

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

No. 11-1184

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
LISA P. JACKSON, ADMINISTRATOR,

Respondents.

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

CORRECTED PROOF BRIEF FOR INTERVENORS FOR RESPONDENTS

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April 16, 2012

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SIERRA CLUB,)	
)	
Petitioner,)	Case No. 11-1184
)	
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v.)	
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U.S. ENVIRONMENTAL PROTECTION)	
AGENCY and)	
LISA P. JACKSON,)	
ADMINISTRATOR,)	
)	
Respondents.)	

**RULE 26.1 DISCLOSURE STATEMENT OF
INTERVENORS FOR RESPONDENTS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Intervenor for Respondents American Chemistry Council (“ACC”), Council of Industrial Boiler Owners (“CIBO”), and National Association of Clean Water Agencies (“NACWA”) make the following declarations:

ACC is a not-for-profit trade association that participates on its members’ behalf in administrative proceedings and in litigation arising from those proceedings. ACC represents the leading companies engaged in the business of chemistry. ACC has no outstanding shares or debt securities in the hands of the

public and has no parent company. No publicly held company has ten percent (10%) or greater ownership interest in ACC.

CIBO is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with over 100 members representing 20 major industrial sectors to promote the exchange of information between industry and government relating to energy and environmental policies, laws, and regulations affecting industrial and institutional boilers. CIBO has not issued shares to the public, although many of CIBO's individual members have done so.

NACWA is a voluntary not-for-profit trade association of the nation's publicly-owned sewage treatment authorities and municipal clean water agencies. NACWA's members operate nearly 300 of the nation's publicly-owned treatment works which collectively serve the majority of the sewered population of the United States. NACWA's purpose and general nature is to provide a forum for collaboratively addressing issues affecting publicly-owned sewage treatment authorities and to advocate on behalf of its members regarding legislative, regulatory and legal matters. NACWA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NACWA. NACWA has no outstanding shares or debt securities in the hands of the public

and has no parent, subsidiary or affiliate that has issued shares or debt securities to the public.

Respectfully submitted,

April 16, 2012

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**INTERVENORS' CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 15(c)(3), 27(a)(4) and 28(a)(1), Intervenors for Respondents submit this certificate as to parties, rulings, and related cases.

Parties and Amici.

This case seeks direct review of final agency action and involves the following parties:

Petitioner

Sierra Club

Respondents

U.S. Environmental Protection Agency and Lisa P. Jackson, EPA
Administrator

Intervenors

American Chemistry Council
Council of Industrial Boiler Owners
National Association of Clean Water Agencies

Rulings Under Review.

EPA final action “Completion of the Requirement to Promulgate Emission Standards,” 76 Fed. Reg. 15,308 (Mar. 21, 2011).

Related Cases.

The case has not previously been before this Court or any other court. Intervenors bring to the Court’s attention the following pending cases that challenge EPA standards for source categories at issue in the present case and in which the administrative record includes the substantive arguments that are before the Court in this case:

U.S. Sugar Corp. v. EPA, No. 11-1108 (D.C. Cir. filed Apr. 14, 2011).

American Chemistry Council v. EPA, No. 11-1141 (D.C. Cir. filed May 17, 2011).

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
CO	Carbon Monoxide
EPA	United States Environmental Protection Agency
HAP	Hazardous Air Pollutant
HCB	Hexachlorobenzene
HMIWI	Hospital/Medical/Infectious Waste Incinerators
MACT	Maximum Available Control Technology
MWC	Municipal Waste Combustion
MWI	Medical Waste Incinerator
NESHAP	National Emission Standard for Hazardous Air Pollutant
PCB	Polychlorinated Biphenyls
PM	Particulate Matter
POM	Polycyclic Organic Matter
SOCMI	Synthetic Organic Chemical Manufacturing Industry
VOC	Volatile Organic Compounds

JURISDICTION

Petitioner Sierra Club seeks review of the U.S. Environmental Protection Agency (“EPA”) final action “Completion of the Requirement to Promulgate Emission Standards,” 76 Fed. Reg. 15,308 (Mar. 21, 2011) (“90 Percent Notice”). The Clean Air Act (“CAA”) provides this Court exclusive jurisdiction to review EPA final agency actions taken by the Administrator under the CAA. 42 U.S.C. § 7607(b)(1). Intervenors support Respondent EPA’s challenges to Petitioner’s standing and the timeliness of its claims.

STATUTES AND REGULATIONS

All applicable statutes and regulations are provided in the addendum to Petitioner’s Brief.

STATEMENT OF ISSUES

1. Whether Petitioner Sierra Club has standing to challenge the EPA final 90 Percent Notice, where vacatur of the EPA action will not result in amending final agency actions not before this Court and will therefore not redress the alleged injury that Sierra Club claims as the basis for this challenge.

2. Whether Sierra Club’s challenge to the 90 Percent Notice is an untimely collateral challenge to other EPA actions not before this Court, where Sierra Club

challenges EPA standards that were challenged and resolved in prior judicial proceedings.

3. Whether Sierra Club's claims reach beyond the 90 Percent Notice and challenge other EPA actions not before this court, which in some instances are pending in other judicial proceedings or in EPA administrative proceedings.

4. Whether EPA's determination of compliance with 42 U.S.C. §7412(c)(6) is reasonable and lawful, where EPA has fulfilled the terms of the provision by issuing standards to control the listed pollutants from the relevant sources as demonstrated by the record in this case.

5. Whether the 90 Percent Notice, which is a statement of fact regarding EPA's having met the requirements of a CAA provision and does not alter the legal obligations of regulated sources or announce an interpretation of law or policy by EPA, constitutes a rulemaking and is subject to public notice and comment requirements.

STATEMENT OF THE CASE

Intervenors adopt EPA's statement of the case. EPA Br. at 3-4.

SUMMARY OF ARGUMENT

Petitioner Sierra Club does not have standing to challenge the 90 Percent Notice, which itself does not require anyone to reduce their emissions or to take or forbear from taking any other action. Therefore the 90 Percent Notice does not address the environmental and health injury claimed by Sierra Club. Instead, the 90 Percent Notice compiles the many substantive rules that do set emission standards directed under section 112(c)(6) and that are accomplishing the intended emission reductions.

Over the years in a number of separate rulemakings, Sierra Club has pressed EPA to adopt its view of what a “standard” is for purposes of section 112(c)(6), and each time EPA has rebuffed Sierra Club’s narrow interpretation of that term. Then Sierra Club passed up opportunities to ask a reviewing court to consider the merits of its interpretation. Now Sierra Club seeks to have this Court decide the sufficiency of these standards, in the absence of the administrative record that provides the content for such a decision and in many instances years after regulated facilities have invested in complying with the rules. In other rulemakings, Sierra Club has altogether failed to raise its claims in administrative and judicial proceedings. Sierra Club’s claims are out of time and on that basis should be dismissed. Sierra Club has again raised these claims in two ongoing rulemaking challenges, which unlike in this case, will provide a reviewing court the necessary

record of EPA's decisionmaking, and amply justify EPA's conclusion that its rules impose the standards required by section 112(c)(6).

ARGUMENT

I. SIERRA CLUB AND ITS CLAIMS ARE NOT PROPERLY BEFORE THIS COURT.

A. SIERRA CLUB LACKS STANDING TO BRING THESE CLAIMS.

As set forth in the Brief for Respondent EPA ("EPA Br."), this Court cannot in this action redress Sierra Club's claims, the third required element of standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Sierra Club challenges the merits of EPA actions that are not before this Court, that are either final rules that are in effect and with which sources are complying, or are rulemakings subject to pending judicial or administrative review.

Nor can Sierra Club satisfy the other required elements Article III standing under *Lujan*. *Id.* at 560-61. Sierra Club can claim no injury from EPA's statement that rules have been completed, where the alleged injury derives from the content of final or pending rules not before this Court. Any injury Sierra Club may claim from EPA's rules is traceable only to the rules themselves, on the basis of each rule's administrative record and legal justification. Although Sierra Club has not been injured by the 90 Percent Notice, a decision by this Court in favor of Sierra Club on these claims would injure all parties to the prior rulemakings and

judicial proceedings, the substance of which Sierra Club challenges in this case. A decision here on Sierra Club's claims would require this Court to reach legal conclusions that are grounded in records not before the Court, directly and negatively affecting hundreds of parties also not before the Court. As discussed below, many of the rules at issue here have been in place for many years and were the result of extended rulemaking procedures that provided the necessary context for consideration of all substantive comments by all interested parties.

B. EPA MET ITS DUTY TO REGULATE CATEGORIES THAT ACCOUNT FOR 90 PERCENT OF EMISSIONS OF SECTION 112(c)(6) POLLUTANTS.

At bottom, Sierra Club's complaint is that EPA did not establish what Sierra Club believes constitute "standards" when EPA completed dozens of earlier rulemakings for source categories covering the section 112(c)(6) pollutants. Pet. Br. at 11-13. To the contrary, EPA has promulgated standards controlling emissions of the pollutants identified in section 112(c)(6) for all of the source categories that EPA determined account for 90% of the aggregate emissions of those pollutants.

The following tables summarize the source categories and specific regulations that support EPA's 90% finding for Polychlorinated Biphenyls ("PCBs"), Hexachlorobenzene ("HCB"), and Polycyclic Organic Matter ("POM"). The information has been compiled from Tables I.1 & II.1 in Memorandum from

Nathan E. Topham, EPA Environmental Engineer, to Docket ID: EPA-HQ-OAR-2004-0505-006 (Feb. 18, 2011). JA ____.

TABLE A: PCBs

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Hazardous Waste Incineration	17.72%	Hazardous Waste Combustors: 40 CFR part 63 subpart EEE
Medical Waste Incineration (MWI)	25.69%	Hospitals, Medical, and Infectious Waste Incinerators: 40 CFR part 60 subpart Ce & Ec; 40 CFR part 62 subpart HHH
Municipal Waste Combustion (MWC)	51.07%	Large MWC Units: 40 CFR part 60 subpart Cb, Ea, & Eb; 40 CFR part 62 subpart FFF
		Small MWC Units: 40 CFR part 60 subpart AAAA & BBBB; 40 CFR part 62 subpart JJJ
TOTAL	94.48%	

TABLE B: HCB

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Chlorinated Solvents Production	55.92%	Synthetic Organic Chemical Manufacturing Industry: 40 CFR part 63 subpart F
		Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater: 40 CFR part 63 subpart G
		Equipment Leaks: 40 CFR part 63 subpart H
		Negotiated Regulation for Equipment Leaks:

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
		40 CFR part 63 subpart I
Pesticides Manufacture	44.08%	Pesticide Active Ingredient Production: 40 CFR part 63 subpart MMM
		Synthetic Organic Chemical Manufacturing Industry: 40 CFR part 63 subpart F
		Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater: 40 CFR part 63 subpart G
		Equipment Leaks: 40 CFR part 63 subpart H
TOTAL	100.00%	

TABLE C: 16-PAH (POM)

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Aerospace Industry (Surface Coating)	20.63%	Aerospace Manufacturing and Rework Facilities: 40 CFR part 63 subpart GG
Petroleum Refining: All Processes (Major)	13.46%	Petroleum Refineries: 40 CFR part 63 subpart CC
		Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units: 40 CFR part 63 subpart UUU
Primary Aluminum Production	8.33%	Primary Aluminum Reduction Plants: 40 CFR part 63 subpart LL
Pulp & Paper:	8.17%	Chemical Recovery Combustion Sources at

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Kraft Recovery Furnaces		Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills: 40 CFR part 63 subpart MM
Coke Ovens: Charging, Topside & Door Leaks	6.78%	Coke Oven Batteries: 40 CFR part 63 subpart L
		Coke Ovens: Pushing, Quenching, and Battery Stacks: 40 CFR part 63 subpart
Coke Ovens: Pushing, Quenching & Battery Stacks	6.50%	Coke By-Product Recovery Plants: 40 CFR part 63 subpart L
		Coke Ovens: Pushing, Quenching, and Battery Stacks: 40 CFR part 63 subpart CCCCC
Blast Furnace & Steel Mills	6.28%	Integrated Iron and Steel Manufacture: 40 CFR part 63 subpart FFFFF
Industrial Organic Chemicals Manufacturing (Major)	2.81%	Synthetic Organic Chemical Manufacturing Industry: 40 CFR part 63 subpart F
		Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater: 40 CFR part 63 subpart G
		Equipment Leaks: 40 CFR part 63 subpart H
		Negotiated Regulation for Equipment Leaks: 40 CFR part 63 subpart I
Pulp & Paper: Lime Kilns	2.30%	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills: 40 CFR part 63 subpart MM
Commercial Institutional Coal Combustion (Area)	1.74%	Industrial, Commercial, and Institutional Boilers: 40 CFR part 63 subpart JJJJ

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Industrial Coal Combustion (Major)	1.38%	Industrial, Commercial, Institutional Boilers and Process Heaters: 40 CFR part 63 subpart DDDDD
Fabricated Metal Products (Major)	1.35%	Surface Coating of Miscellaneous Metal Parts and Products: 40 CFR part 63 subpart MMMM
Chemical Manufacturing: Cyclic Crude & Intermediate Production (Major)	1.27%	Synthetic Organic Chemical Manufacturing Industry: 40 CFR part 63 subpart F
		Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater: 40 CFR part 63 subpart G
		Equipment Leaks: 40 CFR part 63 subpart H
		Negotiated Regulation for Equipment Leaks: 40 CFR part 63 subpart I
Other:	9.05%	Each category below represents 1% or less contribution to the POM finding, for a total of 9.05% as a group
Coke By-Product Recovery Plants: 40 CFR part 63 subpart L Secondary Lead Smelting: 40 CFR part 63 subpart X Industrial, Commercial, Institutional Boilers and Process Heaters: 40 CFR part 63 subpart DDDDD Paper & Other Web Coating: 40 CFR part 63 subpart JJJJ Portland Cement Manufacturing Industry: 40 CFR part 63 subpart LLL Industrial, Commercial, and Institutional Boilers: 40 CFR part 63 subpart JJJJ Synthetic Organic Chemical Manufacturing Industry: 40 CFR part 63 subpart F Synthetic Organic Chemical Manufacturing Industry for Process Vents Storage Vessels, Transfer Operations, and Wastewater: 40 CFR part 63 subpart G Equipment Leaks: 40 CFR part 63 subpart H Negotiated Regulation for Equipment Leaks: 40 CFR part 63 subpart I Surface Coating of Automobiles and Light Duty Trucks (Surface Coating of Plastic Parts and Products): 40 CFR part 63 subpart PPPP		

Source Category	Percentage of Emissions	Constituent NESHAPs or § 129 Rules
Asphalt Roofing Manufacturing: 40 CFR part 63 subpart LLLLL Industrial, Commercial, Institutional Boilers and Process Heaters: 40 CFR part 63 subpart DDDDD Printing and Publishing Industry: 40 CFR part 63 subpart KK Reciprocating Internal Combustion Engines: 40 CFR part 63 ZZZZ Miscellaneous Organic Chemical Manufacturing: 40 CFR part 63 subpart FFFF Shipbuilding and Ship Repair (Surface Coating): 40 CFR part 63 subpart II Hazardous Waste Combustors: 40 CFR part 63 EEE Wood Furniture Manufacturing Operations: 40 CFR part 63 subpart JJ Pesticide Active Ingredient Production: 40 CFR part 63 subpart MMM Group IV Polymers and Resins: 40 CFR part 63 subpart JJJ Hospitals, Medical, and Infectious Waste Incinerators: 40 CFR part 60 subpart Ce & Ec, 40 CFR part 62 subpart HHH Small Municipal Waste Combustion Units: 40 CFR part 60 subpart AAAA & BBBB, 40 CFR part 62 subpart JJJ Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations): 40 CFR part 63 subpart R Hazardous Waste Combustors: 40 CFR part 63 subpart EEE Large Municipal Waste Combustion Units: 40 CFR part 60 subpart Cb, Ea, & Eb, 40 CFR part 62 subpart FFF.		
TOTAL	90.05%	

Sierra Club makes the bald statement that “EPA has not set a single emission standard for PCBs or HCB.” Pet. Br. at 21. Sierra Club obviously wants the court to believe that EPA has neglected its duty to protect the public and the environment by allowing these hazardous air pollutants (“HAP”) to go unregulated. But this is not true. The HAP standards that EPA has promulgated under section 112 have significantly reduced emissions of PCBs, HCB and the

remaining section 112(c)(6) pollutants. For example, in 1994, EPA promulgated its first section 112 regulations for the synthetic organic chemical manufacturing industry (“SOCMI”).¹ As noted in Table B, these standards account for approximately 55% of the HCB emissions reductions set forth in EPA’s 90 Percent Notice. While EPA did not identify the specific amount of HCB emissions reduced by the SOCMI standard, in the preamble to the final rule, EPA stated that the rule would reduce all HAP emissions from this category by 510,000 tons/year through requirements to install pollution controls such as floating roofs, closed vent systems, wastewater stream recycling, and product recovery pollution controls on thousands of vents, storage vessels, wastewater operations equipment leaks, transfer operations and the like. *Id.* at 19,410-411. JA ___. EPA further estimated that the regulations would cost \$230 million per year of compliance. *Id.*

In 2006, EPA again evaluated HAP emissions, including HCB, from SOCMI facilities, in order to meet its CAA responsibility to determine whether there were any remaining section 112(f) “residual risks” from SOCMI facilities. EPA found there were no residual risks, concluding that the existing standards

¹ National Emission Standards for Hazardous Air Pollutants for Source Categories; Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipment Leaks; Final Rule, 59 Fed. Reg. 19,402, (Apr. 22, 1994). JA ___.

protected public health with an ample margin of safety.² Pursuant to section 112(d)(6), EPA also looked at whether the SOCM standards should be tightened as a result of any technological developments, concluding that they should not. *Id.* EPA concluded that imposing additional controls would achieve, at best, minimal emission and risk reductions. *Id.* EPA also concluded that the ecological hazard quotient values for HAPs, including HCB, were not high enough to constitute “significant and widespread” adverse environmental effects as defined in CAA section 112(a)(7), and there was “not an effect” on threatened or endangered species or on their critical habitat as defined by the Endangered Species Act. *Id.* at 76,611.

Another example of EPA section 112 rulemaking are the standards for petroleum refineries, which account for approximately 13% of the POM emission reductions set forth in EPA’s 90 Percent Notice. *See* Table C, *supra* at 20. EPA has determined that these standards have also achieved significant environmental and public health benefits. EPA estimated that HAP emissions from petroleum refineries would be reduced by approximately 52,910 tons/year as refineries met emission standards by installing control devices such as flares, floating roofs,

² National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry; Final Rule, 71 Fed. Reg. 76,603, 76,605 (Dec. 21, 2006). JA ____.

closed vent systems, suppression, and other pollution control measures on process vents, storage vessels, wastewater, and equipment leaks at petroleum refineries.³ EPA estimated the annual cost to comply to be approximately \$79 million (1992 dollars). *Id.* at 43,245-246. JA ____.

In sum, EPA's section 112 rules have achieved substantial HAP emissions reductions and significant environmental benefits. Industrial facilities have spent hundreds of millions of dollars on pollution controls and operational improvements to comply with these standards, one of which has been in place for as long as 18 years.

C. SIERRA CLUB'S CHALLENGES TO THE STANDARDS ARE UNTIMELY.

The CAA requires that challenges to an agency action promulgating an emission standard "shall be filed within sixty days" from publication of the notice in the Federal Register. 42 U.S.C. § 7607(b)(1). The sixty-day periods following the publication of the final rules at issue have long since passed, and judicial review of the standards adopted in these rules, when sought, has been pursued and concluded. Therefore, the Court lacks jurisdiction to review Sierra Club's claims. *See NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

³ National Emission Standards for Hazardous Air Pollutants for Source Categories: Petroleum Refineries; Final Rule, 60 Fed. Reg. 43,244, 43,246 (Aug. 18, 2005). JA ____.

Sierra Club has exercised or foregone its right to challenge the regulations underlying EPA's 90 Percent Notice. *See* Pet. Br. at 17-20. It is too late for Sierra Club to challenge the standards it cites in its Brief. *See* Pet. Br. at 10-13. First, Sierra Club argued in comments on several of EPA's proposed rules that the standards being proposed by EPA at the time were illegal because they utilized air pollutants, such as volatile organic compounds ("VOCs") and particulate matter ("PM"), as surrogates for controlling emissions of section 112(c)(6) pollutants. Sierra Club claimed that the statute directed EPA to promulgate numeric emission limits for the named section 112(c)(6) pollutants (PCB, HCB and POM). *See* Table D. In each instance, EPA rejected those comments and issued final rules and, as far as we can tell, Sierra Club did not challenge EPA's use of surrogates in those rules in court. Accordingly, Sierra Club cannot collaterally attack those rules in this proceeding. The table below summarizes Sierra Club's participation in several of those rules.

TABLE D: Sierra Club raised issue in rulemaking but failed to pursue in court

Rule	HAP & Control Strategy	Sierra Club Challenges
Hazardous Waste Combustor NESHAP	PCBs: EPA argues that surrogate numeric limits (hydrocarbon (HC) and carbon monoxide (CO)) and a destruction removal	Sierra Club consistently argued that surrogates HC & CO were inadequate to control PCB emissions. EPA consistently rejected those arguments. Sierra Club has had ample opportunity to be heard by both the Agency and the D.C. Circuit on this issue:

Rule	HAP & Control Strategy	Sierra Club Challenges
	<p>efficiency requirement sufficiently control PCB emissions, and therefore PCB emissions from HWCs are subject to regulation for purposes of §112(c)(6). 70 Fed. Reg. 59,401, 59,433 (Oct. 12, 2005); JA __; EPA Br. at 47-49.</p>	<ul style="list-style-type: none"> • 1996: EPA proposed CO/HC as surrogates for non-dioxin/furan organic HAPs (e.g., PCB), along with a DRE requirement. 61 Fed. Reg. 17,358, 17,375-436 (Apr. 19, 1996). JA __. This proposed rule predates EPA's current docketing system, and any comments Sierra Club might have offered are not available electronically. • 1999: EPA finalized the CO/HC PCB surrogate emission limits and DRE requirement as proposed. 64 Fed. Reg. 52,828, 52,847 (Sept. 30, 1999). JA __. • 2001: D.C. Circuit vacated and remanded the 1999 rule to EPA in full on other grounds. <i>Cement Kiln Recycling Coalition v. EPA</i>, 255 F.3d 855 (D.C. Cir. 2001). Sierra Club is a party to that case. • 2004: EPA proposed a new HWC MACT rule. Sierra Club commented criticizing EPA's use of the CO/HC surrogate. See Response to Comments on Apr. 20, 2004 HWC MACT Proposed Rule at 341-42 (EPA-HQ-OAR-2004-0022-0442 Sept. 2005). JA __. • 2005: EPA rejected Sierra Club's CO/HC criticism in its preamble to the 2005 final HWC rule. 70 Fed. Reg. 59401, 59433 (Oct. 12, 2005). JA __. Sierra Club petitioned EPA to reconsider portions of the rule,

Rule	HAP & Control Strategy	Sierra Club Challenges
		<p>including the CO/HC surrogate limit for non-dioxin organic HAPs. Sierra Club Petition for Reconsideration at 12-16 (EPA-HQ-OAR-2004-0022-0517 Dec. 12, 2005). JA ____.</p> <ul style="list-style-type: none"> • 2006: EPA denied Sierra Club's petition to reconsider the CO/HC surrogate limit for non-dioxin organic HAPs. 71 Fed. Reg. 52624, 52627 (Sept. 6, 2006). JA ____. • 2007: In response to the Brick MACT decision, EPA solicited comments on its legal analysis in the HWC MACT. 72 Fed. Reg. 54875 (Sept. 27, 2007). JA ____. <p>Sierra Club responded with essentially the same criticism of the CO/HC surrogate standard. Earthjustice Comments on Behalf of Sierra Club at 20-24 (EPA-HQ-OAR-2004-0022-0613 posted Dec. 14, 2007). JA ____.</p> <ul style="list-style-type: none"> • 2008: EPA responded to Sierra Club's objections to the CO/HC surrogate standard and again declined to change its approach to controlling PCBs and other non-dioxin organic HAPs in its final reconsideration rule. 73 Fed. Reg. 64,068, 64,082 (Oct. 28, 2008). JA ____. • There are still petitions to review the HWC MACT pending before

Rule	HAP & Control Strategy	Sierra Club Challenges
		<p>the D.C. Circuit. There has been no substantive action on these cases since the court granted EPA's motion for voluntary remand of both the 2005 final rule and the 2008 reconsideration rule in June 2009. <i>See Sierra Club v. EPA</i>, No. 05-1441 (D.C. Cir. filed Dec. 8, 2005).</p> <ul style="list-style-type: none"> Any judicial challenge to EPA's approach to regulating PCB emissions from HWCs could only have been properly made in the pending direct challenges to the 2005 and 2008 HWC rules. <i>See</i> 42 U.S.C. §7607(b)(1).
Hospital, Medical, Infectious Waste Incinerator (HMIWI)	PCBs: EPA argues PCB emissions are "subject to regulation" because controls required under § 129 to control emissions of other pollutants (CO, dioxin/furans, mercury) from HMIWIs effectively control emissions of PCBs. 74 Fed. Reg. 51,368, 51,390 (Oct. 6, 2009); JA ___. EPA Br. at 47-49.	<p>Sierra Club argued that EPA must set a numeric limit for PCBs rather than relying on emissions reductions from §129 emissions controls.</p> <ul style="list-style-type: none"> 1999: Sierra Club sued EPA over what at the time was known as the Medical Waste Incinerator rule. The D.C. Circuit upheld EPA's rule, but remanded to the agency for further explanation of the reasoning it used to set the MWI floors. <i>Sierra Club v. EPA</i>, 167 F.3d 658 (D.C. Cir. 1999). According to the Court's summary of the arguments, Sierra Club did not specifically challenge EPA's treatment of PCB emissions in the MWI rule in that case. <i>Id.</i> 2006: EPA and Sierra Club entered

Rule	HAP & Control Strategy	Sierra Club Challenges
		<p>a consent agreement setting a timeline for a new rule. 71 Fed. Reg. 7,036 (Feb. 10, 2006). JA __.</p> <ul style="list-style-type: none"> • 2008: EPA proposed a new HMIWI rule, in which EPA argued that PCBs were sufficiently “subject to standards” because controls to meet numeric limits for 129 pollutants (e.g., those for CO, dioxin/furans and mercury) also limited PCB emissions. 73 Fed. Reg. 72,962, 72,992 (Dec. 1, 2008). JA __. Sierra Club argued in comments that EPA’s §129 justification was insufficient for the §112 (c)(6) determination, and EPA must set § 112 emission standards for PCBs. Earthjustice Comments on Behalf of Sierra Club at 16 (EPA-HQ-OAR-2006-0534-0355 posted Feb. 18, 2009). JA __. • 2009: EPA issued a final HMIWI rule and specifically rejected Sierra Club’s comment, reiterating its reasoning from the proposed rule. 74 Fed. Reg. 51,368, 51,390 (Oct. 6, 2009). JA __. • Sierra Club did not challenge in court EPA’s use of surrogates to control PCB emissions from HMIWIs in the 2009 rule. <i>Med. Waste Inst. v. EPA</i>, No. 09-1297 (D.C. Cir. filed Dec. 7, 2009) (Intervenor Sierra Club’s Proof Brief (ECF No. 1255859)). Sierra

Rule	HAP & Control Strategy	Sierra Club Challenges
		<p>Club intervened in an industry challenge to the 2009 HMIWI rule, but did not raise the issue of PCB emissions, nor did Sierra Club file its own petition for judicial review of the rule. <i>Med. Waste Inst. v. EPA</i>, No. 09-1297 (D.C. Cir. filed Dec. 7, 2009).</p> <ul style="list-style-type: none"> • Subsequent amendments to the HMIWI rule were not related to PCB emissions. <i>See</i> 76 Fed. Reg. 18407 (Apr. 4, 2011). JA ____.
Large Municipal Waste Combustor	<p>PCBs: EPA argues PCB emissions are “subject to regulation” because controls required under § 129 to control emissions of other pollutants (PM, and mercury) from large MWCs effectively control emissions of PCBs. <i>See</i> 71 Fed. Reg. 27,324 (May 10, 2006) (promulgating emission controls as proposed in 70 Fed. Reg. 75348, 75356 (Dec. 19, 2005)); EPA Br. at 47-49.</p>	<p>Sierra Club argued that EPA must set a numeric limit for PCBs in order to comply with § 112(c)(6) rather than relying on emissions reductions from §129 emissions controls.</p> <ul style="list-style-type: none"> • 2005: EPA proposed an MWC rule, and argued that PCBs were sufficiently “subject to standards” under §112(c)(6) because controls to meet numeric limits for §129 pollutants (e.g., those for PM and mercury) also limited PCB emissions. 70 Fed. Reg. 75,348, 75,356 (Dec. 19, 2005). JA ____. • 2006: Sierra Club argued in comments that EPA’s surrogate approach was improper because EPA had not shown PM and mercury were appropriate surrogates for PCB. But EPA rejected that argument, reiterating its reasoning from the proposed

Rule	HAP & Control Strategy	Sierra Club Challenges
		<p>rule, and promulgated the surrogate approach as proposed. Summary of Public Comments and Responses for December 19, 2005 Proposed Rule at 6-8 (EPA-HQ-OAR-2005-0117-0134 Apr. 25, 2006) (responding to comments submitted by Earthjustice on behalf of Sierra Club); JA __; 71 Fed. Reg. 27324 (May 10, 2006). JA __.</p> <ul style="list-style-type: none"> • 2006: Sierra Club petitioned for reconsideration of the rule on several issues, but did not raise the PCB surrogate issue. <i>See</i> 72 Fed. Reg. 13,016 (Mar. 20, 2007). JA __. • 2007: Sierra Club petitioned the D.C. Circuit for review of the MWC rule. EPA voluntarily remanded the rule and granted reconsideration on three issues unrelated to PCB emissions. <i>Sierra Club v. EPA</i>, 2008 U.S. App. LEXIS 3829, No. 06-1250 (D.C. Cir. Feb. 15, 2008); 72 Fed. Reg. 13016 (Mar. 20, 2007). JA __. • Any judicial challenge to EPA's approach to regulating PCB emissions from large MWCs could only have been properly made in the pending direct challenge to the 2006 MWC rule. <i>See</i> 42 U.S.C. §7607(b)(1).

Rule	HAP & Control Strategy	Sierra Club Challenges
Small Municipal Waste Combustor	<p>PCBs: EPA argues that PCB emissions are “subject to regulation” because controls required under § 129 to control emissions of other pollutants (PM and mercury) from small MWCs effectively control emissions of PCBs. <i>See</i> 65 Fed. Reg. 76,350, 76,351 (Dec. 6, 2000) (promulgating emission limits under § 129); JA ___. EPA Br. at 47-49.</p>	<p>Sierra Club argued that EPA must set a numeric limit for PCBs in order to comply with § 112(c)(6) rather than relying on emissions reductions from §129 emissions controls.</p> <ul style="list-style-type: none"> • 1999: EPA proposed a small MWC rule that did not include specific requirements for PCB emission controls. <i>See</i> 64 Fed. Reg. 47276 (Aug. 30, 1999); JA ___. 64 Fed. Reg. 47,234 (Aug. 30, 1999). JA ___. • 2000: In comments, Sierra Club argued that § 112(c)(6) obligated EPA to promulgate specific numeric limits for PCBs. Public Comments and Responses at 27-28 (EPA-HQ-OAR-2004-0312-0005 June 2000). JA ___. EPA argued in its response that § 129 controls for PM and mercury effectively control PCB emissions and therefore a numeric emission limit specific to PCBs is not necessary. <i>Id.</i> EPA promulgated the final rule without a specific requirement to limit PCB emissions. 65 Fed. Reg. 76,349 (Dec. 6, 2000). JA ___. • Sierra Club challenged this rule in court. <i>Sierra Club v. EPA</i>, No. 01-1054 (D.C. Cir. filed Feb. 5, 2001) (consolidated with <i>Ne. Maryland Waste Disposal Auth. v. EPA</i>, 358 F.3d 936 (D.C. Cir. 2004)). But the court’s opinion did not address

Rule	HAP & Control Strategy	Sierra Club Challenges
		the issue of PCB emissions. Sierra Club refers to a 2003 agreement with EPA to “address the agency’s failure to set PCB standards” in other litigation. Pet. Br. at 19-20.

For other standards, Sierra Club did not challenge EPA’s approach to controlling section 112(c)(6) pollutants in either comments during EPA’s rulemaking or in court. Table E below lists those rules. Sierra Club has waived its right to raise such claims and thus cannot now raise the same claims in a challenge to EPA’s 90 Percent Notice.

TABLE E: Sierra Club failed to pursue issue in rulemaking or litigation

Rule	HAP & Control Strategy	Sierra Club Challenges
Hazardous Organic NESHAP	HCB: EPA argues HCB is “subject to regulation” under § 112(c)(6) because it is listed among the HAPs regulated through the MACT control measures required under the rules. EPA Br. at 43-46 (citing 59 Fed. Reg. 19402, 19405	Sierra Club did not challenge in court EPA’s regulation of HCB emissions in either the original MACT standards or EPA’s subsequent statutorily required review of those standards under CAA §§112(f) and 112(d)(6). <i>See NRDC v. EPA</i> , 529 F.3d 1077 (D.C. Cir. 2008).

Rule	HAP & Control Strategy	Sierra Club Challenges
	(Apr. 22, 1994)).	
Pesticide Active Ingredient Production NESHAP	HCB: EPA argues HCB is “subject to regulation” under § 112(c)(6) because it is listed among the HAPs regulated through control measures required under the rule. EPA Br. at 43-46 (citing 64 Fed. Reg. 33,550, 33,552-53 (June 23, 1999)).	Sierra Club did not challenge EPA’s regulation of HCB emissions in this rule in court or through a petition for reconsideration.
Aerospace NESHAP	POM: EPA argues the rule provides standards for control of “organic HAP” emissions, of which POM is a subset, and therefore POM emissions are “subject to regulation” under § 112(c)(6). EPA Br. at 46 (citing 60 Fed. Reg. 45,948, 45,962 (Sept. 1, 1995)).	Sierra Club did not challenge EPA’s regulation of POM emissions in this rule in court or through a petition for reconsideration.
Petroleum Refineries	POM: EPA argues the rule provides	Sierra Club did not challenge EPA’s regulation of POM emissions in this rule

Rule	HAP & Control Strategy	Sierra Club Challenges
NESHAP	standards for control of “organic HAP” emissions, of which POM is a subset, and therefore POM emissions are “subject to regulation” under § 112(c)(6). EPA Br. at 46 (citing 60 Fed. Reg. 43,244, 43,245 (Aug. 18, 1995)).	in court or through a petition for reconsideration.
Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills NESHAP	POM: EPA argues the rule provides standards for control of “organic HAP” emissions, of which POM is a subset, and therefore POM emissions are “subject to regulation” under § 112(c)(6). EPA Br. at 46 (citing 66 Fed. Reg. 3180, 3185 (Jan. 12, 2001)).	Sierra Club did not challenge EPA’s regulation of POM emissions in this rule in court or through a petition for reconsideration.
Coke Oven Batteries NESHAP	POM: EPA argues the rule provides standards for control emissions of “polycyclic organic compounds,” of which POM is a subset, and therefore POM emissions are	Sierra Club did not challenge EPA’s regulation of POM emissions in this rule in court or through a petition for reconsideration.

Rule	HAP & Control Strategy	Sierra Club Challenges
	“subject to regulation” under §112(c)(6). EPA Br. at 44-45 (citing 57 Fed. Reg. 57,534, 57,536 & 57,556 (Dec. 4, 1992)).	

Finally, Sierra Club has asserted these same claims in rules that are currently being challenged in this Court. *See U.S. Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. filed Apr. 14, 2011)(challenging the major source boiler rule); *American Chemistry Council v. EPA*, No. 11-1141 (D.C. Cir. filed May 17, 2011) (challenging the area source boiler rule). These rules set standards for area and major source boilers, which contribute to the 90% requirement of section 112(c)(6). *See* Table C *supra* at 21-22; Pet. Brief at 17. The cases are in abeyance pending EPA’s completion of administrative reconsideration of the rules, which will be completed in spring 2012. *American Chemistry Council v. EPA*, No. 11-1141 (D.C. Cir. July 28, 2011) (order granting abeyance); *U.S. Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. Aug. 3, 2011) (order granting abeyance). Sierra Club and many other directly affected parties in those cases have contributed to the development of an administrative record on which Sierra Club’s substantive claims may be addressed by EPA and then by a reviewing court. The adequacy of

standards in those rules is grounded in the extensive records of those rules, which are not before this Court. This Court should decline to address Sierra Club's claims here because the Court does not have the record of the final agency actions being challenged here.

II. THE 90 PERCENT NOTICE IS NOT A RULE, NOR WOULD IT UNDER ANY CIRCUMSTANCES BE SUBJECT TO PUBLIC NOTICE AND COMMENT REQUIREMENTS.

Intervenors support the position taken by EPA that the 90 Percent Notice bears none of the indicia of a substantive rule to which the Administrative Procedure Act ("APA") 5 U.S.C. § 553 notice and comment requirements apply. EPA Br. at 49-54. It does not meet the textual definition of a rule, of an agency statement that is "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Such an agency action is not a rule and is not subject to judicial review. *See, e.g., Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004); *Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115 (D.C. Cir. 1988).

When determining whether a rule is substantive, the D.C. Circuit considers four questions: (1) "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action; (2) did the agency publish it in the Code of Federal Regulations; (3) did the rule amend or repudiate a prior rule;

and (4) whether the agency invoked its legislative authority. *Am. Min. Congress v. Mine Safety & Health Admin*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (dismissing petition where agency document was without legal effect and not subject to notice and comment rulemaking). Regarding the 90 Percent Notice, the answer to each of these questions can only be no. First, there is no conceivable scenario under which EPA might use this notice as the basis for taking enforcement action, because it imposes no obligations on sources regulated by the standards it mentions. *Id.* Second, this Notice will most certainly not be published in the Code of Federal Regulations because publication in the Code of Federal Regulations is restricted to rules that have “general applicability and legal effect.” 44 U.S.C. § 1510(a). Third, the notice was not a substantive rule because it does not repudiate or amend any prior rules. The 90 Percent Notice does not supply “crisper and more detailed” requirements (*Am. Min. Congress*, 995 F.2d at 1109, 1112); it supplies no requirements at all. Finally, EPA did not invoke any authority – much less its legislative authority – in the 90 Percent Notice. 76 Fed. Reg. 15,308. JA ____.

Overall, “the legislative or interpretive status of the agency rules turns . . . on the prior existence or non-existence of legal duties and rights.” *Am. Min. Congress*, 995 F.2d at 1110. The 90 Percent Notice does not create or modify any legal duties or rights. The Notice is not a rule and under any interpretation of the Notice, the APA notice and comment requirements are inapplicable.

EPA appropriately describes the 90 Percent Notice in its Brief as “commemorat[ive]” of the promulgation of emission standards to fulfill the agency’s legal obligations, as agency “bookkeeping” and a “ministerial” document. EPA Br. at 51, 49, 52. Among Intervenor’s members are many facilities that are regulated by the substantive rules commemorated in the Notice. Any and all obligations on these facilities are embodied in the final rules that have gone into effect, and caused facilities to install pollution controls or implement more stringent operating practices to meet the standards. No company reading the Notice has adjusted its operations or reassessed its liabilities on the basis of the Notice. Moreover, no company reading the Notice would anticipate that any of the issues addressed administratively and in some cases judicially, would now be newly subject to comment and amendment on the basis of the Notice.

III. THE STANDARDS IN THE RULES ARE “STANDARDS” UNDER SECTION 112(c)(6) OF THE CLEAN AIR ACT.

Should the Court reach the merits of the case, Intervenor’s support EPA’s analysis demonstrating that in the substantive rules, EPA properly imposed a range of emission control measures that constitute “standards” under section 112(c)(6) of the CAA. EPA Br. at 37-49. This reasoning obtains under both the plain text and a reasonable interpretation of the CAA. As shown in Tables D and E (*supra* at 27-38), EPA has over the last 18 years consistently addressed the claim Sierra Club

raises here, concluding each time that section 112(c)(6) contemplates the full range of control requirements EPA required in those rules. In addition, the controls required under those rules are achieving the HAP emission reductions and health benefits intended by Congress as projected by EPA in each rule. *See, e.g.*, discussion of SOCFI and refinery rules, *supra* at 24-25.

Intervenors support EPA's arguments on the merits, but emphasize that EPA's reasoning is fully elucidated by the records of the rules that are not before this Court.

CONCLUSION

For all the foregoing reasons, the petition for review should be dismissed or denied.

Respectfully submitted,

April 16, 2012

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this Brief for Intervenors for Respondents contains 7,958 words as counted by the Microsoft Word word processing system, and complies with the applicable word limitation.

April 16, 2012

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CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I certify that this Brief for Intervenor for Respondents and Rule 26.1 Disclosure Statement were served electronically through the Court's CM/ECF system on all registered counsel.

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