ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1459 (consolidated with Nos. 12-1460, 13-1147)

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

NATIONAL ASSOCIATION FOR SURFACE FINISHING, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of Final Agency Action
77 Fed. Reg. 58220 (Sept. 19, 2012)

BRIEF OF *AMICUS CURIAE* CHROMIUM RTR COALITION IN SUPPORT OF PETITIONER NATIONAL ASSOCIATION FOR SURFACE FINISHING AND IN OPPOSITION TO ENVIRONMENTAL PETITIONERS CALIFORNIA COMMUNITIES AGAINST TOXICS, CLEAN AIR COUNCIL, AND SIERRA CLUB

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DATED: June 9, 2014

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

Parties and Intervenors:

The petitioners, respondents, and intervenors appearing before this Court are listed in the National Association for Surface Finishing's ("NASF") Opening Petitioner Brief (Doc. 1487502).

Amici:

Air Alliance Houston, the American Lung Association, U.S. Representative Henry A. Waxman, Environment Texas, Pleasantville Area Super Neighborhood Council #57, and Environmental Integrity Project are *amici* in support of Environmental Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club ("Environmental Petitioners").

The Chromium RTR Coalition ("Coalition") is an *amicus* in support of NASF and in opposition to Environmental Petitioners.

B. Rulings Under Review

Description of the final action at issue appears in NASF's Opening Petitioner Brief.

C. Related Cases

The Coalition is not aware of any related cases.

DATED: June 9, 2014

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CORPORATE DISCLOSURE STATEMENT

The Chromium RTR Coalition ("Coalition") submits the following statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

> The Coalition is a not-for-profit, *ad hoc* association formed for the purpose of participating in this litigation. The Coalition has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in the Coalition. The Coalition is composed of 13 trade associations, as defined in Circuit Rule 26.1(b). The Coalition's members are the American Chemistry Council ("ACC"), American Coatings Association ("ACA"), American Forest & Paper Association ("AF&PA"), American Wood Council ("AWC"), American Fuel & Petrochemical Manufacturers ("AFPM"), American Iron & Steel Institute ("AISI"), Brick Industry Association ("BIA"), Council of Industrial Boiler Owners ("CIBO"), National Association of Manufacturers ("NAM"), National Mining Association ("NMA"), National Oilseed Processors Association ("NOPA"), Rubber Manufacturers Association ("RMA"), and Utility Air Regulatory Group ("UARG"). None of the Coalition's members have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL RULES

FEDERAL REGISTER

MISCELLANEOUS

GLOSSARY OF TERMS

Agency	U.S. Environmental Protection Agency
Coalition	Chromium RTR Coalition
Environmental Petitioners	Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club
EPA	U.S. Environmental Protection Agency
GACT	Generally Available Control Technologies and Processes
HAPs	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NASF	National Association for Surface Finishing

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure,[1] Circuit Rule 29, and this Court's scheduling order (Doc. 1491282), the Chromium RTR Coalition ("Coalition") respectfully submits this *amicus curiae* brief in support of Petitioner National Association for Surface Finishing ("NASF") and in opposition to Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club ("Environmental Petitioners").

IDENTITY AND INTEREST OF *AMICUS*

The Coalition is an *ad hoc* association formed for the purpose of participating in this litigation. The Coalition's members are industry and trade groups that represent a large segment of the manufacturing, production, and energy sectors of the U.S. economy. The Coalition's members are: the American Chemistry Council ("ACC"), American Coatings Association ("ACA"), American Forest & Paper Association ("AF&PA"), American Wood Council ("AWC"), American Fuel & Petrochemical Manufacturers ("AFPM"), American Iron & Steel Institute ("AISI"), Brick Industry Association ("BIA"), Council of Industrial Boiler Owners ("CIBO"), National Association of Manufacturers ("NAM"), National Mining Association ("NMA"), National Oilseed Processors Association

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the Coalition, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

("NOPA"), Rubber Manufacturers Association ("RMA"), and Utility Air Regulatory Group ("UARG").

Companies that belong to Coalition members own or operate facilities in source categories subject to maximum achievable control technology (commonly referred to as "MACT") standards under Clean Air Act § 112(d)(2) and (3), 42 U.S.C. § 7412(d)(2) and (3). The MACT standards imposed on those source categories will undergo, or have already undergone,[2] review by the U.S. Environmental Protection Agency ("EPA" or "Agency") under § 112(d)(6), the Clean Air Act provision that mandates review of MACT standards at least every eight years to consider if any "developments in practices, processes, and control technologies" have occurred.

Although the subject of this litigation is EPA's § 112(d)(6) review of existing MACT standards for chromium electroplating and anodizing operations,[3] fundamental issues are at stake, including the meaning of § 112(d)(6) and EPA's scope of authority under that provision. Their resolution will extend far beyond the subject source categories and inform subsequent § 112(d)(6) reviews of other source categories. It is critical at this early stage in EPA's implementation of the

[2] *E.g.*, 71 Fed. Reg. 76603 (Dec. 21, 2006) (§ 112(d)(6) and (f) review of the synthetic organic chemical manufacturing industry).

[3] 77 Fed. Reg. 58220 (Sept. 19, 2012).

§ 112(d)(6) program to make sure that the Agency's approach is in accord with the law.

STATUTES AND REGULATIONS

Statutory provisions not cited in NASF's or Environmental Petitioners' Opening Petitioner Briefs are provided in the Statutory Appendix to this brief.

SUMMARY OF ARGUMENT

When EPA finalized its § 112(d)(6) review of the existing MACT standards for chromium electroplating and anodizing, the Agency concluded that the existing MACT standards should be tightened. This determination was not based on a finding that affected sources are deploying a new control technology, practice, or process that was developed in the time since the MACT standards were first adopted. Rather, the revised standards were based on a finding that, using emissions control measures on which the existing standards were based, certain affected sources emit hazardous air pollutants ("HAPs") at levels well below the maximum allowed under the existing MACT standards.

Clean Air Act § 112(d)(6), the provision that authorizes EPA to periodically review and revise existing MACT standards, allows EPA to revise an existing standard only when "necessary (taking into account developments in practices, processes, and control technologies)." EPA's standard-setting approach in this case does not square with the plain requirements of § 112(d)(6) because EPA

identified no "development" in emissions control measures that necessitates the new, more stringent standards. NASF's petition challenging the standards on that basis should be granted.

At the same time, this Court should deny Environmental Petitioners' unwarranted attempt to have this Court overturn well-established precedent as to the meaning of § 112(d)(6). In two prior cases before this Court, environmental petitioners argued that EPA must, when it conducts a § 112(d)(6) review of an existing MACT rule, re-calculate the existing standards according to the procedures in § 112(d)(2) and (3) that govern initial MACT standard-setting. *See Natural Res. Def. Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008) ("*NRDC*"); *see also Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667 (D.C. Cir. 2013) (per curiam). The Court rejected that argument in both cases. The Court should similarly reject Environmental Petitioners' efforts to re-litigate these settled issues here.

ARGUMENT

Congress set forth a carefully crafted and detailed framework for regulation of HAP emissions from stationary sources through the § 112 program. Initial MACT standard-setting is a two-step process. First, EPA must establish a so-called "MACT floor," which is based on the emissions limitations achieved by the better-controlled sources in the given source category. *See* § 112(d)(3). The

MACT floor is the minimum level of stringency at which a MACT standard may be set. Second, EPA must determine whether the MACT standard should be set at a level more stringent than the MACT floor – i.e., whether the standard should be set "beyond the floor." This determination must be based on consideration of cost and other relevant factors. *See* § 112(d)(2).

After a MACT standard is initially set, EPA must later conduct further review of the standard through two processes. First, EPA is to evaluate, within eight years, whether there are unacceptable health risks that remain after imposition of MACT standards and that warrant review. If there are, EPA must promulgate standards, with an ample margin of safety, that address such risks and that prevent "adverse environmental effect[s]." This is a one-time "residual risk" review. *See* § 112(f)(2)(A).

Second, every eight years EPA must conduct a technology review[4] of the source category under § 112(d)(6), under which EPA is required to "review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section . . . ." § 112(d)(6). The "developments" language of the statute is the "core requirement" that EPA must follow in conducting a § 112(d)(6) review. *NRDC*, 529 F.3d at

[4] "Technology review" is shorthand for EPA's review of whether there have been "developments in practices, processes, or control technologies." "Technology development," as used in this brief, similarly is shorthand for a development in "practices, processes, or control technologies."

1084; *see also Ass'n of Battery Recyclers,* 716 F.3d at 672 ("[T]he statute directs EPA to 'tak[e] into account developments in practices, processes, and control technologies,' 42 U.S.C. § 7412(d)(6), not public health objectives or risk reduction achieved by additional controls."). If, based on the review of relevant technology developments, EPA determines that an existing standard should be revised, the Agency is not required to set the revised standard using the MACT standard-setting framework under § 112(d)(2) and (3). *Ass'n of Battery Recyclers*, 716 F.3d at 673. Instead, EPA may revise the standard "as necessary," based on consideration of cost and other relevant factors.

EPA's longstanding position has been that it is not required to re-set existing MACT standards each time it conducts a § 112(d)(6) review. Moreover, the Agency asserts that, when it determines that an existing standard should be revised under § 112(d)(6), it is not required to use the § 112(d)(2) and (3) procedures in revising the standard.

This Court has twice upheld EPA's interpretation of § 112(d)(6). The Court first interpreted the meaning of § 112(d)(6) in *NRDC*, 529 F.3d 1077. There, the Court considered EPA's § 112(d)(6) review of the MACT standards for the synthetic organic chemicals manufacturing industry. In that review, EPA found that there had been no relevant technology "developments" and therefore declined to revise the existing MACT standards. *Id.* at 1084. The Natural Resources

Defense Council and Louisiana Environmental Action Network challenged the rule, contending that the Agency had inappropriately considered cost in determining if revision of the standards was appropriate. *Id.* They asserted that the Agency had "to start from scratch" (i.e., conduct § 112(d)(2) and (3) MACT standard-setting). *Id.*

In reviewing the challenge, the Court concluded that § 112(d)(6) cannot be read to mandate a whole new round of MACT standard-setting. *Id*. ("We do not think the words 'review, and revise as necessary' can be construed reasonably as imposing any such obligation."). Instead, the Court concluded that "'significant developments in practices, processes and control technologies' . . . . is the core requirement of subsection 112(d)(6)." *Id.* (quoting 71 Fed. Reg. at 76605). Whether, and how, EPA should consider costs in setting § 112(d)(6) was not an issue that the Court needed to decide because "EPA squarely found that there were no 'significant developments in practices, processes and control technologies,'" and therefore no basis for revising the standards. *See id.*

Despite the Court's clear holding that § 112(d)(6) did not require MACT standard-setting, environmental petitioners[5] again raised the issue in subsequent litigation. *Ass'n of Battery Recyclers*, 716 F.3d at 673. This time the subject of the

[5] Sierra Club and California Communities Against Air Toxics (two of the Environmental Petitioners in this litigation) were also petitioners in *Association of Battery Recyclers*.

litigation was EPA's § 112(d)(6) review of the secondary lead smelting industry MACT standards, in which the Agency identified relevant "developments" and revised the existing MACT standards under § 112(d)(6). The Court explained how it had already addressed the question of whether § 112(d)(2) and (3) standard-setting applied in the context of § 112(d)(6) and concluded that it did not. *Id.* at 673.

I. EPA Has Neglected Its Statutory Mandate to Identify "Developments" Before Issuing Any § 112(d)(6) Standards.

As NASF argues in its brief (Doc. 1488725), EPA has not found any relevant "developments" in the rulemaking at issue in this litigation, and has therefore violated the terms of § 112(d)(6), as well as established D.C. Circuit precedent, in revising the MACT standards. *See* NASF Opening Pet. Br. at 27-28.

What comes through loud and clear from the *NRDC* and *Association of Battery Recyclers* decisions is that, in a § 112(d)(6) review, EPA must consider whether any relevant technology "developments" have occurred, and such "developments" are a necessary predicate to revising existing MACT standards. This only stands to reason. It would make no sense under the statutory framework for EPA to be authorized to revise an existing technology-based standard if there has been no "development" in the "practices, processes, and control technologies" that had served as the basis for the maximum achievable *control technology* standard in the first instance. Periodic review under § 112(d)(6) appropriately

focuses on whether there have been "significant developments" to warrant an adjustment to existing standards. *See supra* p. 7.

Instead of identifying "developments," in the rule at issue here, EPA used emissions estimates from some of the sources in the source category as the basis for revising the standards. NASF Opening Pet. Br. at 28. In and of itself, the fact that those emissions were lower than the applicable existing MACT standards in no way evidences relevant technology "developments." MACT standards are designed to reduce sources' emissions by requiring all sources in a category to achieve emissions reductions reached by the better-controlled sources in the category. Reduced emissions are an expected outcome of applying a new MACT standard to a source category. MACT-required emissions reductions are not a new and unforeseen "development" that justifies increasing the stringency of the existing standard.

EPA's approach also does not make practical sense. When affected sources become subject to a MACT standard, most do not manage their operations such that HAP emissions are maintained precisely at the level of the standard. Instead, affected sources operate to keep their HAP emissions comfortably below the level of the standard so as to maintain a "compliance margin." Such a margin ensures that unavoidable or unanticipated variations in production operations and in corresponding HAP emissions levels will not result in an exceedance of a MACT

standard. Maintaining such a margin has the added benefit of sources' achieving and maintaining greater HAP emissions reductions than the applicable MACT standard nominally would require.

EPA's § 112(d)(6) approach in the instant rule creates a disincentive to operating with a prudent compliance margin because the lower HAP emissions levels achieved in practice would become the basis for a downward adjustment of the existing MACT standard each time a § 112(d)(6) review occurs. This approach creates the prospect that § 112(d)(6) could cause MACT standards for any source category to be perpetually ratcheted downward because actual emissions of sources in the category always will be lower than the applicable MACT standard. Such an automatic ratchet cannot be what Congress intended when it required EPA to periodically determine if there have been relevant technology developments in a given source category that might warrant a revision to an existing standard.

In sum, EPA's attempt to ignore the necessary finding of "developments" in its § 112(d)(6) review and revision process is contrary to the statute, this Court's precedent, common sense, and industry practice. EPA's effort to do so should be overturned.

II. Environmental Petitioners' Attempt to Overturn Well-Reasoned Precedent Must Be Rejected.

Environmental Petitioners assert here, as petitioners did in *NRDC* and then in *Association of Battery Recyclers*, that the Agency should be required under

§ 112(d)(6) to recalculate the MACT floor every eight years. Environmental Petitioners assert that despite the holdings in those cases, additional review of the issue is warranted because this Court's review of the issue in the past was allegedly incomplete. According to Environmental Petitioners, the issue of whether § 112(d)(6) review includes MACT standard-setting has never had a "merits airing." Envtl. Pet. Opening Br. at 17 (Doc. 1489100). They contend that the *NRDC* Court only addressed the issue as dicta and that the *Association of Battery Recyclers* Court inappropriately treated it as binding precedent. *Id.* at 30-32. Therefore, they assert that *Association of Battery Recyclers* was "wrongly decided" and that "no panel of this Court has ever addressed this issue on the merits." *Id.* at 32. Environmental Petitioners suggest that the holding is not even established precedent, *see id.* at 17 ("This issue deserves, at least, one merits airing before the Court's precedent is set in stone."), and make an unsupportable plea to have the *en banc* court rule on the issue through either initial hearing *en banc* or through the *Irons* footnote process first used in *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981).

Environmental Petitioners' contention that the issue has never had a "merits hearing" is incorrect. The Court has considered, and three times rejected, their claim. In *NRDC*, the Court addressed the issue on the merits by engaging the statutory language in § 112(d)(6) – namely, "review, and revise as necessary"– as

evidence that MACT standard-setting was not required. *NRDC*, 529 F.3d at 1084. In *Association of Battery Recyclers*, the panel determined that the issue had already been decided after environmental petitioners briefed the issue on the merits again, in a "far better developed" fashion. 716 F.3d at 673. Then, those petitioners filed a petition for panel rehearing and rehearing *en banc* in which they made the same argument the Environmental Petitioners make now. In that petition, they presented the issue on the merits to the Court again, this time *en banc*, claiming that "The [*Association of Battery Recyclers*] panel's decision allows EPA to bypass the stringency requirements in § 112(d)(2)-(3) when the agency promulgates emission standards for hazardous air pollutants as a result of the statutorily required eight-year review." Petition for Panel Rehearing and for Rehearing *En Banc* of California Communities Against Toxics, Frisco Unleaded, Missouri Coalition for the Environment Foundation, Natural Resources Defense Council, and Sierra Club, *Ass'n of Battery Recyclers v. EPA*, No. 12-1129 (D.C. Cir. July 12, 2013) (Doc. 1446421) ("Rehearing Petition"). The Court considered that petition and summarily denied it,[6] without dissent from a single judge. Order, *Ass'n of Battery Recyclers v. EPA*, No. 12-1129 (D.C. Cir. Oct. 3, 2013) (per curiam) (Doc. 1459418).

[6] Environmental Petitioners place that key piece of information in a footnote in their brief. *See* Envtl. Pet. Opening Br. at 7 n.3.

A. The Court Has Already Denied *En Banc* Review of Environmental Petitioners' Claim, So Rule 35 Review Here Is Unwarranted.

Environmental Petitioners indicate that they "intend" to file a Federal Rule of Appellate Procedure 35 petition for initial hearing *en banc*. They have yet to file such a petition, but if filed, there is no basis to grant it.

As noted above, the Court has already denied and considered a Rule 35 petition in *Association for Battery Recyclers*. Nothing has happened in the intervening time since that petition was denied that would provide justification for Rule 35 review of this case.

Rule 35(b)(1) provides that a petitioner must explain why *en banc* hearing is warranted in one of two ways:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

The Environmental Petitioners cannot make a Rule 35(b)(1)(A) showing because no conflict in case law exists. To the contrary, the two decisions at issue – *NRDC* and *Association of Battery Recyclers* – have been entirely consistent in

concluding that § 112(d)(6) review, which can if "necessary" lead to revision of MACT standards, does not follow the § 112(d)(2) and (3) standard-setting framework.[7] Environmental Petitioners also cannot make a showing under Rule 35(b)(1)(B). They have not presented any new "question of exceptional importance" that Environmental Petitioners did not previously assert in their Rule 35 petition in *Association of Battery Recyclers*. *Compare* Rehearing Petition at 8-9 *with* Envtl. Pet. Opening Br. at 34-35 (citing future standard-setting effects and health concerns). Because Environmental Petitioners cannot meet either of the required justifications for Rule 35 review, initial hearing *en banc* is unwarranted in this litigation.

B. Similarly, the *Irons* Footnote Policy Is Not Properly Invoked Here.

Environmental Petitioners also suggest that this case poses an appropriate instance for application of the *Irons* footnote policy. *Irons* was a case in which the panel faced two preceding decisions that conflicted in how they interpreted relevant statutory language. 670 F.2d at 267-68. In order to "resolve[] an apparent conflict between two prior decisions," the panel sought the approval of the *en banc*

[7] In their Rehearing Petition, Environmental Petitioners also posited that the *Association of Battery Recyclers* conflicts with the U.S. Supreme Court's opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Rehearing Petition at 1. Thus, to the extent Environmental Petitioners argue that *Chevron* conflicts, that argument has already been considered by this Court.

court about how the panel intended to resolve the conflict, and thereby set the "law of the circuit." *Id.* at 268 n.11.

The Court has since endorsed use of an *Irons* footnote approach, whereby a panel can "announce . . . the endorsement of the *en banc* court," through its January 17, 1996 "Policy Statement on *En Banc* Endorsement of Panel Decisions" ("*Irons* Policy"). *Irons* Policy at 1. As the Court explains in the *Irons* Policy, an *Irons* footnote is meant to address the same types of issues that could be addressed through the Rule 35 process, but with fewer "administrative burdens" (*e.g.,* additional filings from the parties). *Id.* The Court's *Irons* Policy lists examples of such situations that might warrant a panel's request for an *Irons* footnote:

> (1) resolving an apparent conflict in the prior decisions of panels of the court;
>
> (2) rejecting a prior statement of law which, although arguably dictum, warrants express rejection to avoid future confusion;
>
> (3) overruling an old or obsolete decision which, although still technically valid as precedent, has plainly been rendered obsolete by subsequent legislation or other developments; and
>
> (4) overruling a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law.

Id.

None of those situations is close to the situation at hand in this litigation. This is not surprising because as noted, the *Irons* Policy is

designed to address the same types of situations that could warrant a Rule 35 petition. Because there is neither a conflict in D.C. Circuit precedent nor subsequent rulings in another Circuit or the Supreme Court that could be read to create conflict, application of the *Irons* Policy to this case is unwarranted.

C. Environmental Petitioners' Argument Is Substantively Unavailing.

As explained above, Environmental Petitioners' contention that § 112(d)(2) and (3) standard-setting should apply to § 112(d)(6) has been rejected three times by this Court (first in *NRDC* and then twice in *Association of Battery Recyclers*). Given the consistent and established precedent, there is no procedural basis for the Court to revisit the issue.

Moreover, from a merits perspective, Environmental Petitioners' argument is unavailing. Environmental Petitioners seize on the following italicized language in § 112(d)(2) that "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 . . . " to suggest that Congress intended § 112(d)(2) (and by relation § 112(d)(3)) to govern § 112(d)(6) revision of standards.

Environmental Petitioners fail to appreciate that there is a fundamental difference between "promulgation" of standards and "revision" of standards.

"Promulgation" involves the *initial* setting of standards under the Clean Air Act, while "revision" involves the *subsequent* revisiting and modification of standards. *See Natural Res. Def. Council v. EPA*, 902 F.2d 962, 982 (D.C. Cir. 1990) (separate opinion of Wald, C.J.) ("The word 'promulgate' in the CAA refers only to the original issuance of a standard, while the word 'revision' refers to subsequent modifications of that standard."), *vacated on other grounds*, 921 F.2d 326 (D.C. Cir. 1991) (per curiam).

When this difference is considered, Environmental Petitioners' statutory language-based argument does not hold. Environmental Petitioners point to § 112(d)(5)'s exclusionary language (indicating that § 112(d)(2) need not apply) as purported evidence to show that unless exclusionary language appears in a provision of § 112(d), standards must be set using the § 112(d)(2) and (3) MACT standard-setting framework. *See* Envtl. Pet. Opening Br. at 21. The reason that Congress needed to specify exclusionary language in § 112(d)(5) is because that subsection concerns the *promulgation* of standards for area sources. Congress wanted to authorize EPA to follow a different course of action in the *promulgation* of initial standards for area sources if it so chose (i.e., promulgation of generally available control technologies and processes (known as "GACT") rather than MACT), it needed to include exclusionary language, or else the "shall require" language of § 112(d)(2) would govern.

By contrast, exclusionary language is not required for § 112(d)(6) because that provision concerns *revision*, not *promulgation*. Because "revision" and "promulgation" are governed by different statutory provisions in § 112, Congress did not need to include exclusionary language in § 112(d)(6). Indeed, where Congress wished for EPA's revision of standards to be governed by the same criteria as initial promulgation, it said as much through *inclusionary* language in other Clean Air Act provisions.[8]

Even assuming *arguendo* that revision were a form of promulgation rather than a distinct form of regulation, Environmental Petitioners' reading would still not prevail. As the *NRDC* court observed, § 112(d)(6) provides specific criteria to govern review. *See* 529 F.3d at 1084. The Supreme Court has concluded that "[i]t is a well-established principle of statutory construction that '[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Ass'n of Battery Recyclers*, 716 F.3d at 672 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012)) (some internal quotation marks

[8] EPA previously briefed, and the Court considered, this concept in the rehearing proceedings in *Association of Battery Recyclers.* EPA Response to Petition for Rehearing En Banc, *Ass'n of Battery Recyclers v. EPA*, No. 12-1129 (D.C. Cir. Aug. 30, 2013) (Doc. 1454312). In that filing, EPA provided examples of provisions where Congress instructed EPA to use the same criteria in "revision" as in "promulgation." *See id.* at 8 & n.3 (citing 42 U.S.C. §§ 7409(d)(1), 7411(b)(1)(B), 7521(a)(1) & 7547(a)(3)). No such language is present in § 112(d)(6).

omitted). Here, specific criteria are presented in § 112(d)(6), and thus even if § 112(d)(2) and (3) could be read to apply, the criteria in those more general provisions would not trump the specific criteria of § 112(d)(6).

CONCLUSION

This Court has previously interpreted § 112(d)(6) and defined the scope of § 112(d)(6) review. Considering relevant technology "developments," EPA is to conduct a § 112(d)(6) review at least every eight years. EPA may conduct that review and determine that no revision of standards is necessary under § 112(d)(6), as EPA did in the rulemaking at issue in *NRDC*. Or, EPA may conduct its review and determine that revision is "necessary" based on "developments" in practices, processes, and control technologies that have occurred since the MACT standards were set. Here, EPA did neither. Rather, EPA revised the chromium electroplating and anodizing MACT standards through § 112(d)(6) without actually identifying any relevant technology developments, contrary to the plain language of the statute and this Court's precedent. NASF's petition for review should be granted.

Environmental Petitioners seek to litigate for the third time well-settled questions as to how § 112(d)(6) should be implemented. For the foregoing reasons, their petition for review should be denied.

DATED: June 9, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Brief of *Amicus Curiae* Chromium RTR Coalition in Support of Petitioner National Association for Surface Finishing and in Opposition to Environmental Petitioners California Communities Against Toxics, Clean Air Council, and Sierra Club contains 4,353 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

/s/ William L. Wehrum
William L. Wehrum

Dated: June 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2014, I electronically filed the foregoing on all registered counsel using the appellate CM/ECF system.

/s/ William L. Wehrum
William L. Wehrum

STATUTORY ADDENDUM

TABLE OF CONTENTS

which read as follows: ''The Administrator shall, after consultation with the Secretary of Transportation and the Secretary of Housing and Urban Development and State and local officials and within 180 days after August 7, 1977, and from time to time thereafter, publish guidelines on the basic program elements for the planning process assisted under section 7505 of this title.''

Subsec. (f)(1). Pub. L. 101–549, §108(b), in introductory provisions, substituted present provisions for provisions relating to Federal agencies, States, and air pollution control agencies within either 6 months or one year after Aug. 7, 1977.

Subsec. (f)(1)(A). Pub. L. 101–549, §108(b), substituted present provisions for provisions relating to information prepared in cooperation with Secretary of Transportation, regarding processes, procedures, and methods to reduce certain pollutants.

Subsec. (f)(3), (4). Pub. L. 101–549, §111, added pars. (3) and (4).

Subsec. (g). Pub. L. 101–549, §108(*o*), added subsec. (g).

Subsec. (h). Pub. L. 101–549, §108(c), added subsec. (h).

1977—Subsec. (a)(1)(A). Pub. L. 95–95, §401(a), substituted ''emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare'' for ''which in his judgment has an adverse effect on public health or welfare''.

Subsec. (b)(1). Pub. L. 95–95, §104(a), substituted ''cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology'' for ''technology and costs of emission control''.

Subsec. (c). Pub. L. 95–95, §104(b), inserted provision directing the Administrator, not later than six months after Aug. 7, 1977, to revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate, with the criteria to include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

Subsecs. (e), (f). Pub. L. 95–95, §105, added subsecs. (e) and (f).

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

CAA § 109(d)(1)

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences,

one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

(July 14, 1955, ch. 360, title I, §109, as added Pub. L. 91–604, §4(a), Dec. 31, 1970, 84 Stat. 1679; amended Pub. L. 95–95, title I, §106, Aug. 7, 1977, 91 Stat. 691.)

CODIFICATION

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

PRIOR PROVISIONS

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

AMENDMENTS

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

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

EFFECTIVE DATE OF 1977 AMENDMENT

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

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

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

TERMINATION OF ADVISORY COMMITTEES

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

ROLE OF SECONDARY STANDARDS

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

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

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

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

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

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

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

''(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

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

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

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

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

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

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

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

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

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

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

(4) The term ''modification'' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

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

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

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

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

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

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

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

CAA § 111(b)(1)(B)

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii)[1] of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing

[1] See References in Text note below.

SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

PART A—MOTOR VEHICLE EMISSION AND FUEL STANDARDS

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

CAA § 202(a)(1)

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) IN GENERAL.—(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) REVISED STANDARDS FOR HEAVY DUTY TRUCKS.—(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO_x) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) LEAD TIME AND STABILITY.—Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) REBUILDING PRACTICES.—The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) MOTORCYCLES.—For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1)[1] of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public

[1] See References in Text note below.

Stat. 1700; amended Dec. 31, 1970, Pub. L. 91–605, § 202(a), 84 Stat. 1739; Apr. 9, 1973, Pub. L. 93–15, § 1(b), 87 Stat. 11; June 22, 1974, Pub. L. 93–319, § 13(b), 88 Stat. 265, related to low-emission vehicles, prior to repeal by Pub. L. 101–549, title II, § 230(10), Nov. 15, 1990, 104 Stat. 2529.

A prior section 212 of act July 14, 1955, was renumbered section 213 by Pub. L. 91–604, renumbered section 214 by Pub. L. 93–319, and renumbered section 216 by Pub. L. 95–95, and is classified to section 7550 of this title.

§ 7547. Nonroad engines and vehicles

(a) Emissions standards

(1) The Administrator shall conduct a study of emissions from nonroad engines and nonroad vehicles (other than locomotives or engines used in locomotives) to determine if such emissions cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such study shall be completed within 12 months of November 15, 1990.

(2) After notice and opportunity for public hearing, the Administrator shall determine within 12 months after completion of the study under paragraph (1), based upon the results of such study, whether emissions of carbon monoxide, oxides of nitrogen, and volatile organic compounds from new and existing nonroad engines or nonroad vehicles (other than locomotives or engines used in locomotives) are significant contributors to ozone or carbon monoxide concentrations in more than 1 area which has failed to attain the national ambient air quality standards for ozone or carbon monoxide. Such determination shall be included in the regulations under paragraph (3).

CAA § 213(a)(3)

(3) If the Administrator makes an affirmative determination under paragraph (2) the Administrator shall, within 12 months after completion of the study under paragraph (1), promulgate (and from time to time revise) regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution. Such standards shall achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the engines or vehicles to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. In determining what degree of reduction will be available, the Administrator shall first consider standards equivalent in stringency to standards for comparable motor vehicles or engines (if any) regulated under section 7521 of this title, taking into account the technological feasibility, costs, safety, noise, and energy factors associated with achieving, as appropriate, standards of such stringency and lead time. The regulations shall apply to the useful life of the engines or vehicles (as determined by the Administrator).

(4) If the Administrator determines that any emissions not referred to in paragraph (2) from new nonroad engines or vehicles significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, the Administrator may promulgate (and from time to time revise) such regulations as the Administrator deems appropriate containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution, taking into account costs, noise, safety, and energy factors associated with the application of technology which the Administrator determines will be available for the engines and vehicles to which such standards apply. The regulations shall apply to the useful life of the engines or vehicles (as determined by the Administrator).

(5) Within 5 years after November 15, 1990, the Administrator shall promulgate regulations containing standards applicable to emissions from new locomotives and new engines used in locomotives. Such standards shall achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the locomotives or engines to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.

(b) Effective date

Standards under this section shall take effect at the earliest possible date considering the lead time necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period and energy and safety.

(c) Safe controls

Effective with respect to new engines or vehicles to which standards under this section apply, no emission control device, system, or element of design shall be used in such a new nonroad engine or new nonroad vehicle for purposes of complying with such standards if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function. In determining whether an unreasonable risk exists, the Administrator shall consider factors including those described in section 7521(a)(4)(B) of this title.

(d) Enforcement

The standards under this section shall be subject to sections 7525, 7541, 7542, and 7543 of this title, with such modifications of the applicable regulations implementing such sections as the Administrator deems appropriate, and shall be enforced in the same manner as standards prescribed under section 7521 of this title. The Administrator shall revise or promulgate regulations as may be necessary to determine compliance with, and enforce, standards in effect under this section.

(July 14, 1955, ch. 360, title II, § 213, as added Pub. L. 93–319, § 10, June 22, 1974, 88 Stat. 261; amended Pub. L. 101–549, title II, § 222(a), Nov. 15, 1990, 104 Stat. 2500.)