

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1131 (and consolidated cases)

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, *et al.*
Petitioners,

v.

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

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

PROOF REPLY BRIEF FOR PETITIONER SIERRA CLUB

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
GLOSSARY OF ACRONYMS AND ABBREVIATIONS.....	v
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	1
I. EPA’S FLOORS ARE UNLAWFUL AND ARBITRARY.	1
A. EPA’s Selection Of The “Best Performing” Units Is Unlawful And Arbitrary.	1
1. EPA’s Use Of Technology As A Proxy For Performance In Selecting The “Best Performing” Units Is Unlawful.....	1
2. EPA’s Use Of Technology As A Proxy For Performance In Selecting The “Best Performing” Units Is Unreasonable And Arbitrary.	5
B. EPA’s Use Of The Upper Prediction Limit To Set Floors Is Unlawful And Arbitrary.	7
1. EPA’s Claim That It Can Set Floors Reflecting Its “Upper Prediction Limit” Is Unlawful.	7
2. EPA’s Decision To Set Floors At The Upper Prediction Limit Is Unreasonable And Arbitrary.....	10
C. EPA’s Decision To Set Floors At Three Times The Method Detection Level Is Unlawful And Arbitrary.....	12
D. EPA’s Decision To Set New-Unit Standards At The Existing-Unit Floor Level Is Unlawful And Arbitrary.	14
II. EPA’S REFUSAL TO SET FINAL STANDARDS REFLECTING THE MAXIMUM ACHIEVABLE DEGREE OF REDUCTION IS UNLAWFUL AND ARBITRARY.	15
A. EPA’s Refusal To Set Beyond-The-Floor Standards For New Multiple Hearth Units Is Unlawful And Arbitrary.	15
B. EPA’s Refusal To Set Beyond-The-Floor Standards For Existing Units Is Unlawful And Arbitrary.	16
III. EPA’S REFUSAL TO REQUIRE EMISSIONS MONITORING IS UNLAWFUL AND ARBITRARY	21

CONCLUSION.	22
CERTIFICATE REGARDING WORD LIMITATION.	24
CERTIFICATE OF SERVICE.	25
STATUTES AND REGULATIONS	

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>AFL-CIO v. Chao</i> , 409 F.3d 377 (D.C. Cir. 2005).....	9
<i>Alaska DEC v. EPA</i> , 540 U.S. 461 (2004).....	19
<i>Amer. Textile Mfrs. Inst., Inc. v. Donovan</i> , 452 U.S. 490 (1981).....	19
<i>Ass’n of Battery Recyclers v. EPA</i> , 208 F.3d 1047 (D.C. Cir. 2000).....	3
* <i>Cement Kiln Recycling Coal. v. EPA</i> , 255 F.3d 855 (D.C. Cir. 2001).....	2, 3, 4, 13
<i>Chevron v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	8, 17
<i>Entergy v. Riverkeeper</i> , 556 U.S. 208 (2009).....	18, 19
<i>Ethyl Corp. v. EPA</i> , 51 F.3d 1053 (D.C. Cir. 1995).....	18
<i>Husqvarna v. EPA</i> , 254 F.3d 195 (D.C. Cir. 2001).....	18
<i>Mossville Env’tl. Action Now v. EPA</i> , 370 F.3d 1232 (D.C. Cir. 2004) (“MEAN”).....	9, 10
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> 463 U.S. 29 (1983).....	4, 6, 11, 14, 16, 22

* Authorities upon which we chiefly rely are marked with an asterisk.

* <i>Nat'l Lime Ass'n v. EPA</i> , 233 F.3d 625 (D.C. Cir. 2000).....	3
<i>Nat'l Lime Ass'n. v. EPA</i> , 627 F.2d 416 (D.C. Cir. 1980).....	19
<i>New York v. EPA</i> , 443 F.3d 880 (D.C. Cir. 2006).....	9, 10
* <i>Northeast Maryland Waste Disposal Auth. v. EPA</i> , 358 F.3d 936 (D.C. Cir. 2004).....	2, 4, 5, 14
* <i>Sierra Club v. EPA</i> , 479 F.3d 875 (D.C. Cir. 2007).....	2, 9, 13
<i>Whitman v. Am. Trucking Ass'n</i> , 531 U.S. 457 (2001).....	9, 10

STATUTES

42 U.S.C. § 7411(a)(2).....	16
42 U.S.C. § 7414(a)(3).....	22
42 U.S.C. § 7429(a)(1).....	16
42 U.S.C. § 7429(a)(2).....	8, 15, 17, 18, 19
42 U.S.C. § 7429(c)(1).....	21, 22
42 U.S.C. § 7429(g)(2–4)	16
42 U.S.C. § 7547(a)(3).....	18
42 U.S.C. § 7661c(b)	22

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 60.4770	16
40 C.F.R. § 60.4775	16

FEDERAL REGISTER

76 Fed. Reg. 15,372 (Mar. 21, 2011).....	16, 22
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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

Br.	Proof Brief for Petitioner Sierra Club
EPA or the agency	U.S. Environmental Protection Agency
EPA Br.	Proof Brief for Respondents EPA
Floor Memo	EPA-HQ-OAR-2009-0559-0157
Floors	Statutory minimum stringencies
NACWA	National Association of Clean Water Agencies and Hatfield Township Minicipal Authority
NACWA Br.	Page Proof Brief of Intervenors- Respondents
Palo Alto Comments	EPA-HQ-OAR-2009-0559-0085
RTC	EPA-HQ-OAR-2009-0559-0171
UPL	Upper prediction limit

SUMMARY OF ARGUMENT

EPA's brief confirms that the challenged rule marks yet another attempt by this agency to circumvent the Clean Air Act's incinerator and air toxics provisions. Ignoring the statutory text and dismissing repeated decisions by this Court, EPA has set standards that do not reflect either the maximum degree of reduction that is achievable or the emission level achieved by the relevant best-performing incinerators. These standards reduce emissions of mercury and many other pollutants by less than one percent. Flouting the statute's mandate to establish emissions monitoring requirements for incinerators, EPA has established only parameter monitoring and once-per-year stack testing requirements.

ARGUMENT

I. EPA'S FLOORS ARE UNLAWFUL AND ARBITRARY.

A. EPA's Selection Of The "Best Performing" Units Is Unlawful And Arbitrary.

1. EPA's Use Of Technology As A Proxy For Performance In Selecting The "Best Performing" Units Is Unlawful.

EPA agrees that even though factors other than technology affect sewage sludge incinerators' emissions, the agency selected incinerators for its floor analysis based solely on the type of control technology they use. *See* Br. 18-19. EPA argues this approach was lawful because, for various reasons, non-technology

factors affect sewage sludge incinerators' emissions less than they affect other types of incinerators' emissions. EPA Br. 56-59.

As this Court has already held, a “decision to base floors exclusively on technology even though non-technology factors affect emission levels [] violates the Act.” *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) (emphasis added); *see also Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 954-955 (D.C. Cir. 2004) (technology-based approach unlawful where EPA did not demonstrate that “technology alone” determined emission levels); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 863 (D.C. Cir. 2001) (using technology as proxy for performance violates statute unless technology is “the only factor determining emission levels”) (emphasis in original) (*quoting Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633 (D.C. Cir. 2000)).

These holdings – none of which EPA bothers to acknowledge – flow directly from the core requirement in §129(a)(2) and §112(d)(3). If technology is not the only factor affecting emissions, technology-based floors do not reflect emission levels actually achieved by the relevant best units. *See Sierra Club*, 479 F.3d at 880 (floors must reflect “the emission level actually *achieved* by the best performers (those with the lowest emission levels)”) (emphasis in original); *Northeast Maryland*, 358 F.3d at 954 (floors unlawful where EPA fails to demonstrate that they “reflect the emission levels of the best-performing” units);

Cement Kiln, 255 F.3d at 865 (Act “requires” EPA to “set floors at the emission level achieved by the best-performing sources”); *Nat’l Lime*, 233 F.3d at 633 (basing floors on technology unlawful unless it is “the only factor determining emission levels”). EPA cannot avoid this precedent just by claiming that non-technology factors are less important here than in other rulemakings. *See Ass’n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1052 (D.C. Cir. 2000) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning”) (citation omitted).

EPA’s lawyers claim, *post hoc*, that “variations in sludge content have little impact on the emissions performance of the best performing units.” EPA Br. 58. Their brief also cites *dicta* that basing floors on technology “could be” reasonable if “the Agency can demonstrate with substantial evidence – not mere assertions – that MACT technology significantly controls emissions, or that factors other than the control have a negligible effect,” *Cement Kiln*, 255 F.3d at 866. EPA Br. 55.

The *dicta* in *Cement Kiln* cannot be read to overrule the plain holding in that case and the identical holdings in every prior and subsequent case construing the floor language in §112 and §129. Not only would such a reading elevate *dicta* above established and binding precedent on an issue of statutory interpretation, *see Battery Recyclers*, 208 F.3d at 1052, it would also allow EPA to issue floors that

violate the Clean Air Act by not reflecting the emission level achieved by the relevant best-performing sources. *Northeast Maryland*, 358 F.3d at 946 (“[W]e need not spend time deconstructing ... dicta, because the words of the statute must ultimately decide the issue.”). In any event, EPA itself never claimed that the effect of sludge on sewage sludge incinerators’ emissions is “little,” (EPA Br. 58) let alone “negligible” (*Cement Kiln*, 255 F.3d at 866). All EPA claims to know is that there are some pre-existing limits on the amount of metals that sewage sludge incinerators can burn and emit. EPA Br. 58. EPA does not deny that individual incinerators’ metal levels can be far below those limits, or pretend to know the actual levels of metals in the sludge that the best-performing incinerators burn. Indeed, the only record information on this point refutes EPA’s lawyers’ claim by showing that metal levels in sludge can have an enormous impact on metal emissions. Palo Alto Comments at 5-7, 13, JA____-__, ____ (Palo Alto reduced mercury content in sludge by more than 60 percent, with similar reduction in emissions); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”).

2. EPA's Use Of Technology As A Proxy For Performance In Selecting The "Best Performing" Units Is Unreasonable And Arbitrary.

EPA does not dispute that it bears the burden of “demonstrat[ing] with substantial evidence – not mere assertions” that its floors reflect the actual performance of the best units. Br. 20 (*quoting Northeast Maryland*, 358 F.3d at 954). As EPA's brief confirms, however, the agency has never even attempted to demonstrate that technology alone determines sewage sludge incinerators' emissions, or that the units EPA dubbed “best” are the actual best performers just because they use certain technologies. *Compare* EPA Br. 55-60 *with* Br. 20. Further, EPA fails to refute, or even confront, record evidence that the units it picked are not the best performers. Br. 21-22. *See Northeast Maryland*, 358 F.3d at 954 (“Given the absence of evidence that the permit levels reflect the emission levels of the best-performing 12 percent...and affirmative evidence that they do not, we cannot uphold the MACT floors”).

Without disputing Palo Alto's comments that it has greatly reduced its mercury emissions by reducing mercury in the sludge it burns, EPA now argues they “do not demonstrate that Palo Alto's program is unique among sewage sludge incinerators in this respect.” EPA Br. 59. That is precisely the point. Because EPA lacks any emissions data for 121 of 143 other multiple hearth incinerators and 54 of 60 fluidized bed incinerators, Br. 6, the agency has no idea how many

incinerators other than Palo Alto's also reduce their emissions by burning cleaner sludge.

EPA's lawyers try to paper over EPA's internally contradictory claims that: (1) it identified the best performing incinerators based on the technology they use; but (2), different incinerators for which emissions data happened to be available in State databases have "lower" emissions. Br. 22 (*quoting* 76 Fed. Reg. 15,372, 15,387/1 (Mar. 21, 2011), JA____). They assert the units for which EPA obtained data from State databases "met the same criteria" EPA used in choosing units based on technology. EPA Br. at 57. That argument appears nowhere in the record, which makes clear that EPA's only real "criteri[on]" for including those incinerators in the floor analysis was that emissions data for them was available in State databases. Floor Memo 7, JA ____; *See State Farm*, 463 U.S. at 50. Indeed, with one insignificant exception, EPA assumed that every incinerator for which it had emissions information was within the best performing twelve percent. Floor Memo at 7, JA ____.

Lastly, EPA seeks to dismiss the agency's failure to implement its own stated selection criteria, Br. 21-22, as relevant only to the amount of data it collected. EPA Br. 46. If EPA had truly selected the best performers based on their control technology, the Palo Alto incinerator – which undisputedly has better technology than at least some of the incinerators EPA selected – would have been

in the top 12 percent. Br. 21-22. Similarly, EPA would have no basis for distinguishing between the incinerators it picked as best-performing from all the other incinerators using the same technology (and therefore, under EPA's theory, performing equally well). *Id.* EPA's unexplained exclusion of these incinerators from the top 12 percent lays bare the truth behind EPA's floor approach: the agency simply claimed all incinerators for which it had emissions information are the best performers without having a rational basis for that claim.

B. EPA's Use Of The Upper Prediction Limit To Set Floors Is Unlawful And Arbitrary.

1. EPA's Claim That It Can Set Floors Reflecting Its "Upper Prediction Limit" Is Unlawful.

EPA does not dispute that §129(a)(2) requires floors for existing units to reflect the "average" emission level achieved by the best-performing 12 percent of incinerators. *See* Br. 23-24. Yet nowhere in its brief does EPA even try to explain how setting floors at the "upper prediction limit" (UPL) for the entire 12 percent satisfies this statutory requirement. *See id.* at 24 (*quoting* 76 Fed. Reg. at 15,389/2, JA____). Instead, EPA's position is that it can simply set floors at levels it expects any incinerator in the top 12 percent "to meet 'every day and under all operating

conditions.” EPA Br. 47 (*quoting Mossville Env'tl. Action Now v. EPA*, 370 F.3d 1232, 1241 (D.C. Cir. 2004) (“*MEAN*”)).¹

Section 129(a)(2) unambiguously provides that emission standards for existing incinerators “shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.” 42 U.S.C. § 7429(a)(2) (emphasis added). EPA’s own description of the UPL as the number EPA expects any future test by any unit in the top 12 percent to “fall below” makes clear that the UPL is higher than the highest – i.e., worst – emission level EPA expects any of the units in the top 12 percent to achieve. Br. 24. It is no more the “average” emission level achieved by the best performers than the worst grade a teacher expects any child in his class to achieve is the average grade for the class. Nowhere in the record or in its brief has EPA ever explained how the UPL is an “average.” Because the UPL is not the average, EPA’s floors are unlawful. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter....”).

EPA does not dispute that by contending that it can set floors for existing incinerators at the UPL for the entire group of best performers it deprives the term

¹ EPA incorrectly claims that Sierra Club does not challenge EPA’s use of an UPL generally but only whether §129 allows the agency to use an UPL when it does not have emissions test data for the best performing 12 percent of units. EPA Br. 41 n.12, 46. *But see* Br. 23-28.

“average” of meaning. Br. 24. EPA’s brief fails to identify any meaning or purpose the term “average” might retain in §129(a)(2) if it can be expanded to encompass the worst emission level EPA expects any unit in the top 12 percent to ever reach. Further, setting floors at the UPL is effectively setting them at the level EPA regards as “achievable” for the worst-performing incinerator in the top 12 percent, not the average level the top 12 percent “actually achieved.” *Sierra Club*, 479 F.3d at 880. This Court has consistently rejected agencies’ attempts to deprive statutory language of meaning and to nullify objective limits that Congress places on their discretion, and it should reject this attempt by EPA to rewrite §129. *See New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006) (rejecting statutory interpretation that would make word “‘insignificant’ if not ‘superfluous’”) (citation omitted); *Whitman v. ATA*, 531 U.S. 457, 485 (2001) (“The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”); *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005) (“whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed”).

Contrary to EPA’s suggestion (at 47), *MEAN* does not excuse EPA from compliance with §129(a)(2)’s requirement that floors reflect the “average” emission level achieved by the best-performing units. The issue in *MEAN* was whether EPA could use an existing regulatory limit to estimate the performance of

the best-performing five sources all subject to that limit. 370 F.3d at 1237. The Court held the regulatory limit reasonably estimated those sources' actual performance given record evidence of the variability. *Id.* at 1242. Although it holds EPA may consider individual sources' long-term variability in determining the emission levels they have achieved, *MEAN* does not hold that once EPA has determined sources' emission levels (considering variability) it need not set floors at the "average" emission level achieved by the best-performing 12 percent. Indeed, because EPA found that the same regulatory limit reflected the actual performance of all five best-performing sources, *id.* at 1237, the question of determining the "average" emission level achieved by these five sources did not arise in *MEAN*. EPA's invitation to misread *MEAN* as rewriting §129(a)(2) and absolving the agency of any obligation to assure its floors reflect the "average" emission level achieved by the top-performing 12 percent must be rejected. *See New York*, 443 F.3d at 887; *Whitman*, 531 U.S. at 485.

2. EPA's Decision To Set Floors At The Upper Prediction Limit Is Unreasonable And Arbitrary.

EPA's brief does not identify any part of the record where EPA demonstrated with substantial evidence – or at all – that the UPL for all incinerators in the top 12 percent represents the "average" emission level achieved by this group. EPA's failure to provide the required demonstration, together with

strong record evidence that EPA's UPL approach does not reflect the best units' performance, renders its rule arbitrary. Br. 25-26 (*quoting Northeast Maryland*, 358 F.3d at 954).

For two pollutants, the UPL approach yielded new-unit floors that were worse than the agency's existing-unit floors – a mathematically impossible result. EPA Br. 53; Br. 26-27. EPA's brief confirms that the record contains no explanation of why EPA thought it could nonetheless rely on the UPL to produce valid floors for other pollutants. EPA's lawyers argue that when EPA's UPL approach produced these results, the agency “was working with a smaller data set with greater variation in the data,” EPA Br. 53. EPA made no such claim in the record. *See State Farm*, 463 U.S. at 50. In any event, admitting that EPA's UPL approach produces absurd results in some circumstances scarcely demonstrates that it produces reasonable estimates in others, and nothing in the record even suggests that EPA identified a point at which data sets are both large enough and homogeneous enough that it can be confident the UPL will reasonably estimate the “average.”

In addition, EPA does not deny its selective use of the UPL yielded floors that were worse than if the agency had used the UPL either consistently or not at all. Br. 8-9, 27. Nor does the agency identify any record explanation for choosing to measure units' performance in two different ways within the same rulemaking

or believing both measures are valid even though they yield different results. *See id.*²

With respect to EPA's application of the UPL to data sets comprising less than 12 percent of sewage sludge incinerators (*see* Br. at 8-9, 27), EPA claims it used a statistical technique to show that it had the "amount" of data necessary to represent the top 12 percent. EPA Br. 43. The issue, though, is not whether EPA had enough data but whether the data it had were representative of the top 12 percent of units. EPA's claims that incinerators for which it had data were both among the top 12 percent and representative of other units in the top 12 percent are arbitrary and capricious. Br. 20-23, 28-30; *supra* 4-7.

C. EPA's Decision To Set Floors At Three Times The Method Detection Level Is Unlawful And Arbitrary.

EPA argues that the Court should ignore the unlawfulness of the floors it set at three times the method detection level because Sierra Club's objections to these floors were presented in a "conclusory manner." EPA Br. 60. To the contrary, the defect in those floors is a simple one and the opening brief explains it fully. Br. 30-31. Because floors set at three times the method detection level do not even purport to be estimates of the relevant best units' performance, they contravene

² In a footnote, EPA mischaracterizes Sierra Club's objection as an argument that the agency should have "applied the UPL analysis to the single lowest test run." EPA Br. 54 n.15. *But see* Br. 8-9, 27.

§129(a)(2) and binding Circuit precedent. *Id.* EPA does not dispute this point.

EPA Br. 60-62.

EPA instead pretends that the issue is whether its selection of three times the method detection level was a “scientific” or “policy” choice about how to address data at detection levels. *Id.* Regardless of whether EPA believes that its choice was scientific, floors do not satisfy §129 unless they reflect the “emission level actually achieved by the best performers (those with the lowest emissions).”

Sierra Club, 479 F.3d at 880. By failing to address this issue in its brief – let alone identify some part of the record where EPA even claimed that floors set at three times the method detection level reflect the relevant best units’ performance – EPA confirms that its floors are unlawful.

EPA also professes concerns about the reliability of its non-detect data. EPA Br. at 61. Those concerns do not excuse the agency from compliance with the statute. *See Cement Kiln*, 255 F.3d 865 (“Section 7412(d)(3) requires only that EPA set floors at the emission level achieved by the best-performing sources. If EPA cannot meet this requirement using the MACT methodology, it must devise a different approach capable of producing floors that satisfy the Clean Air Act.”). In any event, EPA concedes that unlawful approach it adopted – setting floors at a multiple of the method detection level – was just “[o]ne approach that can be applied to account for measurement variability.” *See Floor Memo* at 15, JA____.

D. EPA's Decision To Set New-Unit Standards At The Existing-Unit Floor Level Is Unlawful And Arbitrary.

EPA argues that it was justified in denying reconsideration of its decision to set new-unit standards at the existing-unit floors because commenting on its “99-percentile UPL method” was practicable. EPA Br. 64-65. Because the new-unit standards at issue are not the product of a UPL calculation, that argument is incorrect. *See* Br. 32-33.

On the merits, EPA's lawyers argue EPA did not just set new-unit standards at the existing-unit floors but, rather, applied “a relatively larger statistical adjustment” that happened to yield new-unit standards that equaled the existing-unit floors. EPA Br. 64. EPA itself never even claimed its decision to set these new-unit standards at the existing-unit floors resulted from any statistical exercise or that the resulting standards had anything to do with actual performance of the relevant best units. *State Farm*, 463 U.S. at 50. In any event, even if EPA's new-unit standards did reflect some additional statistical exercise, EPA's lawyers do not and cannot point to any record evidence demonstrating they reflect the relevant best incinerators' actual performance. *See Northeast Maryland*, 358 F.3d at 954.

II. EPA’S REFUSAL TO SET FINAL STANDARDS REFLECTING THE MAXIMUM ACHIEVABLE DEGREE OF REDUCTION IS UNLAWFUL AND ARBITRARY.

A. EPA’s Refusal To Set Beyond-The-Floor Standards For New Multiple Hearth Units Is Unlawful And Arbitrary.

EPA’s brief fails to dispute any of the reasons it was impracticable to comment on EPA’s refusal to set beyond-the-floor standards for new multiple hearth incinerators. Namely, EPA does not dispute that (1) its final standards for new multiple hearth incinerators appear for the first time in its final rule, (2) they are far weaker than both the standards it proposed and the hypothetical floors on which it sought comment, or (3) its rationale for declining to propose beyond-the-floor standards—the proposed floors were so strong that stronger standards were unachievable—is inapplicable to the floors EPA actually promulgated. Br. 34-36.

On the merits, EPA does not dispute its final standards for these incinerators fail to “reflect the maximum degree of reduction ... achievable.” 42 U.S.C. § 7429(a)(2). Instead, EPA’s lawyers claim setting standards at the floors was reasonable—and that Sierra Club lacks standing to challenge them—because no evidence indicates any new multiple hearth incinerators will be constructed. EPA Br. 67-68 & n.21.

EPA’s belief that new incinerators will not be built does not excuse its undisputed failure to meet the substantive requirements of §129(a)(2) when it set standards for these incinerators. Moreover, EPA’s lawyers ignore that new-unit

standards cover “modified” incinerators as well as new ones. *See* 40 C.F.R. §§ 60.4770, 60.4775; *see also* 42 U.S.C. §§ 7411(a)(2), 7429(a)(1), (g)(2–4); NACWA Int. Br. 10. Far from denying that existing multiple hearth incinerators will be modified, EPA created a separate subcategory for new multiple hearth incinerators in part to avoid discouraging such modifications. 76 Fed. Reg. at 15,384/3, JA____. *See also* NACWA, “Emergency Joint Motion for Stay,” Ex. 6, JA____ (identifying two multiple hearth incinerators that may be modified and subject to new-unit standards).

EPA’s lawyers also seek to rely on the agency’s explanation for refusing to propose standards more stringent than it proposed for all new incinerators. EPA Br. 69. EPA itself did not make any such claim with respect to the lax floors it ultimately issued for new multiple hearth units. Br. 35 (*citing* 75 Fed. Reg. 63,260, 63,277/2-3 (Oct. 14, 2010), JA____); *supra* 15; *see also State Farm*, 463 U.S. at 50.

B. EPA’s Refusal To Set Beyond-The-Floor Standards For Existing Units Is Unlawful And Arbitrary.

Defending its decision to set final standards at levels it regards as “cost-effective” rather than at levels reflecting the “maximum” degree of reduction that is “achievable” considering cost, *see* Br. at 36-37, EPA argues “it is reasonable for EPA to consider whether beyond-the-floor reductions are achievable, and then to

consider cost and other factors (including cost-effectiveness) in deciding whether to require additional reductions.” EPA Br. 70 (emphasis added).

EPA does not and cannot point to any ambiguity in the statute that would allow such an interpretation even if it were “reasonable.” Section 129(a)(2) provides that standards must “reflect the maximum degree of reduction in emissions ... that the Administrator, taking into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements, determines is achievable....” 42 U.S.C. § 7429(a)(2). This language unambiguously requires EPA to consider cost in determining what is achievable. It does not authorize EPA to separate “cost” from the achievability determination in §129(a)(2) and convert it into a separate and independent basis for “deciding whether to require additional reductions,” EPA Br. 70. *A fortiori*, it does not authorize EPA to establish “cost-effectiveness”—a factor that §129(a)(2) does not even mention—as a separate and independent basis for such decisions. *Chevron*, 467 U.S. at 842-43.

EPA agrees “cost-effectiveness” is a factor “other” than “cost.” EPA Br. 70. EPA argues, however, that §129(a)(2)’s enumeration of the factors EPA shall consider does not bar EPA from basing its decisions on “other” factors. *Id.* 71. To the contrary, the statute’s enumeration of the specific factors Congress intended EPA to consider makes clear that Congress did not intend EPA to base its

decisions on other factors. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995) (“The Administrator plainly oversteps her authority when she considers other factors” not listed in the statute.). Moreover, Congress enumerated the factors in §129(a)(2) to govern EPA’s achievability determination. *See supra* 17. Cost-effectiveness is not even relevant to achievability, and EPA does not claim otherwise. Br. 36-37.

EPA’s reliance on *Husqvarna v. EPA*, 254 F.3d 195 (D.C. Cir. 2001), EPA Br. 70-71, is misplaced. The question there was whether § 213(a)(3) of the Clean Air Act, 42 U.S.C. § 7547(a)(3), requires a “best balance” of the factors it enumerates. 254 F.3d at 200. Whether §213 (let alone §129) authorizes consideration of cost-effectiveness as one such factor was not before the Court.

Entergy v. Riverkeeper, 556 U.S. 208 (2009), is similarly inapposite. The Court held the Clean Water Act provision at issue did not require that standards reflect the greatest possible reduction in emissions. 556 U.S. at 218-219 (discussing 33 U.S.C. § 1326(b)’s requirement for “best technology available for minimizing adverse environmental impact”). By contrast, §129(a)(2) requires the “maximum degree of reduction... achievable.” 42 U.S.C. §7429(a)(2). That language does not “admit[] of degree,” but rather “refer[s] exclusively to the greatest possible reduction,” 556 U.S. at 219 (internal quotations omitted). *See*

also Alaska DEC v. EPA, 540 U.S. 461, 463, 485 (2004) (agreeing with EPA that “maximum” and “achievable” are “strong, normative terms.”).

EPA complains Sierra Club did not explain how cost would render application of a technology “unachievable.” EPA Br. 70. Because EPA contends it can consider cost (and cost-effectiveness) separately from achievability, *id.*, the question of how EPA might consider cost in determining achievability is not before the Court. In any event, as EPA recognizes, EPA Br. 70 n.22, Sierra Club explained that the relevant question regarding cost is whether a standard is “too costly to be achievable.” Br. 37; *see also Nat’l Lime Ass’n. v. EPA*, 627 F.2d 416, 432 & n.46 (D.C. Cir. 1980) (“The statutory standard is one of achievability, given costs.”). Contrary to EPA’s claim (at 70 n.22), this interpretation does not acknowledge that “some form of a cost-benefit analysis is permissible.” Rather, §129(a)(2) expressly defines the relationship between costs and benefits by requiring the “maximum” degree of reduction that is “achievable” considering cost. 42 U.S.C. § 7429(a)(2). *See Amer. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981) (through language requiring standards reduce risks “to the extent feasible,” “Congress itself defined the basic relationship between costs and benefits, by placing the ‘benefit’ ... above all other considerations save those making attainment of this ‘benefit’ unachievable.”) (*citing* 29 U.S.C. § 655(b)(5)).

Even if it were not unlawful for EPA to base decisions under §129(a)(2) on its own cost-effectiveness opinions, EPA does not dispute its cost-effectiveness analysis arbitrarily counted all of the costs but only some of the benefits for certain beyond-the-floor options. Br. 38. Claiming only that its analysis described potential control technologies and evaluated whether any cost-effective reductions could be achieved, EPA conspicuously fails to deny that it: (1) considered all the costs but only some of the pollutant reductions provided by a combination of activated carbon injection, a fabric filters and an afterburner, (2) thereby made this option look less cost-effective than it actually is; and (3) left unexplained its inconsistent approach. *See* Br. 38.

EPA also argues Sierra Club's comments on the beyond-the-floor standards EPA proposed show that raising this issue during the comment period was practicable. EPA Br. 72 n.23. But EPA does not dispute that neither the beyond-the-floor option at issue nor EPA's rationale for rejecting it were even mentioned in the proposal. Br. 39.

Finally, EPA argues that because §129 does not require standards to be based on "process changes" or "substitution of materials," as §112 does, standards need not reflect the reductions achievable from burning cleaner sludge. EPA Br. 72-73. Yet EPA acknowledges §129(a)(3)'s mandate that §129 standards be based on, *inter alia*, methods for "removal" of pollutants "before" combustion. *Id.*; Br.

39-40 (*quoting* 42 U.S.C. § 7429(a)(3)). EPA does not deny such measures are being taken, or that numeric standards reflecting such removal are achievable. Br. 39-40; *see also* Palo Alto Comments at 6, JA____.

III. EPA'S REFUSAL TO REQUIRE EMISSIONS MONITORING IS UNLAWFUL AND ARBITRARY

EPA does not dispute that §129(c)(1), 42 U.S.C. § 7429(c)(1), requires actual “emissions” monitoring and that “parameter” monitoring does not satisfy this statutory requirement. EPA Br. 73-74. EPA’s lawyers, however, assert *post hoc* that the combination of “initial and annual emissions testing” and “the option of continuous emissions monitoring or continuous sampling as an alternative” constitute emissions monitoring requirements. EPA Br. 74 (emphasis added).

The “option” of continuous monitoring or sampling is not a requirement at all. EPA’s lawyers’ argument thus boils down to a claim that “annual emissions testing,” by itself, satisfies §129(c)(1)’s requirement for “emissions monitoring.” EPA itself made no such claim and, indeed, expressly distinguished between the annual stack testing requirements and monitoring requirements in its rule by addressing them in separate regulatory provisions: “You must meet, as applicable, the performance testing requirements specified in paragraph (a) of this section [and] the monitoring requirements specified in paragraph (b) of this section....” 76 Fed. Reg. 15,415/2, JA____ (emphasis added); RTC at 12-23, JA____; *see also*

State Farm, 463 U.S. at 50. Moreover, EPA admitted that “emissions test data ... are not representative of” “the normal, and unavoidable variation in emissions that would be expected to recur over time,” making clear it does not regard them as adequate to satisfy §129(c)(1)’s requirement for emissions monitoring. Floor Memo at 4-5.

EPA argues irrelevantly that two other sections of the Clean Air Act, §504(b), 42 U.S.C. § 7661c(b), and §114(a)(3), 42 U.S.C. § 7414(a)(3), do not require “continuous emissions monitoring.” EPA Br. 75. EPA also argues that its monitoring requirements suffice to serve the purpose of those provisions. *Id.* at 76. Unlike §114(a)(3) and §504(b), §129(c) requires “emissions monitoring,” not just parameter monitoring or testing. 42 U.S.C. § 7429(c)(1); *See also* Br. 40-41. The challenged rule not only fails to require “continuous emissions monitoring,” EPA Br. 75, it does not require “emissions monitoring” of any kind.

CONCLUSION

Sierra Club respectfully requests that the Court remand the rule without vacatur and set a one-year deadline for EPA’s remand response.

DATED: December 6, 2012

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Proof Reply Brief for Petitioner Sierra Club contains 4,991 words, as counted by counsel's word processing system.

DATED: December 6, 2012

/s/ James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2012 I have served the foregoing **Proof Reply Brief for Petitioner Sierra Club** on all registered counsel through the Court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew

STATUTES AND REGULATIONS

TABLE OF CONTENTS**STATUTES****Page**

42 U.S.C. § 7411, Clean Air Act § 111..... ADD1

42 U.S.C. § 7547, Clean Air Act § 213..... ADD9

United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control (Refs & Annos)

Subchapter I. Programs and Activities

Part A. Air Quality and Emissions Limitations (Refs & Annos)

42 U.S.C.A. § 7411

§ 7411. Standards of performance for new stationary sources

Currentness

(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.A. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C.A. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) 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.

(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) 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 and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by [section 7410](#) of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [section 7408\(a\)](#) of this title or emitted from a source category which is regulated under [section 7412](#) of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under [section 7410\(c\)](#) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under [sections 7413](#) and [7414](#) of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall--

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider--

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that--

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either--

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that--

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent

the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure--

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and [section 7413](#) of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of--

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to--

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date--

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and [section 7413](#) of this title.

Credits

(July 14, 1955, c. 360, Title I, § 111, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1683; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, [Pub.L. 95-95, Title I, § 109\(a\)](#)-(d)(1), (e), (f), Title IV, § 401(b), 91 Stat. 697 to 703, 791; Nov. 16, 1977, [Pub.L. 95-190](#), § 14(a)(7) to (9), 91 Stat. 1399; Nov. 9, 1978, [Pub.L. 95-623, § 13\(a\), 92 Stat. 3457](#); Nov. 15, 1990, [Pub.L. 101-549, Title I, § 108\(e\)](#) to (g), Title III, § 302(a), (b), Title IV, § 403(a), 104 Stat. 2467, 2574, 2631.)

[Notes of Decisions \(117\)](#)

42 U.S.C.A. § 7411, 42 USCA § 7411

Current through P.L. 112-195 (excluding P.L. 112-140 and 112-141) approved 10-5-12

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United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 85. Air Pollution Prevention and Control (Refs & Annos)

Subchapter II. Emission Standards for Moving Sources

Part A. Motor Vehicle Emission and Fuel Standards (Refs & Annos)

42 U.S.C.A. § 7547

§ 7547. Nonroad engines and vehicles

Currentness

(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).

(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.

Credits

(July 14, 1955, c. 360, Title II, § 213, as added June 22, 1974, [Pub.L. 93-319, § 10, 88 Stat. 261](#); amended Nov. 15, 1990, [Pub.L. 101-549, Title II, § 222\(a\)](#), 104 Stat. 2500.)

[Notes of Decisions \(9\)](#)

42 U.S.C.A. § 7547, 42 USCA § 7547

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