counsel is aware of the following related cases that, as of the time of filing, have appeared before the United States Supreme Court:

(1) *Michigan v. EPA*, 135 S.Ct. 2699 (2014) (No. 14-46).

(2) *Utility Air Regulatory Grp. V. EPA*, 135 S.Ct. 2699 (2014) (No. 14-47, consolidated with No. 14-46).

(3) *Nat'l Mining Ass'n v. EPA*, 135 S.Ct. 2699 (2015) (No. 14-49, consolidated with No. 14-46).

CORPORATE DISCLOSURE STATEMENTS

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

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

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

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STATUTES

FEDERAL REGISTER

CASE MATERIAL

MISCELLANEOUS

GLOSSARY

CAA (or Act)	Clean Air Act
CFB	Circulating Fluidized Bed
EGU	Electric Generating Unit
EPA (or Agency)	United States Environmental Protection Agency
HAP	Hazardous Air Pollutants
HCl	Hydrogen Chloride
ICR	Information Collection Request
JA	Joint Appendix
MATS (or the Rule)	Mercury and Air Toxics Standards Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012)
UARG	Utility Air Regulatory Group

JURISDICTIONAL STATEMENT

These consolidated cases challenge a final action of the U.S. Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act"), published at 80 Fed. Reg. 24,218 (Apr. 30, 2015) (the "Reconsideration Denial"), Joint Appendix ("JA")___. This Court has jurisdiction under CAA §307(b)(1).[1] Petitions for review were timely filed.

STATEMENT OF ISSUES

EPA denied petitions filed by the Utility Air Regulatory Group ("UARG") and ARIPPA for reconsideration of the Mercury and Air Toxics Standards Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS" or "the Rule"), JA___, which regulates electric generating units' ("EGUs") emissions of hazardous air pollutants ("HAPs").

1. Whether EPA's denial of UARG's petition for reconsideration was arbitrary and capricious, or otherwise unlawful, where the petition submitted information that was impracticable to present during the comment period and of central relevance to the Rule because it demonstrated that the risk from EGU non-mercury HAP emissions is de minimis.

2. Whether EPA's denial of ARIPPA's petition for reconsideration was arbitrary and capricious, or otherwise unlawful, where the petition submitted information that was impracticable to present during the comment period and of central relevance to the Rule because it demonstrated that the MATS hydrogen

[1] The Table of Authorities provides parallel citations to the U.S. Code.

chloride standard could not be satisfied by existing EGUs burning bituminous coal-refuse.

STATUTES AND REGULATIONS

This case involves EPA's denial of petitions for reconsideration of a rule promulgated under CAA §112(n)(1). The addendum reproduces pertinent portions of cited statutes and regulations.

INTRODUCTION

EPA's threshold determination that it is "appropriate and necessary" to regulate EGU HAP emissions under CAA §112 relied heavily on a study finding that non-mercury metal HAP emissions from five coal-fired EGUs posed a cancer risk slightly above a de minimis one-in-one-million level. UARG's petition for reconsideration presented new data demonstrating that (1) the emissions measurements upon which EPA relied reflected contaminated samples and were consequently *two orders of magnitude* higher than uncontaminated measurements; and (2) when non-contaminated test data are used, *no* coal-fired EGU poses a risk above EPA's de minimis threshold.

EPA also failed to recognize the distinction between bituminous and anthracite coal refuse, leading the Agency to promulgate a hydrogen chloride ("HCl") standard that bituminous coal refuse-fired EGUs using circulating fluidized bed ("CFB") technology cannot meet. ARIPPA's petition for reconsideration submitted

information demonstrating the unique characteristics of these units and the consequences of EPA's failure to consider them.

EPA should have granted the petitions because it was impracticable for either Petitioner to submit the new data or information during the comment period, and because the petitions raise issues of central relevance to the Rule. CAA §307(d)(7)(B).

STATEMENT OF THE CASE[2]

I. The Clean Air Act and EPA's Prior Analyses of EGU Emissions.

Clean Air Act §112 treats EGUs differently than all other sources. *See generally* Supplemental Finding Br. at 5-8. Congress instructed EPA to conduct "a study of the hazards to public health reasonably anticipated to occur as a result of [EGU HAP] emissions" remaining *after* "imposition of the requirements of this [Act]." CAA §112(n)(1)(A). EPA must evaluate "alternative control strategies" for those EGU HAP emissions that "may warrant regulation" under §112. *Id.* EPA may then regulate those emissions under §112, but *only* to the extent "such regulation is appropriate and necessary after considering the results of" those analyses. *Id.* EPA must weigh the costs and benefits of regulating EGU HAPs under §112 in its "appropriate and necessary" determination. *Michigan v. EPA*, 135 S.Ct. 2699 (2015).

[2] Recognizing the relationship between this case and *Murray Energy v. EPA*, No. 16-1127 (challenging EPA's "supplemental finding" on remand from *Michigan v. EPA*), this Court has ordered the two cases argued on the same day, before the same panel. To avoid repetition, this brief cites and incorporates by reference the Statement of the Case in the Opening Brief of State and Industry Petitioners in No. 16-1127, Doc. 1647029 (hereinafter "Supplemental Finding Br.").

Congress treated EGUs differently out of recognition that their HAP emissions had already been (and would further be) reduced by pollution control equipment installed to satisfy other CAA programs aimed at conventional (i.e., non-HAP) pollutants, and that every EPA analysis to date had found EGUs' HAP emissions posed no unacceptable risks. *See* Supplemental Finding Br. at 4-7. Specifically, EPA had already found on multiple occasions that EGU HAP emissions were lower than needed to protect the public health with an ample margin of safety and did not warrant regulation. *See, e.g.*, 40 Fed. Reg. 48,292, 48,297-98 (Oct. 14, 1975), JA___-___; 52 Fed. Reg. 8724, 8725 (Mar. 19, 1987), JA___.

In its repeated efforts to implement §112(n)(1) prior to the MATS Rule, EPA likewise found little or no definite or quantifiable risk from EGUs' HAP emissions, particularly for coal-fired EGUs' emissions of non-mercury metals. EPA completed the study required by §112(n)(1)(A) in 1998 and concluded that EGUs' non-mercury HAP emissions pose only "potential concerns and uncertainties that may need further study."[3] In 2000, EPA issued a finding that it was "appropriate and necessary" to regulate mercury emissions from coal-fired EGUs under §112 and listed them for regulation on that basis, but notably did not include non-mercury metal emissions in

[3] EPA, Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress, Vol. 1 at ES-27, EPA-453/R-98-004a (Feb. 1998), EPA-HQ-OAR-2009-0234-3052 ("Utility Study"), JA___.

that finding. 65 Fed. Reg. 79,825 (Dec. 20, 2000), JA___; *see* Supplemental Finding Br. at 8-11.[4]

And in 2005, EPA reversed its 2000 finding and concluded that regulating even EGUs' mercury emissions under §112 was *not* appropriate and necessary because "new information demonstrates that the level of [mercury] emissions projected to remain 'after imposition of' section 110(a)(2)(D) does not cause hazards to public health." 70 Fed. Reg. 15,994, 16,004 (Mar. 29, 2005), JA___ (removing EGUs from list of source categories for regulation under §112); Supplemental Finding Br. at 11-12. EPA simultaneously reaffirmed its previous conclusions regarding the very small and uncertain risk from other EGU HAPs. *Id.* at 16,006, JA___. Although this Court ultimately overturned EPA's delisting decision on procedural grounds, *New Jersey v. EPA*, 517 F.3d 574, 581-82 (D.C. Cir. 2008), the Court did not address EPA's technical justification for that delisting, including its conclusions regarding health or environmental risks.

II. The 2012 MATS Rule.

On remand from *New Jersey*, EPA once again assessed whether regulation of EGU HAP emissions is "appropriate and necessary." In 2010, EPA issued an information collection request ("ICR") requiring hundreds of EGUs to conduct emissions testing for certain HAPs (at an estimated cost of roughly $100 million) and

[4] EPA did find it appropriate and necessary to regulate *oil*-fired EGUs' nickel emissions. *Id.*

report the results to EPA within eight months. *See* 74 Fed. Reg. 58,012 (Nov. 10, 2009) (notice of proposed collection), JA___.

Based on data obtained from the ICR, EPA performed a "case study" of emissions and associated risks for non-mercury metal HAPs. EPA, "Supplement to the Non-Hg Case Study Chronic Inhalation Risk Assessment In Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units," EPA-452/R-11-013 (Nov. 2011), EPA-HQ-OAR-2009-0234-19912 ("Study"), JA___. In that Study, EPA identified only five coal-fired EGUs nationwide that presented a lifetime cancer risk to the most-exposed individual greater than a de minimis risk threshold of one-in-one million, with the highest just five-in-one-million. *Id.* at 12, JA___.[5] A risk of five-in-one-million or less from so few units in the industry is well within the range EPA has previously determined is sufficient to protect public health and the environment with an "ample margin of safety." *See NRDC v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008). Nonetheless, EPA declared that "non-Hg HAP from U.S. EGUs pose a hazard to public health." 77 Fed. Reg. at 9363, JA___.

As to other HAP emissions, EPA concluded that EGUs' mercury emissions contribute to consumption of methylmercury in fish, "pos[ing] a hazard to public health," *id.*, and that acid gas emissions *could* present potential environmental hazards,

[5] The facilities are Chesapeake Energy Center, Conesville, Gallatin, James River, and Yorktown. *Id.*

76 Fed. Reg. 24,976, 25,050 (May 3, 2011), JA___. *See* Supplemental Finding Br. at 13-15.

EPA then interpreted §112(n)(1)(A) to require regulation of all EGU HAPs under §112 regardless of risk posed by any individual HAP if *any single* HAP emitted by *any single* EGU was projected to create either an environmental risk or a public health risk greater than the "one-in-one million" de minimis risk level. *See* 77 Fed. Reg. at 9325-26, 9358, JA___-___, ___. EPA thus reversed its 2005 determination, found that regulation of EGU HAP emissions under §112 was "appropriate and necessary," *id.* at 9362-63, JA___-___, and promulgated the MATS Rule establishing technology-based §112(d) emission standards for EGU mercury, non-mercury metals, and acid gas emissions, *id.* at 9487-94, JA___-___.

In comments on the proposed Rule, UARG noted, *inter alia*, that EPA's health risk estimates for non-mercury metals for the five facilities in the Study that exceeded the one-in-one million risk level were based on emission factors for chromium and nickel that (i) were unrealistically high, (ii) were inconsistent with the results of previous analyses by EPA and others, and (iii) appeared to be the result of sample contamination. UARG, "Comments on Proposed MATS Rule," at 72-77 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-18035 ("UARG Comments"), JA___-___. EPA summarily dismissed these comments without ruling out the possibility of contamination, stating that the data "anomaly" could be caused by:

> any number of reasons including unrepresentative coal sampling, control device problems, degradation of the refractory, or sampling contamination. The idea that test data should be discarded because it does not match initial expectations is unfounded.

77 Fed. Reg. at 9357, JA___.

ARIPPA explained in its comments that the proposed definition of coal refuse was ambiguous, because it incorporated specific numeric limitations on ash content and heating value that effectively excluded certain coal refuse from the definition due to the inherent variability in material composition. ARIPPA, "Comments on Proposed MATS Rule," at 10-14 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17754 ("ARIPPA Comments"), JA___-___. Moreover, applying the proposed definition of coal refuse, a coal refuse-fired combustion unit did not appear to fit within either of MATS' two subcategories for coal-fired EGUs. *Id.* at 15, JA___.

ARIPPA then explained that, if the Rule was intended to apply to coal refuse-fired CFBs, a specific category of the ARIPPA units could not meet the proposed HCl limit, because of their fuel characteristics and equipment configurations which enable compliance with the MATS mercury emission standard. *Id.* at 21-22, JA___-___. In particular, ARIPPA noted EPA had not considered the distinguishing characteristics among coal refuse combusted by certain ARIPPA plants. *Id.* at 23, JA___.

In responding, EPA acknowledged that it reached certain incorrect conclusions in the proposal that required revisions to certain definitions. However, the final

Rule's revised definitions for the coal-fired EGU subcategories only perpetuated the uncertainty surrounding the applicability of MATS to coal refuse-fired sources. EPA similarly dismissed ARIPPA's concerns about these plants' inability to meet the HCl limit with an oversimplified justification for electing not to revise the emission standard based on coal rank. 77 Fed. Reg. at 9394, JA___.

III. Petitions for Reconsideration.

UARG and ARIPPA filed petitions for reconsideration under CAA §307(d)(7)(B).

UARG's petition presented new evidence demonstrating that the Study was based on contaminated emissions data. UARG, "Petition for Reconsideration," at 3-7 (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20179 ("UARG Petition"), JA___-___. Specifically, owners of the five EGUs that had reported unrealistically high chromium and nickel emissions performed follow-up testing to replicate the earlier ICR testing. UARG Petition at 7, JA___; *see* Memorandum from Ralph L. Roberson to UARG Hazardous Air Pollutant Committee, "Review of EPA's Non-Mercury Inhalation Risk Assessment" at 3 (Apr. 16, 2012) ("RMB Report"), JA___. This investigation established that elevated emissions of chromium and nickel reported by these units were due to contamination from stainless steel fittings in stack test equipment used in the ICR stack testing. Indeed, for some EGUs, more chromium appeared in the samples than was contained in the coal combusted. *Id.* at 9, JA___. Retesting was done using Teflon fittings, and when UARG replicated EPA's risk assessment using

uncontaminated data from these tests, it found *no* coal-fired EGU facility presented cancer risks from non-mercury metals above one-in-one-million. *Id.*; UARG Petition at 7 & Attachment 2, JA___ & ___.

ARIPPA's petition explained that the revised definitions for coal-fired EGUs did not resolve the application of the regulation to coal refuse-fired sources, and urged EPA to properly evaluate the HCl emission standard based on relevant coal refuse characteristics. ARIPPA, "Petition for Reconsideration," at 20-25 (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20175 ("ARIPPA Petition"), JA___-___. ARIPPA also provided new, detailed information demonstrating why the technical and economic characteristics inherent in CFB technology, coupled with the necessity of combusting locally-mined coal refuse with specific characteristics, make it impossible for CFBs burning bituminous coal refuse to meet the HCl limit. *Id.* at 7-20, JA___-___. Absent revisions to the HCl standard, ARIPPA explained, such plants will be forced to close and the environmental benefits they provide will be eliminated.

On April 30, 2015, after this Court's decision in *White Stallion Energy Center, LLC v. EPA,* 748 F.3d 1222 (D.C. Cir. 2014), but before the Supreme Court had reversed it in *Michigan v. EPA*, 135 S.Ct. 2699 (2015), EPA denied UARG's Petition because, it said, the objection would not change EPA's risk determination and thus was not centrally relevant. 80 Fed. Reg. at 24,220, JA___; EPA, "Denial of Petitions for Reconsideration of Certain Issues: MATS and Utility NSPS" at 56-60 (Mar. 2015), EPA-HQ-OAR-2009-0234-20493 ("Reconsideration Response Document"), JA___-

___. EPA denied ARIPPA's Petition, broadly insisting it had already considered comments on whether subcategorization was warranted based on coal rank, including for coal refuse. *Id.* at 147, JA___.

IV. Judicial Review of the Rule and Remand Proceeding.

While these petitions for reconsideration were pending, this Court rejected numerous challenges to the Rule, upholding EPA's determination that it need not consider cost in its "appropriate and necessary" analysis. *White Stallion,* 748 F.3d at 1241. This Court explicitly did *not* consider the objections or data presented in the petitions for reconsideration, however, which were not part of the record under review. *Id.* at 1249. The Supreme Court reversed, holding that EPA must consider costs in making an "appropriate and necessary" determination under §112(n)(1)(A). *Michigan* 135 S.Ct. at 2707-12; *id.* at 2707 (explaining "reasonable regulation ordinarily requires paying attention to the advantages *and* disadvantages of agency decisions").

On remand, EPA addressed *Michigan* by issuing a "supplemental finding" that "consideration of cost does not alter the agency's previous determination that it is appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 of the CAA." 80 Fed. Reg. 75,025, 75,026 (Dec. 1, 2015), JA___; 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("Supplemental Finding"), JA___. In doing so, EPA continued to rely on the Study—and the contaminated data on which it is based—to support its "Supplemental Finding" that regulation of EGUs' HAP emissions under §112 is "appropriate and necessary." *See* 80 Fed. Reg. at 75,038-39 (citing "previously

identified significant hazards to public health and the environment" to support finding), JA___-___. Additionally, notwithstanding ARIPPA's comments on the proposed Supplemental Finding, EPA failed to consider the lost environmental benefits resulting from the forced shutdown of the ARIPPA bituminous coal refuse-fired CFBs, which cannot satisfy the applicable HCl emission standard. ARIPPA, "Comments on Proposed Supplemental Finding," at 2-4 (Jan. 14, 2016), EPA-HQ-OAR-2009-0234-20535, JA___-___. Challenges to the Supplemental Finding are before this Court in conjunction with this case. *See supra* n.2.

SUMMARY OF ARGUMENT

UARG's Petition for Reconsideration – EPA cited its finding that non-mercury metal HAP emissions from five coal-fired EGUs posed a cancer risk above a de minimis one-in-one-million threshold as a basis for its "appropriate and necessary" finding. UARG's petition presented new data demonstrating (1) EPA's risk assessment relied on contaminated samples that reported results *two orders of magnitude* higher than uncontaminated measurements; and (2) when non-contaminated test data are used, *no* coal-fired EGU poses a risk above one-in-one-million. UARG's objection is centrally relevant, as it affects EPA's threshold justification for regulating EGUs under §112. *Michigan*, 135 S.Ct. at 2708. And it was impracticable—indeed, impossible—for UARG to submit the new data and risk assessment during the comment period, as they required complex, specialized testing and analysis that could not be completed before EPA issued the final Rule.

EPA's litany of excuses for rejecting UARG's petition is unavailing. EPA says its use of incorrect data is justified because these data were certified by those who submitted them. But a certification is "based on information and belief formed after reasonable inquiry." That the stack testing contractor mistakenly used stainless steel fittings, which in turn contaminated the data, does not make the certification invalid or the data correct. Nor does certification relieve EPA of *its* responsibility to ensure *its* Rule is based on sound factual, scientific, and legal grounds.

EPA next claims the data must have been correct because they were collected during representative operations. That is a non sequitur. So EPA argues that the original analysis was somehow acceptable because EPA averaged the contaminated data into the analysis. But a single badly-skewed data point, let alone five of them, will skew the average too. So EPA claims next that a new analysis incorporating those new data *in combination with the contaminated data* still shows three EGUs with more than de minimis risk. But the problem is the use of badly-skewed, contaminated data, both in the revised and the original analysis. Finally, EPA states, it *could have* regulated all EGU HAPs anyway, even without that non-mercury metals risk finding. Perhaps it could have, but it did not. And even if EPA's premise (that sufficient risk from one HAP requires regulating them all) survives *Michigan*, which it does not, EPA must, at a minimum, grant reconsideration to evaluate whether the absence of a risk finding for non-mercury metal HAPs affects its "appropriate and necessary" finding and its required weighing of costs. *Michigan*, 135 S.Ct. at 2707.

ARIPPA's Petition for Reconsideration – The grounds for ARIPPA's objections arose after the public comment period, as EPA's failure to consider the difference between bituminous and anthracite coal refuse when it subjected bituminous coal refuse-fired CFBs to the same HCl emission standard was not revealed until the final Rule was issued. Furthermore, the Rule's applicability provisions for coal refuse-fired CFBs were ambiguous and misleading throughout the rulemaking. EPA's revisions in the Rule to only some of these provisions merely perpetuated that uncertainty. It therefore was impracticable for ARIPPA to identify the nature and significance of EPA's failure to consider the distinction between bituminous and anthracite coal refuse during the comment period.

EPA's failure to evaluate that critical distinction in establishing the HCl limit for bituminous coal refuse-fired CFBs is also centrally relevant because it bears materially on these sources' emission profiles. Indeed, such distinction is relevant to specific fuel characteristics that EPA itself recognized as an essential consideration when evaluating the appropriate emission standards for acid gases based on coal rank. However, EPA's confusion respecting the definition and characteristics of different types of coal refuse accounts for EPA's failure to identify elevated chlorine concentrations inherent in bituminous coal refuse as relevant to the appropriate HCl emission limit for CFBs combusting this fuel type. Absent revisions to the HCl standard, ARIPPA's bituminous coal refuse-fired plants must shut down, and the environmental benefits they provide will be lost.

Finally, EPA mischaracterized ARIPPA's petition as seeking reconsideration of EPA's determination not to establish a separate subcategory for HCl for CFBs firing coal refuse, regardless of type. Contrarily, ARIPPA's Petition objects to EPA's failure to consider the difference in the characteristics of coal refuse types and account for the distinct emission profiles in evaluating the appropriate HCl emission limit for *bituminous* coal-refuse fired CFBs. EPA's denial also glosses over the issues relating to the definition of coal refuse and does not even acknowledge the interrelatedness between the lack of clarity surrounding such definition and EPA's failure to recognize the differences between coal refuse types in the standard-setting process.

STANDING

Petitioners have members who own or operate EGUs that must install and operate costly emission control technologies, or shut down altogether, to comply with the Rule. Therefore, UARG and ARIPPA suffer a concrete, particularized injury as a result of the Reconsideration Denial because of the continued regulation of EGUs through the Rule. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (when a party is the object of government regulation "there is ordinarily little question that the [governmental] action . . . has caused him injury"). A decision by this Court could remedy that injury by altering EGU compliance obligations under the Rule.

STANDARD OF REVIEW

The Court must set aside EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA §307(d)(9); 5 U.S.C. §706.

Agency action is invalid if the agency failed to consider an important aspect of a problem, offered an explanation that runs counter to the evidence, or is so implausible that the decision could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This case challenges EPA's denial of two petitions for reconsideration. Under CAA §307(d), EPA "is *obligated* by the statute to convene a proceeding to reconsider the rule" whenever a petitioner (1) presents an objection that was "impracticable" to raise during the public comment period or if "the grounds for such objection arose after" that period, and (2) the objection "is of central relevance." *Sierra Club v. Costle*, 657 F.2d 298, 396, 398 (D.C. Cir. 1981) (citing CAA §307(d)(7)(B)) (emphasis added).

ARGUMENT

I. The Agency Unreasonably Denied UARG's Petition on Contaminated Emissions Data.

A. The Contaminated Data Issue is Centrally Relevant to Whether Regulation under §112 is "Appropriate and Necessary."

In determining in 2012 that regulating EGU HAP emissions under §112 is "appropriate and necessary," EPA relied on its Study's conclusion that emissions of non-mercury metals from some EGUs present cancer risks exceeding one-in-one-million. 77 Fed. Reg. at 9363, JA___. EPA then cited the benefits of eliminating these risks to support its Supplemental Finding that regulation is still "appropriate and necessary" when costs are considered. 81 Fed. Reg. at 24,427, JA___. But UARG's

petition for reconsideration presented compelling new evidence that the Study was tainted by contaminated emissions data. When plainly erroneous, contaminated data are excluded from the analysis, no coal-fired EGU would exceed EPA's de minimis cancer risk threshold.

An objection is of "central relevance" under CAA §307(d)(7)(B) "if it provides substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012). UARG's objection is centrally relevant because the new data UARG presented negate a significant basis for EPA's threshold claim of authority to regulate EGUs under §112. *See North Carolina v. EPA*, 531 F.3d 896, 927-28 (D.C. Cir. 2008) (reconsideration required where new data on measurement errors questioned EPA's basis for regulating Minnesota EGUs); *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) ("Because the reasonableness and accuracy of the forecast data is critical to whether" source qualifies for regulatory exemption, "objections to that data, if well-founded, would clearly have been 'of central relevance.'").

The new evidence in UARG's petition confirms the concerns previously raised by commenters—and summarily dismissed by EPA, *supra* pp.7-8—about contaminated sampling data. First, the petition established that the emission capture rates for chromium and nickel emissions for the five EGUs made no sense. RMB Report at 3-4, JA___-___. Because chromium and nickel are emitted in the same manner and controlled by the same equipment as other non-mercury metals, they

should be captured at roughly the same rates. But while the Study reported removal rates for other non-mercury metals of over 97 percent, the chromium and nickel removal rate for one of the five EGUs was only 30 percent. *Id.* at 4, JA___. Indeed, some samples contained more chromium than was in the coal entering the EGU, a physical impossibility. *Id.* at 3, JA___.

UARG's petition also identified the source of this contamination: contractors that performed the emissions testing at these facilities used testing equipment with stainless steel fittings, which contain chromium and nickel. *Id.* at 5-9, JA___-___. EPA itself recognizes that using stainless steel fittings, rather than Teflon, can cause sampling contamination when testing for metals emissions. Reconsideration Response Document at 58 n.80 (citing 40 C.F.R. pt. 60 app'x A-8, Method 29 §6.1.1), JA___. UARG's petition presented results of new testing for these EGUs, using Teflon components instead. RMB Report at 7-9, JA___-___. These new tests found chromium and nickel emissions from these units were actually up to *two orders of magnitude* lower than the values in EPA's Study. *See, e.g.*, *id.* at 8 (chromium measurements at James River reduced from 835 to 8.22 lb/10^{12} Btu), 9 (chromium measurements at Valley reduced from 527 to 5.77 lb/10^{12} Btu), JA___, ___. Tellingly, measured levels of arsenic—which is *not* a component of stainless steel—did not change in the new tests, indicating the lower chromium and nickel readings reflected eliminating stainless steel contamination. *Id.* at 9, JA___.

These new data "provide[] substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation*, 684 F.3d at 125. EPA relied on calculated cancer risks above one-in-one-million from the Study to find that EGU non-mercury metal emissions "pose a hazard to public health" that will "remain after imposition of the [other] requirements of the CAA." 77 Fed. Reg. at 9311, 9363, JA___, ___. But UARG's petition establishes that, when uncontaminated data is used, the "hazards to public health" from non-mercury metal HAPs that EPA cites in the Rule disappear.

The central relevance of UARG's objection has only increased in light of *Michigan*, where the Court held that EPA's authority to regulate EGU HAP emissions turns not only on whether those emissions pose some public health "hazard," but whether the costs of regulating those emissions would "do[] significantly more harm than good." 135 S.Ct. at 2707. The magnitude and certainty of any hazards posed by EGU HAP emissions are important not only to §112(n)(1)(A)'s "hazard" finding, but also to the weighing of costs and benefits required by *Michigan*.

In its Supplemental Finding, EPA claims the Rule's estimated $9.6 billion annual compliance cost is justified by "the agency's *prior conclusions* … that [EGU] HAP emissions … pose significant hazards to public health and the environment." 81 Fed. Reg. at 24,428 (emphasis added), JA___. But once the purported public health hazards from EGUs' non-mercury metal emissions are excluded from the analysis, the already-meager benefits EPA cites in support of its "appropriate and

necessary" finding dwindle to $4-6 *million* in purported quantifiable public health benefits from reducing mercury consumption and the unquantified *potential* environmental benefits of reducing acid gas emissions. 80 Fed. Reg. at 75,040, JA___. Because UARG's objection regarding contaminated data raises a serious question regarding EPA's authority to promulgate the Rule, it is centrally relevant.

B. UARG's Objection Could Not Be Presented During the Comment Period.

It was impracticable for UARG to present its objection to the Rule based on the new testing information during the public comment period. CAA §307(d)(7)(B). At the outset, UARG notes that EPA never claimed that UARG failed to satisfy this criterion of §307(d)(7)(B) because the retesting could have been done during the comment period. *See* Reconsideration Response Document at 57-60 (disputing central relevance, but not timeliness, of submittal of retesting data), JA___-___.

Nor could it. While UARG alerted EPA that its risk estimates for the five EGUs in question appeared to reflect sampling error, it was impracticable for UARG definitively to identify the cause of the data contamination by re-sampling emissions from the affected units within the public comment period. To obtain the information in UARG's petition, it was necessary to: analyze the data used in the Study to identify suspect observations; contact the owners of units that reported potentially contaminated data; investigate potential sources of contamination in conjunction with the owners and the contractors who performed the initial testing; re-sample emissions

from the units; and analyze the predicted health risks from non-mercury metal emissions using those new data. Each of these steps required significant effort and time.

In particular, testing emissions of HAP metals is time-consuming and expensive, *see* 74 Fed. Reg. at 58,013 (providing 8 months for ICR emissions testing at estimated cost of over $100,000 per respondent), JA___; it involves complex equipment that needs to be adapted for individual EGUs, *see* RMB Report at 5, JA___; and it must be conducted under the supervision of qualified sampling contractors and laboratories who are in high demand, *see* UARG, "Comments on Proposed ICR," at 13-14 (Aug. 31, 2009), EPA-HQ-OAR-2009-0234-0017, JA___-___. Operating conditions, time of year, and weather impact when emissions sampling may be conducted. *See id.*; UARG Petition at 7 n.17 (noting unit availability delayed retesting some units), JA___. For these reasons, EPA provided EGU owners with eight months to perform the initial emissions testing, and then it took many more months to conduct the risk assessment using those data. 74 Fed. Reg. at 58,013, JA___. In contrast, EPA provided only *90 days* for public comment on the proposal, *see* 76 Fed. Reg. 38,590 (July 1, 2011) (extending original comment period), JA___, and finalized the Rule just *seven months* after it was proposed, 77 Fed. Reg. at 9446 (final Rule signed Dec. 11, 2011), JA___. Given this schedule, it was impracticable—indeed impossible—for UARG to present its objections during the comment period.

C. EPA Offers No Valid Justification for Denying UARG's Petition.

While EPA provided a number of reasons for denying UARG's petition as not centrally relevant, EPA notably did not refute the new factual evidence indicating that sample contamination had in fact occurred. Rather, EPA argues it can put on blinders and continue to rely on faulty data *despite* the uncontroverted evidence showing they were contaminated. EPA's litany of excuses is unavailing.

First, EPA asserts it could continue to rely on contaminated samples because the owners of the relevant EGUs "provided certifications that the statements and information in the test report were true, accurate, and complete, based on information and belief formed after reasonable inquiry." Reconsideration Response Document at 58, JA___. This response grossly mischaracterizes the obligations of EGU owners and operators.

ICR respondents do not—and were not required to—certify the absolute accuracy of the data submitted, as EPA suggests. Indeed, it would be impossible to provide that kind of certainty. Instead, EGU owners' certifications are "based on information and belief formed after reasonable inquiry." *Id.* Given the complexity of the testing and the time limitations imposed by the ICR, it is not surprising that there were sampling problems. *See, e.g.*, RMB Report at 7, JA___. EPA simply ignores the possibility that, even after conducting a "reasonable inquiry" into its emissions testing, sampling error can occur, whether due to contractor error, the inability of EPA's sampling protocols to prevent all errors, or simply because of the randomness

inherent in data collection. In short, no certification is a guarantee of the absolute accuracy of the data provided—only that the submitter believes the data is accurate based on a *reasonable inquiry*.

More fundamentally, "EPA retains a duty to examine key assumptions as part of its affirmative 'burden of promulgating and explaining a non-arbitrary, non-capricious rule." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C. Cir. 1983) (quoting *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980)). EPA cannot avoid that by asserting it "placed responsibility for emissions test quality assurance and control on EGU owners," Reconsideration Response Document at 57, JA___, particularly in the face of unrefuted evidence that the data on which EPA relies were contaminated. The Agency's continued reliance on those contaminated data in light of the information in UARG's petition is the height of irrationality.

Second, EPA asserts the data used in the Study must be accurate because they were obtained during representative EGU operations using representative fuels. *Id.* at 58-59, JA___. This is a non-sequitur. The issue is sampling error and contaminated data, not unrepresentative operations. That the contaminated samples were obtained during representative operations does not make them valid.

Third, EPA asserts that any abnormalities in these data would have been flagged by the Agency's "outlier analysis." *Id.* at 57, JA___. Yet, it admits that "outlier analyses were not conducted for specific EGUs." *Id.* Similarly, it claims that

UARG "appear[s] to lack understanding of EPA's emissions factor development process, because the average of individual test run values—not the individual test run values—is used in determining emissions factors." *Id.* But bias from contaminated data cannot be averaged away; even a single highly skewed observation will skew an average.[6]

Fourth, the Agency asserts that UARG's petition is not "centrally relevant" because, even when the new, uncontaminated data are incorporated into the risk assessment, EPA still predicts cancer risk estimates greater than one-in-one-million for three EGU facilities. *Id.* at 60 n.81, JA___. But EPA's revised "analysis" used the new data *in combination with the contaminated data* rather than in place of them. *Id.* ("ICR and retest data were combined and used, rather than using just the retest data as suggested by Petitioners."). EPA's response is too cute by half: the problem with EPA's first analysis is that it used plainly incorrect emission factors—up to *two orders of magnitude* higher than actuals—which hopelessly skewed the results. EPA's second analysis suffers the same flaw.[7]

Finally, EPA argues that "a[n] [appropriate and necessary] finding…[for] any one HAP is sufficient to…regulate all HAP[s]," and therefore UARG's objection is "not of central relevance" because EPA could have regulated all EGU HAPs even

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[6] As an example, the average of 0.9, 0.95, 1.05, 1.1, and 100 is 20.8.

[7] Using the example in note 6, *supra*, adding a value of 1 from the retest to the dataset, without removing the contaminated "100" data point, yields an average of 17.5—still a very skewed average.

without that risk finding. Reconsideration Response Document at 59, JA___. EPA again misses the point. As the Supreme Court explained in *Michigan*, "reasonable regulation…requires paying attention to the advantages and the disadvantages of agency decisions." 135 S.Ct. at 2707. Indeed, the fundamental aim of the "appropriate and necessary" determination is to "ensure that the costs [of regulating EGU emissions under §112] are not disproportionate to the benefits." *Id.* at 2710. EPA's assertions regarding *what* §112 might require *if* EPA were to regulate under that provision does not relieve EPA of its obligation to engage in reasoned decision-making in the first instance in determining whether "such regulation" is "appropriate." Further, EPA cannot possibly claim in the Supplemental Finding that the benefits of reducing EGU non-mercury metal HAPs—which are now definitively *zero*—justify $1-2 billion annually for controls mandated by the non-metal HAPs MATS standard. *See* Supplemental Finding Br. at 16.

II. EPA Acted Arbitrarily in Denying ARIPPA's Petition.

EPA is required under §307(d)(7)(B) to reconsider a regulation when: (1) either the grounds for the objection arose after the public comment period or it was impracticable for petitioner to raise the objection during the public comment period; and (2) the objection is of central relevance to the rule.

This Court has not interpreted the first criterion to be a particularly high bar, determining under varying circumstances that it was "impracticable" for petitioner to raise one or more objections during the public comment period. *See e.g., Portland*

Cement Ass'n v. EPA, 665 F.3d 177, 185 (2011) (criterion satisfied where petitioner "could not have reasonably anticipated" how final NESHAP rule would be affected by separate, forthcoming regulation applicable to same sources).

The Rule confirms that EPA failed to acknowledge the distinct characteristics of CFBs combusting bituminous versus anthracite coal refuse in establishing the relevant HCl standard. Consequently, ARIPPA's objections on this basis necessarily arose after the comment period. Furthermore, EPA's discussion throughout the rulemaking of MATS applicability to coal refuse-fired CFBs was ambiguous and even misleading. It therefore was impracticable for ARIPPA to identify the nature and significance of EPA's failure to consider information integral to the distinction between bituminous and anthracite coal refuse prior to issuance of the final Rule.

Section 307(d)(7)(B) also requires that the objection be of central relevance. Central relevance exists where the issue implicates a rule's applicability or substantive obligations. *Kennecott Corp.*, 684 F.2d at 1019 (quoted *supra* p.17). It is centrally relevant to MATS that EPA failed to distinguish among bituminous and anthracite coal refuse-fired CFBs in evaluating the technical and economic feasibility of these sources to satisfy the HCl limit for bituminous coal refuse-fired CFBs. Such distinction is relevant to fuel characteristics otherwise recognized by EPA during MATS development as important to emission standard-setting. Because ARIPPA's petition satisfies §307(d)(7)(B), EPA acted arbitrarily in denying that petition.

Moreover, EPA's denial mischaracterized ARIPPA's petition as simply seeking reconsideration of EPA's determination not to establish a separate subcategory for HCl for CFBs combusting coal refuse, regardless of type. Instead, ARIPPA's petition objected to EPA's failure, as evidenced through the Rule, to consider the variability among different *types* of coal refuse—bituminous and anthracite—in determining the appropriate HCl standard.

As EPA's denial describes, ARIPPA commented on subcategorization for coal refuse-fired CFBs, and EPA responded to certain of those comments. However, the information ARIPPA supplied during the comment period was necessarily limited by the information published during the proposed rulemaking. Such information did not reveal EPA's failure to recognize the distinction between bituminous and anthracite coal refuse, nor how it bears upon the emission profiles for individual plants.

Critically, EPA's treatment of the Rule's applicability to coal refuse-fired CFBs entirely obscured EPA's failure to consider the distinct emission profiles of different coal refuse types, including relevant to potential subcategorization based on fuel characteristics. Instead, EPA merely brushed aside ARIPPA's comments regarding a correct definition of "coal refuse." The Rule revealed EPA's failure to account for the distinctions between types of coal refuse, notwithstanding that EPA professed during the rulemaking to evaluate the fuel characteristics for the alternative coal species.

A. The Rule Revealed EPA's Failure to Distinguish Among Different Coal Refuse Types.

EPA proposed to define "coal refuse" as:

> any by-product of coal mining, physical coal cleaning, and coal preparation operations (e.g., culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material with an ash content greater than 50 percent (by weight) and a heating value less than 13,900 kilojoules per kilogram (6,000 Btu per pound) on a dry basis.

76 Fed. Reg. at 25,122, JA___. ARIPPA's comments emphasized that coal refuse actually would not consistently fall within EPA's proposed definition. ARIPPA Comments at 11-13, JA___-___.[8] Furthermore, EPA's definition was facially inconsistent with the two proposed subcategories for mercury emissions based on fuel type: coal-fired units designed to burn coal[9] with heating value either (1) greater than or equal to 8,300 Btu/lb, or (2) less than 8,300 Btu/lb. 76 Fed. Reg. at 25,124, JA___. The coal refuse definition dictated that CFBs combusting coal refuse *could not* fit within the first subcategory, because coal refuse—by definition—must have a heating value less than 6,000 Btu/lb. However, EPA proposed to separately define the second subcategory (i.e., for units designed to burn coal less than 8,300 Btu/lb) as limited to "nonagglomerating virgin coal." *Id.* Because coal refuse is not considered

[8] The proposed definition was also inconsistent with prior EPA actions that did not include any criteria for heating value or ash content, and contrary to regulatory classifications by other agencies, including the Federal Energy Regulatory Commission ("FERC"). *Id.* at 11-12, JA___-___.

[9] MATS defines "coal" to include "coal refuse." 77 Fed. Reg. at 9484, JA___.

"virgin" coal, coal refuse-fired CFBs also could not fit within the second subcategory. ARIPPA Comments at 9-12, JA___-___.

Although the proposed definition apparently excluded the ARIPPA plants, the record included conflicting evidence reflecting EPA's intent to regulate coal refuse-fired CFBs. *See, e.g.,* 76 Fed. Reg. at 25,066 (recognizing coal refuse-burning units provide environmental benefits and, therefore, warrant special consideration), JA___. In particular, certain of the ARIPPA plants were included in the MACT floors for the regulated pollutants. Memorandum from Jeffrey Cole, RTI Int'l, to Bill Maxwell, EPA, "National Emission Standards for Hazardous Air Pollutants (NESHAP) Maximum Achievable Control Technology (MACT) Floor Analysis for Coal- and Oil-fired Electric Utility Steam Generating Units for Final Rule" (Dec. 16, 2011) (including appended spreadsheets for coal-fired sources), EPA-HQ-OAR-2009-0234-20132 ("Floor Analysis"), JA___.

At least in part due to ARIPPA's comments, EPA acknowledged in the Rule that it "made certain incorrect conclusions [in its proposal] that require [EPA] to revise the definitions of [the] coal-fired EGU subcategories." 77 Fed. Reg. at 9378, JA___. EPA did not also revise the definition of coal refuse, instead preserving the restrictions on ash content and heating value. *Id.* at 9484, JA___.

EPA's ambiguous discussion of the classifications and definition of coal refuse prevented ARIPPA from isolating EPA's failure to distinguish critical characteristics among types of coal refuse. This lack of clarity was amplified by EPA's discussion of

its evaluation of different coal types in assessing whether to establish distinct emission limits based on coal rank. *See, e.g.*, *id.* at 9378, JA___. EPA ultimately established separate limits for mercury reflecting the consequences of coal characteristics on a source's emission profile. *Id.* at 9487, JA___. However, the Rule also reveals the limitations of EPA's assessment: while EPA classified "virgin" coal among bituminous, subbituminous and lignite subcategories, EPA inexplicably disregarded this consideration in determining the appropriate HCl limit for CFBs combusting distinct coal refuse types—specifically, bituminous coal refuse.

The Rule established revised subcategories for coal-fired EGUs designed for (1) coal greater than 8,300 Btu/lb and (2) low rank virgin coal. *Id.* EPA explained, "[u]nder the new definitions, units burning coal refuse are included in the '[u]nit designed for > 8,300 Btu/lb subcategory' because such units do not meet the definition of the newly defined subcategory of 'units designed to burn low rank, virgin coal.'" EPA, "EPA's Responses to Public Comments on EPA's *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*," Vol. 1 of 2, at 294 (Dec. 2011), EPA-HQ-OAR-2009-0234-20126 ("Response to Comments"), JA___. However, the change in regulatory text and confounding description merely added to the ambiguity regarding EPA's treatment of coal refuse-fired CFBs. EPA's definition of coal refuse requires that "coal refuse"

have a heating value *less than 6,000 BTU/lb*, and therefore could not be combusted by units designed for coal *greater than 8,300 Btu/lb*.[10]

In the final Rule, EPA simultaneously: (a) perpetuated an inaccurate definition of coal refuse, (b) revised the basis for subcategorizing coal-fired sources relative to mercury limits in a manner that further contributed to the ambiguous treatment of coal refuse-fired sources, and (c) confirmed its distinct evaluation of virgin coal as comprising multiple coal ranks, while failing to acknowledge comparable distinctions between anthracite and bituminous coal refuse. EPA thereby revealed that it did not properly identify, much less evaluate, how the definitional provisions should address applicability to coal refuse-fired CFBs. The Rule thus established that EPA had not given due consideration to the difference between bituminous and anthracite coal refuse in evaluating the justification for distinct acid gas emission limits among types of coal-fired EGUs.[11] Both the ambiguity surrounding the application of the

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[10] By separate action, EPA eliminated from the definition of coal refuse the restrictions on ash content and heating value. *See* 81 Fed. Reg. 20,172, 20,189 (Apr. 6, 2016), JA___. Notwithstanding EPA's perfunctory treatment of this definitional change in that "technical corrections" rulemaking, EPA thereby effectively acknowledged that the original definition was both ambiguous and inconsistent with the apparent intended application of the regulation.

[11] ARIPPA commented that, because the proposed definition of coal refuse was apparently more aligned with the FERC definition of "anthracite refuse" than "bituminous coal refuse," EPA may have looked to the anthracite refuse definition in developing the proposed definition of coal refuse. ARIPPA Comments at 11-12 n.3, JA___-___. ARIPPA cautioned, however, that the anthracite refuse definition, used alone without consideration of the corresponding definition of bituminous coal refuse, fails to reflect the substantial variability in heating value and ash content

definition of coal refuse and EPA's prior inconsistent statements about the Rule's intended applicability to coal refuse-fired units obfuscated EPA's failure to recognize the fundamental distinction among types of coal refuse, and how such distinction affects the sources' HCl emissions. Because the grounds in ARIPPA's petition arose after the public comment period, and ARIPPA was unable to raise such objections before issuance of the Rule, EPA acted arbitrarily in denying ARIPPA's petition.

B. ARIPPA's Objections to EPA's Failure to Consider Variability Among Types of Coal Refuse Are Centrally Relevant to MATS.

The different coal refuse types exhibit fundamentally disparate characteristics that bear on the emission profiles of sources combusting coal refuse. ARIPPA Comments at 11-12, JA___-___. Bituminous coal refuse, also known as "gob," is characterized by higher chloride and sulfur concentrations than anthracite coal refuse, also known as "culm." Due to the higher chloride concentrations, CFBs combusting bituminous coal refuse *cannot* achieve the Rule's HCl limit. By contrast, anthracite coal refuse-fired CFBs routinely exhibit HCl emissions well below the MATS limit.

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inherent in coal refuse. *Id.* Additionally, EPA's apparent attempt to mirror the FERC definition of anthracite refuse indicated that EPA had considered the distinction between bituminous and anthracite coal refuse in developing the relevant MATS standards. EPA never responded to ARIPPA's comments on this point. It was only upon promulgation of the final Rule that EPA demonstrated it had not considered the bituminous-anthracite distinction. Accordingly, even if the similarity between EPA's proposed definition of coal refuse in MATS and the FERC definition of anthracite refuse was merely an unintended coincidence, such similarity had the effect of perpetuating the misimpression that EPA was considering the significant differences between bituminous and anthracite coal refuse in MATS.

In evaluating the potential relevance of fuel type to distinct emission limit-setting, EPA reported in the Rule's preamble that it had considered the characteristics of high sulfur and high chlorine among coal types. 77 Fed. Reg. at 9396, JA___. EPA acknowledged that chlorine content of coal, and its resulting impact on emissions, is a relevant—if not essential—consideration when evaluating the appropriate HCl emission limit based on coal rank. *Id.* However, EPA concluded that the data before it did not justify separate emission limits for acid gases based on chlorine content. *Id.* (asserting the absence of "information demonstrating that sources are unable to meet the proposed HCl limit due to the chlorine content of the coal").

Instead, EPA emphasized that sources burning high-chlorine coal were among the top-performers in the MACT floor for the final acid-gas standards. Specifically, EPA explained that it "reassessed the emission limits and believes [they] are … achievable by all sources," because "coal refuse-fired EGUs … are in the MACT floor pool of sources from which the [HCl emission] limit was derived," and because "there are at least two coal refuse fired CFBs unit [*sic*] that are meeting both the final Hg and HCl existing-source limits." Response to Comments at 584-85, JA___-___. But GenOn's Seward CFB units are the only *bituminous* coal refuse-fired CFBs that can meet the HCl standard, and they are meaningfully different than all other bituminous

coal refuse-fired CFBs.[12] Floor Analysis ("Coal Acid Gases" appended spreadsheet), JA___. All other coal refuse-fired CFB units considered by EPA in the acid gas MACT floor combust *anthracite* coal refuse. EPA's confusion regarding the appropriate definition and characteristics of distinct types of coal refuse accounts for EPA's failure to identify elevated chlorine concentrations inherent in bituminous coal refuse as relevant to the appropriate HCl limit for bituminous coal refuse-fired CFBs.

ARIPPA had already demonstrated to EPA that the ARIPPA plants that combust high-chlorine coal refuse cannot meet the HCl limit. ARIPPA Comments at 21-25, JA __-__. Therefore, EPA's claim that it did not have any information demonstrating that sources are unable to meet the HCl limit due to chlorine content is simply untrue. Instead, EPA collapsed culm and gob into a single fuel type—coal refuse—and determined *not* to establish a separate HCl emission limit for *any* coal refuse-fired CFBs. *See* Response to Comments at 561 (acknowledging EPA's fuel variability analysis evaluated "units tested that were using coal refuse as the primary fuel source," without distinguishing among types of coal refuse), JA___. Thus, because EPA concluded that *culm*-fired CFB units exhibited emission levels consistent

[12] The Seward CFBs are fundamentally different than all other bituminous coal refuse-fired CFBs. The design of these newer, larger CFBs incorporated a fly ash conditioning and reinjection system which can achieve significantly greater reductions in acid gases (including HCl) than other CFBs. All other bituminous coal refuse-fired CFBs face insurmountable technical and economic obstacles to any potential retrofit application of this technology. Because the Seward units are unique, references in this brief to "bituminous coal refuse-fired" CFBs exclude Seward.

with the HCl limit, and because EPA did not acknowledge the distinction between coal refuse types, EPA broadly concluded that "coal refuse"-fired CFBs can achieve the HCl limit.

It is technically and economically infeasible for CFBs combusting high-chlorine coal refuse to satisfy the HCl standard. ARIPPA Comments at 21-25, JA___-___. Further, due both to contractual commitments and practical constraints, these sources cannot simply elect to combust alternative fuels. *Id.* at 3, JA___. Accordingly, if the HCl limit is not revised, these sources will be required to cease operations. Therefore, ARIPPA's objections are centrally relevant because they bear directly upon the MATS limitations for these units and their continued viability.

C. EPA's Denial Relies on an Incorrect Characterization of ARIPPA's Petition and Therefore Contravenes §307(d)(7)(B).

EPA mischaracterizes ARIPPA's petition as limited to EPA's rejection of a distinct subcategory for HCl for CFBs combusting coal refuse, regardless of type. Reconsideration Response Document at 145-149, JA___-___. But ARIPPA's concerns reflect a more narrow issue—EPA's failure to consider the distinguishing characteristics of specific types of coal refuse in evaluating the technical and economic feasibility of bituminous coal refuse-fired CFBs to achieve the HCl limit. ARIPPA's petition also stressed that EPA's analysis of the relevant subcategorization issue was muddied throughout the rulemaking by EPA's ambiguous presentation of MATS applicability to coal refuse-fired sources. Nevertheless, EPA's denial merely glosses

over these issues and does not even acknowledge the fundamental interrelatedness between the lack of clarity surrounding the coal refuse definition and EPA's failure to recognize the differences between coal refuse types in the standard-setting process. *Id.* at 149, JA___. Moreover, EPA only broadly mentioned the need to clarify the relationship between the fuel characteristics of coal refuse and the description of the two subcategories for mercury standard-setting. *Id.* EPA's denial of ARIPPA's petition was therefore arbitrary, capricious, and inconsistent with §307(d)(7)(B).

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

Respectfully submitted,

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Dated: December 6, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(c)(1) and 32(c)(2)(C), I certify that the foregoing Opening Brief of Industry Petitioners contains 8,488 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: December 6, 2016

/s/Makram B. Jaber
Makram B. Jaber

Statutory and Regulatory Addendum

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

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Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

PENDING ACTIONS AND PROCEEDINGS

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

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

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

CAA §112

§ 7412. Hazardous air pollutants

(a) Definitions

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

(1) Major source

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

(2) Area source

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

(3) Stationary source

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

(4) New source

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

(5) Modification

The term ''modification'' means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant

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

(7) Adverse environmental effect

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

(8) Electric utility steam generating unit

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

(9) Owner or operator

The term ''owner or operator'' means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source

The term ''existing source'' means any stationary source other than a new source.

(11) Carcinogenic effect

Unless revised, the term ''carcinogenic effect'' shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment.[1] Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

[1] See References in Text note below.

such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

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

(9) Deletions from the list

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

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

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

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

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

CAA §112(d)

(d) Emission standards

(1) In general

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

(2) Standards and methods

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

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

(B) enclose systems or processes to eliminate emissions,

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

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

(E) are a combination of the above.

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

(3) New and existing sources

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

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard,

with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

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

(4) Health threshold

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

(5) Alternative standard for area sources

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

(6) Review and revision

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

(7) Other requirements preserved

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

(8) Coke ovens

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

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

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

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

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

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

(ii) door and jam cleaning practices.

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

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

(9) Sources licensed by the Nuclear Regulatory Commission

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

any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

(e) Schedule for standards and review

(1) In general

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

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

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

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

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

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

(2) Priorities

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

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

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

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

(3) Published schedule

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

(4) Judicial review

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

(5) Publicly owned treatment works

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

(f) Standard to protect health and environment

(1) Report

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

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

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

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

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

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting

track the movement of hazardous air pollutants through the Great Lakes, to determine the portion of water pollution loadings attributable to atmospheric deposition of such pollutants, and to support development of remedial action plans and other management plans as required by the Great Lakes Water Quality Agreement.

(C) The Administrator shall assure that the data collected by the Great Lakes atmospheric deposition monitoring network is in a format compatible with databases sponsored by the International Joint Commission, Canada, and the several States of the Great Lakes region.

(3) Monitoring for the Chesapeake Bay and Lake Champlain

The Administrator shall establish at the Chesapeake Bay and Lake Champlain atmospheric deposition stations to monitor deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) within the Chesapeake Bay and Lake Champlain watersheds. The Administrator shall determine the role of air deposition in the pollutant loadings of the Chesapeake Bay and Lake Champlain, investigate the sources of air pollutants deposited in the watersheds, evaluate the health and environmental effects of such pollutant loadings, and shall sample such pollutants in biota, fish and wildlife within the watersheds, as necessary to characterize such effects.

(4) Monitoring for coastal waters

The Administrator shall design and deploy atmospheric deposition monitoring networks for coastal waters and their watersheds and shall make any information collected through such networks available to the public. As part of this effort, the Administrator shall conduct research to develop and improve deposition monitoring methods, and to determine the relative contribution of atmospheric pollutants to pollutant loadings. For purposes of this subsection, ''coastal waters'' shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C. 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of—

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal waters cause or contribute to exceedances of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C. 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] or, with respect to the Great Lakes, exceedances of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements promulgated pursuant to this paragraph with respect to coastal waters shall only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(n) Other provisions CAA §112(n)(1)

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph. CAA §112(n)(1)(A)

(B) The Administrator shall conduct, and transmit to the Congress not later than 4

emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions*. The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability*. This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity*. Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded*. Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

CAA §307

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)[1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

CAA §307(b)(1)

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

[1] See References in Text note below.
[2] So in original. Probably should be ''this''.
[3] So in original.
[4] So in original. Probably should be ''subsection,''.

lishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

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

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

CAA §307(d)

(d) Rulemaking

(1) This subsection applies to—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

[5] So in original. The word ''to'' probably should not appear.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a ''rule''). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the ''comment period''). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

CAA §307(d)(7)(B)

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

CAA §307(d)(9)

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91–604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92–157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93–319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95–95, title III, §§303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95–190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681–2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, §230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, §230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original ''section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, §3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original ''subtitle C of title I'', and was translated as reading ''part C of title I'' to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), ''subchapter II of chapter 5 of title 5'' was substituted for ''the Administrative Procedures Act'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88–206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

[6] So in original. Probably should be ''sections''.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2016, a copy of the foregoing Opening Brief of Industry Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/Makram B. Jaber
Makram B. Jaber