

ORAL ARGUMENT NOT YET SCHEDULED

NO. 12-1272

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

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

v.

**ENVIRONMENTAL PROTECTION AGENCY,
Respondent.**

**Petition for Review of Final Action of the
United States Environmental Protection Agency**

BRIEF OF INDUSTRY *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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| Petitioners, |) | No. 12-1272 |
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| v. |) | |
| |) | |
| ENVIRONMENTAL PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |
| |) | |

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Industry *Amici Curiae* submit this certificate as to parties, rulings, and related cases.

1. Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing in this court are listed in the Joint Brief for Petitioners White Stallion Energy Center, LLC, *et al.*

Industry *Amici* move for leave to participate as *amici curiae*, and include the American Chemistry Council, the Council of Industrial Boiler Owners, the American Petroleum Institute, the Brick Industry Association, the American Forest & Paper Association, the Rubber Manufacturers Association, the American Fuel & Petrochemical Manufacturers, the American Wood Council, the National Oilseed

Processors Association, the National Association of Manufacturers, the Portland Cement Association, the Chamber of Commerce of the United States of America, the Healthcare Waste Institute, and the Energy Recovery Council.

Counsel for Industry *Amici Curiae* are also aware that the following local government entities are seeking leave to participate as *amici*: Ecomaine; Kent County, Michigan; Lancaster County Solid Waste Management Authority; Marion County, Oregon; Northeast Maryland Waste Disposal Authority; Solid Waste Disposal Authority of the City Of Huntsville, Alabama; Spokane Regional Solid Waste System; City of Tampa, Florida; Wasatch Integrated Waste Management District; and the York County Solid Waste And Refuse Authority.

These consolidated actions are petitions for review of an informal rulemaking by the United States Environmental Protection Agency. There was no action in the district court.

2. Rulings Under Review. The final agency action under review is of the United States Environmental Protection Agency entitled National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012). This case addresses the National Emissions Standards for Hazardous Air

Pollutants promulgated for “new” fossil-fuel electric generating units (i.e., those on which construction commences after the date that EPA published the proposed rule in the Federal Register (May 3, 2011)).

3. Related Cases. This case involves two issues that were severed from petitions consolidated under *White Stallion Energy Center, LLC. v. EPA*, No. 12-1100, that challenge the same underlying action by EPA. A June 28, 2012 order of this Court severed these issues for expedited review, and assigned the case Docket No. 12-1272.

Dated: August 3, 2012

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Industry MACT Coalition (“the Coalition”) files the following statement: The Coalition is composed of a number of trade groups and associations that regularly participate on behalf of their members in EPA rulemakings and other proceedings under the Clean Air Act and other environmental statutes that affect the interest of their members, as well as in litigation arising from such proceedings. The Coalition was formed to represent the interest of these trade groups and associations in this matter.

The Coalition is an unincorporated entity whose members have no ownership interests in the entity and whose members have not issued shares or debt

securities to the public. Notwithstanding this statement, the Coalition is composed of the following trade groups and associations, none of which has a parent company and no publicly held company has a 10% or greater interest in any of the trade groups or associations: the American Chemistry Council, the Council of Industrial Boiler Owners, the American Petroleum Institute, the Brick Industry Association, the American Forest & Paper Association, the Rubber Manufacturers Association, the American Fuel & Petrochemical Manufacturers, the American Wood Council, the National Oilseed Processors Association, the National Association of Manufacturers, and the Portland Cement Association.

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ix

The Healthcare Waste Institute is a policy-making group that consists of members of the National Solid Wastes Management Association and the Waste Equipment Technology Association. Its members transport, treat, dispose of, and otherwise manage hospital, medical, infectious, pathological, and chemotherapeutic wastes.

The Energy Recovery Council is a non-profit trade association for entities engaged in the waste-to-energy sector. The waste-to-energy process allows for safe disposal of municipal solid waste while at the same time generating renewable electricity using modern combustion technology equipped with state-of-the-art emission control systems. Its members own and operate 69 of the 87 modern waste-to-energy facilities in the United States and include several dozen business organizations and municipalities in the municipal waste management and energy fields.

Each of the above associations is a “trade association” as defined by D.C. Circuit Rule 26.1. None of the associations has a parent company nor has issued shares or debt securities to the public. No publicly held company has a 10% or greater ownership interest in any of the above-listed associations.

Dated: August 3, 2012

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

| | |
|--------------|--|
| CAA | Clean Air Act |
| EPA | U.S. Environmental Protection Agency |
| HAP | Hazardous Air Pollutant |
| HCl | Hydrogen Chloride |
| HMIWI | Hospital, medical and infectious waste incinerators |
| ICAC | Institute of Clean Air Companies |
| MACT | Maximum Achievable Control Technology |
| PM | Particulate Matter |
| ppmv | parts per million by volume |
| PVC MACT | Polyvinyl Chloride Maximum Achievable Control Technology |
| PVCPU | Polyvinyl Chloride and Copolymers Production Unit |
| Utility MACT | National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units |

**STATEMENT OF IDENTITY,
INTEREST IN CASE, AND AUTHORITY TO FILE**

This case involves fundamental issues as to the manner in which the U.S. Environmental Protection Agency (“EPA”) establishes maximum achievable control technology (“MACT”) standards pursuant to Clean Air Act (“CAA”) Sections 112 and 129, 42 U.S.C. §§7412, 7429.¹ EPA’s methodology for setting such standards has broad implications for industries subject to existing MACT standards that may be revised and, in some cases, new MACT standards yet to be developed.

Industry *Amici* include trade associations that collectively represent virtually the entire industrial base in the country.² As a result, the members of the Industry *Amici* are affected by numerous MACT standards, such as standards for petroleum refining, chemical manufacturing, industrial boilers, brick manufacturing, rubber manufacturing, municipal waste combustors, medical waste incinerators, and the

¹ With few exceptions not relevant here, EPA’s MACT floor- and standard-setting methodology under Sections 112 and 129 is the same. As a result, references in this brief will be to the relevant provisions of Section 112.

² These associations include: American Chemistry Council, Council of Industrial Boiler Owners, American Petroleum Institute, Brick Industry Association, American Forest & Paper Association, Rubber Manufacturers Association, American Fuel & Petrochemical Manufacturers, American Wood Council, National Oilseed Processors Association, National Association of Manufacturers, Portland Cement Association, Healthcare Waste Institute, Energy Recovery Council, and the Chamber of Commerce of the United States of America.

like. EPA applied a pollutant-by-pollutant approach to setting MACT floors in the MACT for fossil-fuel electric generating units (“Utility MACT”) at issue in this case. Unless corrected by this Court, such an approach will continue to be applied by EPA as new standards are set for other industries. Thus, Industry *Amici* and its members have a strong and continuing interest in making sure that EPA correctly construes and applies the CAA—both now and in the future—in a manner that is consistent with its plain language and Congressional intent.

Industry *Amici* file this brief by motion.³

SUMMARY OF ARGUMENT

When Congress rewrote Section 112 of the CAA in 1990, it established a phased regulatory approach for control of hazardous air pollutants (“HAPs”). *See Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004). Section 112 requires EPA first to establish technology-based maximum achievable control technology, or “MACT,” standards for numerous categories of industrial sources, and, second, to consider within eight years after setting a MACT standard whether more stringent standards are needed in light of any remaining risk to the public health or environment. *Id.* MACT standards, however, were never intended to place

³ Counsel for Industry *Amici* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

technology above all other considerations, particularly if such standards would stymie industrial growth. In clear contravention of this statutory scheme, EPA's current floor-setting methodology creates an "unachievable" standard in the first instance, rendering everything beyond the MACT "floor" determination essentially meaningless.

MACT standards must reflect "the maximum degree of reduction in emissions of the hazardous air pollutants" that the Administrator "determines is *achievable* for new or existing sources," "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." 42 U.S.C. §7412(d)(2) (emphasis added). Section 112(d)(3) of the CAA sets a MACT "floor" and requires new unit MACT standards to be no "less stringent than the emission control that is *achieved in practice* by the *best controlled similar source*." *Id.* §7412(d)(3) (emphasis added). Hence, because the MACT floor must be "achieved in practice" by the best controlled similar source, the floor must be "achievable" by that source. EPA may then set the MACT standard more stringent than the "floor" – i.e., set a "beyond the floor" standard – if it determines a more-stringent standard is "achievable." But in doing so, it must take into account cost, non-air quality health and environmental impacts, and energy requirements in determining whether the more-stringent standard is "achievable."

For new sources, Section 112(d)(3) unambiguously directs EPA to identify a single best controlled “similar source” in each affected source category and determine the “MACT floor” for all pollutants based on the performance of that best controlled “similar source.” Rather than comply with this clear statutory mandate, EPA cherry-picked emissions data from multiple sources and set the MACT floor based on whatever source it deemed the “best” for each individual pollutant. In other words, this so-called “pollutant-by-pollutant” approach allows EPA to identify the minimum level of stringency for each pollutant in isolation, which means there often is a different best performer for each pollutant. As a result, the EPA’s MACT floors for new units consists of a mixed bag of limits from different sources that does not reflect the performance that the best controlled similar source has “achieved in practice.”

EPA’s interpretation of the statute in a manner that allows the agency to select a different source, possibly using different emissions controls, to set the floor for each regulated pollutant also is unreasonable. EPA’s methodology results in standards that do not reflect levels “achieved in practice” by any single source. This result runs counter to congressional intent when sources find themselves unable to meet what Congress defined as the *minimum* stringency of a MACT standard—the floors.

Finally, EPA’s interpretation undermines Congress’ reasonable assumption that what has been “achieved in practice” by the best-performing source should be “achievable” by all sources in the category. Congress required identification of the “best controlled similar source” in establishing the floor to ensure that new units being built will be subject to emission limitations that are *actually being achieved* by the best performing source, and assumed that source’s level of control is replicable. Indeed, this Court has previously held that the level of control mandated by technology-based standards must be “achieved” under the worst foreseeable circumstances.

EPA’s current floor-setting approach has led to circumstances in which virtually all existing facilities in certain source categories will have to shut down, and new sources will likely never be built because of the inability to achieve the standards based on EPA’s MACT floor determination. 74 Fed. Reg. 51,368, 51,398 (Oct. 6, 2009). This interpretation renders the “beyond the floor” language illusory, because EPA has no ability to consider elements including costs and, non-air quality impacts, in determining whether the standards are achievable. Moreover, some new facilities cannot be built, even when such facilities present little or no risk at all to human health or the environment.

The pollutant-by-pollutant approach allows EPA to cherry-pick limits based on the best performing facilities for each pollutant, creating a hypothetical source

that somehow simultaneously achieves reductions for individual pollutants only achieved in isolation. As the Chief Sustainability Officer of Covanta Energy Corporation and former Assistant Administrator for Research at EPA aptly described the crux of the problem in testimony before Congress. He explained that EPA's "'pollutant-by-pollutant' approach rather than 'plant-by-plant' is analogous to asking the decathlon champion at the Olympics to be able to win not only the overall decathlon, but all of the 10 gold individual events [as] well. People don't work that way and neither do machines." Statement by Paul Gilman, Chief Sustainability Officer, Covanta Energy, To the House Committee on Energy and Commerce Subcommittee on Energy and Power at 2 (Sept. 8, 2011) (Ex. 1).

Industry *Amici* file this brief to demonstrate that the unlawful methods at issue in this case are applied broadly by EPA and are having a widespread and adverse effect on industry as a whole. Therefore, it is important for the Court to reach the merits of this issue, and direct EPA to apply the unambiguous requirements of the CAA in the Utility MACT and, by extension, to all future MACT determinations for other source categories.

ARGUMENT

I. New Unit MACT Floors Must Be Based on The Performance Achieved by An Actual Source, Not Some Imaginary Source.

EPA's current "pollutant-by-pollutant" approach to setting MACT floors by cherry-picking emissions data from multiple sources cannot be squared with the

plain language of Section 112(d)(3), which requires the agency to set the floor based upon what has been “achieved in practice by *the* best controlled similar *source*.” 42 U.S.C. §7412(d)(3) (emphases added). The definite article “the” followed by the singular use of “source” makes clear that, for each group of “similar” sources, EPA must identify *one* source in setting the MACT floor for all pollutants, not multiple sources. *See, e.g., United States v. Hayes*, 555 U.S. 415, 421-22 (2009) (Congress’ use of “the word ‘element’ in the singular ... suggests that Congress intended to describe only one required element,” and that Congress “would have used the plural ‘elements,’ as it has done in other ... provisions” if it did not intend the singular form).

Likewise, the passive phrase “*achieved* in practice” (emphasis added) confirms that EPA must identify an *existing* “source” in setting the MACT floor, not some imaginary source. Construing Section 112(d)(3) as EPA suggests would vitiate well-accepted rules of statutory construction. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). It would also allow the agency to effectively rewrite the statute, which it cannot do. *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (“[I]t is not the province of this Court to rewrite the statute[.]”).

EPA claims that Section 112(d)(3) cannot mean what it clearly says for two reasons. First, EPA asserts that a single source approach to establishing MACT floors is unreasonable because it would not reflect the “best performing sources” for each pollutant but instead lead to “least common denominator floors—that is, floors reflecting limited or no control.” 77 Fed. Reg. 9304, 9387 (Feb. 16, 2012) (Pet’rs Addendum at ADD-300). Second, EPA argues that it should not be forced to make “value judgments” regarding which pollutants merit greater or lesser controls in identifying the best controlled single source. *Id.* Neither argument has merit.

A. MACT floors based on the single best-controlled source do not lead to “least common denominator floors.”

EPA’s “least common denominator” argument ignores the fact that setting the MACT floor is just the first step in determining the appropriate level of control for a MACT standard. Once the MACT floor is established, EPA must determine—based on consideration of cost, energy requirements, and non-air quality health and environmental impacts—whether a more-stringent MACT standard is achievable.⁴ 42 U.S.C. §7412(d)(2); *see also* EPA 112(j) Guidelines at

⁴ For example, EPA guidance notes that it may develop standards that are more stringent than the MACT floor when the “economic impact and incremental cost-effectiveness are not unreasonable,” or when the “standard would control emissions of a high risk or highly toxic pollutants[.]” EPA, *Guidelines for MACT Determinations Under Section 112(j) Requirements*, at 3-11 (Feb. 2002), available at <http://www.epa.gov/ttn/atw/112j/guidance.pdf> (“EPA 112(j) Guidelines”).

3-11 (“While the Clean Air Act establishes that MACT shall be no less stringent than the MACT floor, in establishing MACT, the Administrator *must* take into consideration ‘the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements.’”) (emphasis added). If EPA cannot justify more stringent standards, the MACT floor reflects the appropriate level of control at which the standard is set. They are not “least common denominator floors.” Moreover, after setting the MACT standard, the CAA next requires EPA to determine whether the standard should be further strengthened to eliminate any remaining significant risk to health or the environment, and *then* periodically review and revise existing MACT standards based upon—among other things—advances in technology. *See* 42 U.S.C. §7412(d)(6), (f).

EPA ignores all of these statutory requirements in arguing that an actual source approach to establishing floors would result in weak MACT standards. To the contrary, setting the MACT floor is only the first of many steps in the process, and Section 112 expressly allows EPA to set standards beyond the floor when appropriate.

B. Making “value judgments” is an inherent part of EPA’s job implementing the Section 112 program.

EPA next argues that, without the pollutant-by-pollutant approach, it would be making “value judgments” regarding which pollutants merit greater or lesser

controls in identifying “the best controlled similar source,” stating that such judgments “are antithetical to the direction of the statute at the MACT floor-setting stage.” 77 Fed. Reg. at 9387 (Pet’rs Addendum at ADD-300). This is nonsense. EPA regularly makes value judgments when, like here, statutes require it. In a 2001 report to EPA’s Administrator, EPA’s Science Advisory Board expressed the importance of making “value judgments” in determining the appropriate level of environmental protection:

Even in an ideal world, where science could precisely describe all health and environmental damages in detail and accurately predict the costs and consequences of all proposed control actions, *important value judgments would be required* to choose the best level and pattern of environmental protection.

EPA, *Improved Science-Based Environmental Stakeholder Processes, A Commentary by the EPA Science Advisory Board*, at 5 (Aug. 2001) (emphasis added) (Ex. 2).

EPA also “[f]requently ... make[s] *value judgments* on analyses based on large data sets,” which presumably includes data relevant to setting MACT floors. EPA, *Statement of Work; EAD Technical Support for Professional Services, Data Analysis, and Development of EPA Statistical Dissemination Techniques*, at 1 (Nov. 23, 2010) (Ex. 3) (emphasis added). In setting MACT floors under Section 112(d), EPA acknowledged the need to “optimize the part of the [MACT] standard providing the most environmental protection” when there are “mutually

inconsistent control technologies,” a task EPA refused to do in adopting the pollutant-by-pollutant approach. 77 Fed. Reg. at 9388 (Pet’rs Addendum at ADD-301). In implementing the MACT program under Section 112(g), EPA stated that “practical judgements must be made,” including the need to “ensure consistency with the EPA’s overall goal of providing the regulated community with flexibility and incentives to seek emission reductions that are environmentally beneficial and cost-effective.” EPA, *Technical Background Document to Support Rulemaking Pursuant to the Clean Air Act – Section 112(g); Ranking of Pollutants with Respect to Hazard to Human Health*, at 5-6 (Feb. 1994) (“EPA Ranking”) (Ex. 4).⁵ EPA’s selective reluctance to make “value judgments” in setting MACT floors is a hollow justification for ignoring the plain language of the CAA and EPA’s responsibility to select the single most appropriate “best controlled similar source.”

⁵ Under Section 112(g), an increase in HAP emissions from an existing source is not considered a modification if those emissions can be offset by decreases in emissions of “more hazardous” air pollutants. 42 U.S.C. §7412(g). Thus, it is clear Congress requires EPA to make some judgments on the relative risk of HAPs. *See, e.g.*, EPA Ranking at 5 (noting EPA’s “requirement to identify the relative hazard of the 189 HAP[s] and the requirement to provide offsetting guidance for determining whether an emissions decrease is ‘more hazardous’” under Section 112(g)) (Ex. 4). Indeed, it appears that EPA has already made “value judgments” with respect to at least some HAPs, and the agency provides no reason why it could not do so in setting MACT floors. *See, e.g.*, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) (indicating that EPA identified “mercury” as the “HAP of greatest concern to public health”).

Nor is EPA's current pollutant-by-pollutant approach necessary to preserve the "direction of the statute at the MACT floor-setting stage," as EPA's suggests. 77 Fed. Reg. at 9387 (Pet'rs Addendum at ADD-300). To the contrary, EPA's approach renders the beyond-the-floor analysis under Section 112(d) meaningless. As noted, the CAA provides a two-step process for setting MACT standards for new sources: (1) setting the floor based upon what "the best controlled similar source" "achieved in practice"; and (2) setting MACT standards more stringent than the floor if such limits are "achievable," taking into account cost and other factors. 42 U.S.C. §7412(d)(2), (d)(3). But EPA's "pollutant-by-pollutant" approach in setting the MACT floor reads this two-step process out of existence. By choosing the best performing unit for each individual HAP, EPA ignores what those units have actually "achieved in practice" for all HAPs. Instead, EPA's methodology attempts to define what it believes is simultaneously "achievable" by some hypothetical source that is best performing for all HAPs.

In other words, EPA's floor methodology is based on what it believes is hypothetically "achievable" by some non-existent source, not what has been "achieved in practice" by the best actual source. And it does so without considering the beyond-the-floor factors as required under Section 112(d)(2). As EPA has explained elsewhere, such an approach is inconsistent with Section 112's requirements: "[w]hen determining the existing source level of control,

identification of a similar emission unit does not mean that the controls will automatically be applied to the MACT emission unit. Costs, non-air quality health and environmental impacts, and energy requirements should be used to assess the technologies ability to meet MACT criteria.” EPA 112(j) Guidelines at 3-19 to 3-20 (emphasis added); see also 70 Fed. Reg. 59,402, 59,443 (Oct. 12, 2005) (rejecting a “straight emissions methodology” as creating “arbitrary” and “impermissible” results, including “a beyond the floor standard without consideration of the beyond the floor factors”).

C. MACT standards for new sources must be “achieved in practice,” not theoretically achievable by some nonexistent source.

Even if the statute is somehow deemed ambiguous, EPA’s pollutant-by-pollutant approach to setting the floor is unreasonable. “[A]chieved in practice” means more than the theoretical possibility of compliance from an imagined source:

It is reasonable to suppose that if an emissions standard is as stringent as “the emissions control that is achieved in practice” by a particular unit, then that particular unit will not violate the standard. This only results if “achieved in practice” is interpreted to mean “achieved under the worst foreseeable circumstances.”

Sierra Club v. EPA, 167 F.3d 658, 665 (D.C. Cir. 1999) (emphasis added). Instead of identifying the “best controlled similar source,” EPA established separate floors using emissions data from different sources representing the lowest emissions test

result for each source, creating a set of standards reflecting the performance of a hypothetical source rather than the actual best controlled similar source.⁶ *Id.* (noting “use of the singular in the statutory language suggests” that EPA should consider the “unit with the best observed performance”). Yet, as Petitioners have demonstrated, EPA failed to demonstrate that even the multiple best controlled similar sources that it identified in setting the Utility MACT standards “will not violate” the standards that are based on the performance of those very units.

The need to identify *a single source* that has achieved the best control “in practice” is particularly important with respect to ensuring that the best controlled similar source “will not violate the standard” because controls installed to reduce one HAP may have antagonistic effects on other HAPs. EPA recognized this fact but ignored it in adopting its pollutant-by-pollutant approach to establishing MACT floors:

The EPA notes ... that if optimized performance for different HAP is not technologically possible due to mutually inconsistent control technologies (for example, if metals performance decreased if organics reduction is

⁶ For example, in the case of hospital, medical and infectious waste incinerators (“HMIWI”), the “best controlled similar unit” for purposes of setting the MACT floor under Section 129 for large HMIWI constituted a hypothetical amalgam of five different units (Unit Nos. 20-1, 125, 1, 40 and 120-2), which utilized different controls. EPA-HQ-OAR-2006-0534-0383, Tables 1-10 in Appendix A (Ex. 5). For medium HMIWI, the “best controlled similar unit” was composed of eight different units (Unit Nos. 108-1, 63, 95, 38, 21, 34, 81 and 30). *Id.*

optimized), *then this would have to be taken into account by the EPA in establishing a floor (or floors)*. The Senate Report indicates that if certain types of otherwise needed controls are mutually exclusive, *the EPA is to optimize the part of the standard providing the most environmental protection*. S. Rep. No. 228, 101st Cong. 1st sess. 168 (although, as noted, the bill accompanying this Report contained no floor provisions).

EPA-HQ-OAR-2009-0234-20126 at 433 (emphases added) (Ex. 6); *see also id.* at 447 (“The EPA is aware that the performance of one control technology can affect the performance of other in-stream control technologies.”).

It is unreasonable to interpret the CAA to allow for standards that purport to have been “achieved in practice,” but that will not be “achievable” by actual affected sources, much less the “best controlled similar source” used to set the standard. MACT floors are based on what has been “achieved in practice,” and “beyond-the-floor” standards are based on what is “achievable” considering cost and other factors. *Compare* 42 U.S.C. §7412(d)(2) *and* §7412(d)(3). The logic of the MACT floor is self-evident. The statute reasonably presumes new sources can replicate any emission level that has already been achieved by an existing source. Section 112 “thus embodies an assumption that standards based on achievability will be *more stringent* than ones based merely on past achievement.” *Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) (emphasis added) (Williams, J., concurring).

EPA's current pollutant-by-pollutant methodology for establishing MACT floors for new sources results in floors that themselves are not achievable (i.e., the MACT floors are more stringent than "beyond-the-floor" standards could be). Hence, EPA has adopted an interpretation that is "demonstrably at odds with the intentions of its drafters." *Id.* at 885. Judge Williams recognized that EPA must avoid such a result and "keep[] the relation between 'achieved' and 'achievable' in accord with common sense and the reasonable meaning of the statute." *Id.* In adopting its current pollutant-by-pollutant approach to setting floors, EPA failed to adhere to this directive.

II. EPA's Reliance on "Snapshots" in Time Does Not Establish Emissions Levels "Achieved in Practice."

In setting the new source Utility MACT standards, EPA identified the "best" performing unit and determined the MACT floor based on that unit's performance solely using the lowest test results measured for that unit, irrespective of the types of controls that are being used and without regard to other test results for the unit showing higher emissions rates. This is not the first time EPA has used this approach. *See* EPA-HQ-OAR-2002-0037-0185 at 6-13 ("PVC MACT") (Ex. 7). But, the CAA is clear, and this Court has found "unambiguous," that the MACT *floors* must be based on what is *achieved* by the best controlled unit, not what is *achievable*. *Sierra Club*, 479 F.3d at 878, 880-81 (citation omitted); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 955 (D.C. Cir. 2004) ("EPA has

once again improperly invoked achievability . . . to gloss over the actual achievement requirement” in setting the floor.). Here, EPA has turned this Court’s rulings on their head, finding because an emission level has been observed at one point in time (with no consideration of the circumstances of such emissions or of other test results showing higher emissions rates), a standard based on that single observation necessarily must have been “achieved in practice.”

EPA’s approach is not supported by the statute or case law. As outlined by Petitioners, a single emissions test conducted at one point in time does not adequately reflect variability that even the best performers experience “in practice” over time. Even the best performing units may have significant variability due to changing operations, inputs and other factors that may affect a unit’s emissions. This Court has consistently affirmed EPA must look to what the best controlled source “‘achieved under the worst foreseeable circumstances.’” *Sierra Club*, 167 F.3d at 665; *see also Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 631 (D.C. Cir. 2000). MACT standards must be achieved “every day and under all operating conditions.” *Mossville Env’tl. Action Now v. EPA*, 370 F.3d 1232, 1242 (D.C. Cir. 2004). EPA’s failure to consider such factors is clear error.

As illustrated below, this problem is pervasive. In standard after standard, EPA’s floor setting methodology—which focuses on the lowest emissions “observed” for each pollutant—does not give “due consideration . . . to the possible

impact on emissions of recognized variations in operations.” *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 434 (D.C. Cir. 1980).

A. Solid Waste Incinerators

In 2009, EPA set new MACT standards for HMIWI units. As was the case here, EPA purportedly established MACT floors that had been “achieved in practice,” but the record showed only that the MACT floor for any particular pollutant may have been observed at *one* unit at *a particular* point in time—a snapshot of the facility’s overall performance. For example, a “best performing unit” for large HMIWI was identified for lead, cadmium, mercury, and nitrogen oxides based on one test result each.⁷ EPA-HQ-OAR-2006-0534-0318, Table 2, at 159, 187, 239 (Ex. 8).⁸ But, as Petitioners explain, one test result cannot accurately reflect the source’s overall performance. Pet’rs Br. at 40-41. For example, a source that purportedly met the hydrogen chloride standard for new units of 5.1 parts per million by volume (“ppmv”) exceeded the final standard in two out of three test runs, with the highest average emissions of 7.33 ppmv.⁹ Another source

⁷ A test result reflects the average of three test runs.

⁸ The same is true for medium HMIWI for mercury, nitrogen oxides and sulfur dioxide. EPA-HQ-OAR-2006-0534-0318, Table 2, at 171, 246, 276-77 (Ex. 8).

⁹ EPA-HQ-OAR-2006-0534-0318, Table 2 at 123 (Unit 36-1) (Ex. 8). The three test results (in ppmv) were 0.12, 5.21, and 7.33, showing the potential for significant variation. Individual test runs were as high as 11 ppmv.

purportedly met the carbon monoxide standard for new units of 11 ppmv based on the average of its test runs, but again these values ranged to as high as 20 ppmv.¹⁰ A level of emissions has not been “achieved in practice” simply because it has been measured in a single test at a particular point in time. Under the established law of this circuit, EPA must show that the “best controlled similar source” will meet the standard under the “worst foreseeable circumstances.”

B. Portland Cement Plants

In the Portland Cement MACT, issued in 2010, EPA again simply relied on the lowest measured emissions in determining the MACT floors that failed to adequately characterize the variability inherent in the performance of the best controlled similar sources. *See Portland Cement Ass’n v. EPA*, 665 F.3d 177, 188-89 (D.C. Cir. 2011). This decision illustrates the paradox established by EPA’s methodology, which sets levels allegedly “achieved in practice” that may not be “achievable.” For example, solely because of their geographic location, certain kilns may not be able to utilize limestone with less naturally occurring mercury because such limestone is not locally available. Thus, such sources could not meet the standards. This clearly shows that emissions variability was not adequately factored into these standards.

¹⁰ EPA-HQ-OAR-2006-0534-0318, Table 2 at 135 (Unit 125) (Ex. 8). The three test results (in ppmv) were 1.30, 10.54, and 20, again showing the potential for significant variation. Individual test runs ranged from 0.43-41.1 ppmv.

As discussed in the concurring opinion in *Portland Cement*, the CAA’s reference to “‘the emission *control* that is *achieved* in practice by the best *controlled* similar source,’ . . . would seem to be specifically directing EPA’s attention to the active steps a kiln has taken to ‘control’ its emissions, not simply to the level of emissions itself.” 665 F.3d at 194 (Brown, J., concurring) (emphases in original). The “beyond-the-floor” analysis allows EPA to consider other factors that could lower the emissions required, including “‘substitution of materials.’” *Id.* at 195 (citing 42 U.S.C. §7412(d)(2)(A)). “[T]he very existence of that secondary phase indicates that EPA should *not* be permitted to set a standard at the floor-setting stage which is unachievable due to input quality.” *Id.* (emphasis in original).¹¹ Use of the terms “achieved” and “controlled,” in fact, require that EPA “focus on what sources have actually done to ameliorate the pollution caused by their particular set of inputs.” *Id.* at 196.

C. Polyvinyl Chloride

In assessing the MACT floors for the Polyvinyl Chloride and Copolymers Production MACT, EPA’s methodology likewise failed to account for variability in setting the standards for new units. EPA recognized “MACT and other

¹¹ In the case of medical and municipal waste, the contents of the waste may not be in control of the incinerator, but depends on the actions of third parties and, in fact, on state and local regulation. None of this is considered in EPA’s methodology.

technology-based standards are often derived from short-term emissions test data, but such data may not be representative of the range of operating conditions that the best performing facilities face on a day-to-day basis. In statistical terms, each test produces a limited data sample, not a complete enumeration of the available data for performance of the unit over a long period of time.” EPA-HQ-OAR-2002-0037-0193 at 3 (Ex. 9). “[A] single test offered a weak basis’ for inferring that plants could meet the standards.” *Id.* (quoting *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973)). EPA best explained it as follows: “Each data point should be viewed as a snapshot of actual performance. Along with an understanding of the factors that may affect performance, each of these snapshots gives information about the normal, and unavoidable, variation in emissions that would be expected to recur over time.” *Id.* It follows that one snapshot in time viewed in isolation as in EPA’s current floor-setting methodology cannot adequately reflect all those variations.

But, while recognizing that there may be various methods to account for emissions variability, EPA continues to rely on application of a statistical analysis of narrowly selected emissions data, which is inadequate to address the minimal data points considered and the potential factors that may affect the variability of emissions for a particular unit. *See* Pet’rs Br. at 27-33. In setting the MACT floor in this case, for example, EPA did not account for the fact that the resin industry

produces over 100 different grades and types of resin. EPA-HQ-OAR-2002-0037-0146 at 101 (Ex. 10).¹² As such, EPA’s focus on a snapshot in time cannot show any particular emissions level has been “achieved in practice.”¹³

III. EPA’s Unlawful Floor-Setting Methodology Has Had and Will Have Significant Adverse Impacts on Industry, Contrary to the Plain Language of the CAA and the Intent of Congress.

As Congress explained, the twin goals of the CAA are “to promote the public health and welfare *and* the productive capacity of its population.” 42 U.S.C. §7401(b)(1) (emphasis added). Congress carefully balanced protection of public health and economic effects in the regulatory scheme for MACT emissions limitations under Sections 112 and 129. Once a MACT floor is determined, based on what has been “achieved in practice” by the best performing source, EPA then must consider costs and feasibility to go beyond the floor and, within eight years, must ensure that there is no significant remaining risk. This regulatory scheme is designed to require EPA to achieve an appropriate balance between environmental protection and economic effects.

As Judge Williams posited in his concurring opinion in *Sierra Club v. EPA*, “[w]hat if meeting the ‘floors’ is extremely or even prohibitively costly for

¹² EPA implicitly recognized as much by increasing the subcategories for these standards in the final rule. 77 Fed. Reg. 22,848, 22,869-70 (Apr. 17, 2012).

¹³ This rule is currently being challenged before this Court in *Polyone Corp. v. EPA*, No. 12-1260 (D.C. Cir. filed June 14, 2012).

particular plants because of conditions specific to those plants (e.g., adoption of the necessary technology requires very costly retrofitting, or the required technology cannot, given local inputs whose use is essential, achieve the ‘floor’)?” 479 F.3d at 884 (Williams, J., concurring). For these plants, “what has been ‘achieved’ under § 112(d)(3) would not be ‘achievable’ under § 112(d)(2) in light of the latter’s mandate to EPA to consider cost.” *Id.* Similarly here, EPA’s floor methodology sets a floor that was purportedly “achieved in practice” as required by Section 112(d) at a level that is “more stringent than ‘beyond-the-floor.’” *Id.* at 885. Despite this Court’s earlier rulings that appear to divorce setting MACT floors from “achievability, controls, or technology,” it is clear that Congress “was quite concerned about the costs of regulation—and those costs presumably included the economic impact of putting going concerns out of business.” *Portland Cement Ass’n*, 665 F.3d at 195-96 (Brown, J., concurring). EPA’s current floor-setting methodology, however, not only ignores the statutory language and the clearly expressed concerns of Congress, but it turns the carefully constructed provisions for addressing HAPs on its head.

Recognizing the implications of EPA’s unrealistic approach, pollution control vendors have been unwilling to offer guarantees to meet EPA’s new source MACT standards. Such guarantees are necessary for sources to obtain financing for new projects, including the equipment that is necessary to meet EPA’s new

source MACT standards. *See, e.g.*, EPA-HQ-OAR-2009-0234-20176 at 2 (Ex. 11) (“ICAC member companies are not in a position member companies are not in a position to offer commercial guarantees to their customers to meet [EPA’s MACT] standard” for new sources); *cf.* EPA-HQ-OAR-2009-0234-20193 at 1 (Ex. 12) (“the particulate matter (PM), HCl and mercury emission limits established for new units are not measurable with sufficient accuracy for reliable control of the emissions reduction systems and sustainable long term emissions compliance”).

Moreover, EPA has admitted that its new approach will force industry to severely curtail or eliminate operations. For example, in the HMIWI MACT, EPA predicted that its revised standards will result in no new units ever being built, and the eventual shut down of the remaining 57 exiting units.¹⁴ 74 Fed. Reg. at 51,398. Likewise, when EPA applied its “pollutant-by-pollutant” floor approach to sources manufacturing Portland cement in 2010, EPA estimated that the MACT standards could shut down nearly 20 percent of the nation’s cement plants within two years. House Energy & Commerce Committee, *Fact Sheets: Cement Sector Regulatory Relief Act of 2011* (July 28, 2011), available at <http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8853>.

¹⁴ EPA assumed the industry would simply switch to another disposal technology without considering the limitations on the ability to dispose of hospital, medical and infectious wastes in any other manner than incineration, or the risks of alternative technologies.

Similarly, EPA does not “anticipate the construction of any new PVCPU in the next 5 years.” 77 Fed. Reg. at 22,898. Even in the case of the Utility MACT, public comments explained that “*no* new coal-fired EGUs will be built in the country.” EPA-HQ-OAR-2009-0234-20126 at 441-446 (Ex. 6) (emphasis added). Congress never intended that the Act be implemented so as to eliminate an entire industry. H.R. Rep. No. 101-490, pt. 1, at 328 (1990) (“MACT is not intended to ... drive sources to the brink of shutdown.”); 70 Fed. Reg. at 59,442 (stating that “MACT is not intended to drive sources out of business”). Rather, Congress intended sources to improve their emissions at a minimum to what has been “achieved in practice” by their peers and then to the best that may be “achievable” after considering costs and other factors. *Sierra Club*, 353 F.3d at 979-80.

As Judge Brown recognizes, the paradox identified by Judge Williams was not created by the statute, but by this Court’s prior rulings. *Portland Cement Ass’n*, 665 F.3d at 196 (Brown, J., concurring). Unless this Court clarifies its rulings and their application to EPA’s new floor methodology more generally, EPA is free from ever considering costs or other factors in setting technology-based standards, rendering the “beyond-the-floor” analysis meaningless.

Moreover, reassessing EPA’s floor methodology does not result in *standards* that are less protective of health or the environment. The “beyond-the-floor” analysis authorizes EPA to set stricter standards, “so long as it considers the costs

of that course of action.” *Id.* Further, the risk review required by Congress provides the ultimate assurance that HAPs will be controlled to levels that protect public health with an ample margin of safety. 71 Fed. Reg. 76,603, 76,609 (Dec. 21, 2006).

CONCLUSION

For the foregoing reasons, and the reasons outlined in Petitioners’ brief, EPA’s current MACT floor-setting methodology is counter to the plain terms of the statute, including terms as interpreted by this Court and, in any event, is unreasonable. EPA’s methodology prevents any meaningful consideration of costs and risk, in clear contravention of the law. This Court, therefore, must reassess and clarify EPA’s authority under Sections 112 and 129, vacate the standards based on EPA’s use of a pollutant-by-pollutant approach to setting MACT floors, and require EPA to adequately assess a unit’s performance to determine what, in fact, is “achieved in practice.”

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rules 32(a)(1) and 32(a)(2)(C), the undersigned hereby certifies that the foregoing Brief of Industry *Amici Curiae* in Support of Petitioners is 6,088 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is in compliance with Federal Rule of Appellate Procedure 29(d), providing that an amicus brief be no more than one-half the maximum length authorized for a party's principal brief.

Respectfully submitted,

/s/ William L. Wehrum

Dated: August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2012, I caused to be electronically filed the foregoing Brief of Industry *Amici Curiae* in Support of Petitioners with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, which will serve such filing to all registered CM/ECF users.

/s/ William L. Wehrum _____