ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1127 (AND CONSOLIDATED CASES)

MURRAY ENERGY CORPORATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondent.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 81 FED. REG. 24,420 (APR. 25, 2016)

BRIEF FOR STATE AND LOCAL GOVERNMENT RESPONDENT-INTERVENORS IN SUPPORT OF EPA

FOR THE COMMONWEALTH OF MASSACHUSETTS
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Respondent-Intervenor states and local governments the Commonwealths of Massachusetts and Virginia; the States of California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; the District of Columbia; the Cities of Baltimore, Chicago, and New York; and the County of Erie in New York (collectively, State Intervenors) certify as follows:

A. Parties and *Amici*: Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners, filed November 18, 2016, and the Brief for Respondent United States Environmental Protection Agency (EPA), filed January 18, 2017: (1) National Congress of American Indians, Great Lakes Indian Fish and Wildlife Commission, Bad River Band of Lake Superior Chippewa Indians, Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, and St. Croix Chippewa Indians of Wisconsin; (2) Institute for Policy Integrity at New York University School of Law; (3) American Thoracic Society; and (4) Elsie Sunderland, Joel D. Blum, Celia Y. Chen, Charles T. Driscoll, Jr., David C. Evers, Philippe Grandjean,

Daniel A. Jaffe, Robert P. Mason, and Noelle Eckley Selin, all of whom filed *amicus curiae* briefs in support of Respondent on January 25, 2017.

B. Rulings Under Review: References to the rulings at issue appear in the Brief for Respondent EPA.

C. Related Cases: State Intervenors adopt the statement of related cases set forth in the Brief for Respondent EPA.

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DATED: February 10, 2017

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GLOSSARY OF ABBREVIATION

Cato Institute Br.	Brief of Amicus Curiae Cato Institute in Support of Petitioners, ECF No. 1647667
EPA	United States Environmental Protection Agency
EPA Br.	Brief for Respondent, ECF No. 1656539
JA	Joint Appendix
NESCAUM	Northeast States for Coordinated Air Use Management
NGO	Public Health and Environmental Groups
Pet'rs' Br.	Opening Brief of State and Industry Petitioners, ECF No. 1647029
Standards	Mercury and Air Toxics Standards, 77 Fed. Reg. 9304 (Feb. 16, 2012)
Sunderland, et al. Br.	Brief of Amicus Curiae Elsie M. Sunderland, Joel D. Blum, Celia Y. Chen, Charles T. Driscoll, Jr., David C. Evers, Philippe Grandjean, Daniel A. Jaffe, Robert P. Mason, and Noelle Eckley Selin in Support of Respondents, ECF No. 1657479
Supplemental Finding	Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016)

PRELIMINARY STATEMENT

In 1990, Congress amended section 112 of the Clean Air Act to require regulation of hazardous air pollutant emissions from fossil-fuel-fired power plants if EPA determined that regulation was "appropriate and necessary." 42 U.S.C. §7412(n)(1)(A). In April 2015, nearly twenty-five years after the 1990 amendments, and nearly fifteen years after EPA initially made that appropriate and necessary determination in 2000, power plants were finally required to limit their hazardous emissions under the 2012 Mercury and Air Toxics Standards ("Standards"). 77 Fed. Reg. 9304 (Feb. 16, 2012). Today, nearly all power plants covered by the Standards have come into compliance, at a fraction of the predicted cost and with no adverse effect on electricity reliability.

The undersigned States and Local Governments ("State Intervenors") have long sought to reduce the dangers that power-plant emissions—particularly mercury—pose to our residents and natural resources. By the time EPA promulgated the Standards, power plants were the largest source of domestic mercury emissions, 76 Fed. Reg. 24,976, 25,002 (May 3, 2011), and mercury pollution of our Nation's waters was ubiquitous. All fifty states have mercury-related fish consumption advisories, and a dozen states have been required to develop state-wide mercury "total maximum daily loads" in order to meet Clean Water Act standards. Comments, Massachusetts Attorney General, et al., Proposed

Supplemental Finding, 3, EPA-HQ-OAR-2009-0234-20551 ("States Comments"), JA __. That pollution endangers human health and degrades valuable state resources, including recreational fisheries worth billions of dollars. *Id.* 5, JA _.

Faced with ongoing delays in federal controls on power-plant mercury emissions, by 2012 many states had adopted their own strict limits. *Id.* 10-11, JA _-_. Those state efforts were frustrated, however, by the cross-border transport of mercury emitted by out-of-state power plants. *Id.* 3-4, JA _-_. The nationally-uniform Standards are essential to protecting our residents and natural resources from the dangerous quantities of mercury, other toxic metals, and acid gases that power plants emit.

In its recent Supplemental Finding, 81 Fed. Reg. 24,420 (Apr. 25, 2016), EPA reaffirmed its determination that regulating hazardous power-plant air pollutants is appropriate and necessary, following the Supreme Court's instruction in *Michigan v. EPA* to give "at least some attention to cost" in making that determination. 135 S. Ct. 2699, 2707 (2015). In its "preferred approach" in the Supplemental Finding, EPA correctly determined that the costs of complying with the Standards are reasonable using standard cost-impact metrics. EPA then properly weighed those costs against the Standards' benefits, including substantial reductions in the harms to public health and the environment caused by power-plant emissions—harms that recent studies have shown were greatly

underestimated by EPA's 2012 record. EPA's approach is more than reasonable, in particular given that its original compliance cost estimate—$9.6 billion—was nearly five times higher than the actual implementation cost—approximately $2 billion. *See* Comments, Calpine Corporation, et al., Proposed Supplemental Finding, 3, EPA-HQ-OAR-2009-0234-20549 ("Calpine Comments"), JA_.

Petitioners wrongly claim that EPA was required to conduct a formal benefit-cost analysis, and must limit its consideration of benefits to only those that may be monetized. Nothing in *Michigan* or section 112 requires that result. And Petitioners' suggestion that EPA could defer regulation entirely to the states ignores the experience—briefed extensively in prior litigation over the Standards—of the many states that have been unable to address hazardous cross-border power-plant pollution without the Standards.

ISSUES PRESENTED, STATUTES, AND REGULATIONS

The issues presented are set forth in EPA's brief; State Intervenors address EPA's issue 1 (whether EPA's preferred approach is reasonable) and issue 3 (whether EPA was required to consider alternatives to regulation under section 112), and adopt in full EPA's argument on issue 2 (whether EPA's alternative benefit-cost approach is reasonable), and issue 4 (whether EPA reasonably considered non-speculative costs raised by commenters). Except for 16 U.S.C.

§817 and 42 U.S.C. §2131, included in the attached Addendum, all applicable statutes and regulations are contained in the briefs for Petitioners and EPA.

STATEMENT OF THE CASE

State Intervenors adopt EPA's Statement of Facts and emphasize the following:

State Intervenors have pursued more than fifteen years of litigation and regulatory efforts to limit hazardous power-plant air emissions that endanger public health and our natural resources. In 2005, EPA purported to revoke its 2000 appropriate and necessary determination, to remove power plants from the section 112 source category list, and to regulate existing power-plant mercury emissions through a "cap-and-trade" program under section 111(d) and new power-plant mercury emissions under section 111(b). 70 Fed. Reg. 15,994, 16,029-33 (Mar. 29, 2005). Many of the State Intervenors challenged those actions as violating sections 111 and 112, and as likely to result both in significantly greater overall mercury emissions than section 112's maximum achievable control technology standards allow and in dangerous mercury "hotspots" in communities surrounding power plants. This Court vacated that delisting (and the concomitant section 111 regulations) because EPA had failed entirely to make the stringent public health

and environmental findings required by section 112(c)(9) prior to delisting. *New Jersey v. EPA*, 517 F.3d 574, 582-84 (D.C. Cir. 2008).

More recently, this Court rejected a large number of statutory and record-based challenges to the Standards brought by many of the Petitioners. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd Michigan v. EPA*, 135 S. Ct. 2699 (2015). After the *Michigan* decision, many of the State Intervenors opposed vacatur of the Standards on remand, arguing that (i) EPA could readily comply with the Supreme Court's cost-consideration directive and reaffirm its appropriate and necessary determination and (ii) vacatur would endanger public health and the environment by allowing power plants to emit tens of thousands of tons of hazardous air pollutants during the remand period. The Court remanded the Standards without vacatur. *See* Order, *White Stallion*, No. 12-1100, ECF No. 1588459.

EPA subsequently issued the Supplemental Finding challenged here, concluding that, taking costs into account, it remains appropriate and necessary to regulate power-plant hazardous emissions. 81 Fed. Reg. 24,421. The Supplemental Finding reaffirmed the massive health and environmental benefits of reducing power-plant hazardous emissions, *id.* 24,423, and acknowledged the growing body of evidence cited by State Intervenors and others that those emissions, particularly of mercury, have devastating effects on the health of our

residents—including particularly vulnerable populations—and our waterbodies, and the wildlife and fisheries that depend upon them, *see id.* 24,441.

SUMMARY OF ARGUMENT

EPA's preferred approach is consistent with *Michigan's* directive, the goals of the Act, and the text of section 112. Neither *Michigan* nor the Act requires EPA, for purposes of its cost consideration, to undertake a formal benefit-cost analysis, let alone one that solely considers monetized benefits.

Analyzing costs under its preferred approach, EPA properly relied upon longstanding cost-impact metrics to assess the industry's ability to absorb the cost of regulation. The experience of the many states that have long regulated power-plant mercury emissions supports EPA's conclusion that the industry could readily do so, without negative impacts on the provision of electricity. Assessing benefits, EPA also properly considered an extensive record of health and environmental harms posed by power-plant hazardous emissions—harms that recent science shows were underestimated in the 2012 record.

Petitioners wrongly claim that EPA was required to consider regulatory approaches under other sections of the Act or to defer regulation to states. The provisions of the Act that Petitioners cite cannot be used to control power-plant hazardous emissions, and individual states, acting alone, cannot adequately protect against the dangers these toxins pose.

ARGUMENT

I. EPA'S PREFERRED APPROACH IS REASONABLE AND CONSISTENT WITH BOTH THE DIRECTIVE OF *MICHIGAN* AND SECTION 112.

A. EPA Was Not Required to Conduct the Fully Monetized Comparison of Benefits and Costs that Petitioners Seek.

Petitioners' main argument against EPA's preferred approach (and the Supplemental Finding, overall) is that it is not a constrained dollar-to-dollar comparison of monetized benefits and costs. *See* Pet'rs' Br. 39-40, 55-57. But EPA is not obligated to apply Petitioners' favored approach; in confirming EPA's discretion to determine how to consider costs, the *Michigan* court made clear that it was not requiring EPA to "conduct a formal cost-benefit analysis" or to "assign[] a monetary value" to "each advantage and disadvantage." 135 S. Ct. at 2711.

And as EPA properly concluded, the text of section 112 nowhere contains such a requirement for *any* determination, including the section 112(n)(1)(A) appropriate and necessary determination. Legal Memorandum Accompanying the Proposed Supplemental Finding 21-22, EPA-HQ-OAR-2009-0234-20519, JA _-_. Indeed, in previously arguing that EPA must consider costs, Petitioners repeatedly contended that the appropriate and necessary standard is very broad. *See, e.g.*, Opening Briefs of Pet'r Utility Air Regulatory Group, et al., 25-26 and Pet'r Michigan, et al., 23, 29, *Michigan*, (Nos. 14-46, 14-47, 14-49). By attempting now to read into section 112(n)(1)(A) a requirement that EPA may consider only fully

monetized benefits, Petitioners urge an interpretation that would impermissibly narrow that standard and is inconsistent with *Michigan*. *See* 135 S. Ct. at 2709 ("broad reference to appropriateness encompasses *multiple* relevant factors"). Such a cramped review would necessarily *underestimate* the Standards' benefits, contravening Congress's clear intent that EPA carefully analyze health hazards posed by power-plant hazardous emissions. *See* 42 U.S.C. §7412(n)(1)(A) (directing EPA to regulate after considering its study of health hazards reasonably anticipated to result from power-plant hazardous emissions).

Moreover, EPA's decision not to limit its analysis to monetized benefits is consistent with the purpose of section 112 as a whole. In 1990, Congress sought to remedy "the slow pace of EPA's regulation of [hazardous air pollutants]" under section 112's then-existing, risk-based approach. *New Jersey*, 517 F.3d at 578. It established a rigorous schedule for listing and setting technology-based emissions standards for all sources emitting threshold volumes of the 189 hazardous air pollutants it specifically identified as warranting regulation. 42 U.S.C. §7412(b)(1), (c)(1), (e)(1). In doing so, Congress understood it would be difficult to quantify, at the initial point of regulation, the benefits of reducing toxic emissions that cause health harms over time. *See* S. Rep. No. 101-228 (1989), 1990 U.S.C.C.A.N. 3385, 3567 (recognizing the difficulties of "giv[ing] sufficient weight" to "substances which express their toxic potential only after long periods

of chronic exposure"). Congress also knew that scientific understanding of the human health effects of toxic pollutant exposure could evolve over time. Accordingly, while it made technology-based standards and emissions volume the regulatory starting points, it also required a subsequent evaluation of "remaining" or "likely to remain" health risks, 42 U.S.C. §7412(f)(1)(A), and of whether such risks necessitated more stringent emissions standards, *id.* §7412(f)(2).

Thus, because the effects of toxic exposure are difficult to quantify and often can be understood only after years or even decades, the length of time needed even to attempt to conduct a fully monetized analysis further undercuts Petitioners' contention. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (rejecting argument that quantified benefit-cost analysis was required by section 111(a) in part because of "the specific time constraints" imposed by Congress for listing sources and setting standards); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232, 235 (2009) (Breyer, J. concurring in part and dissenting in part) (interpretation that avoided formal cost-benefit proceedings was reasonable given, in part, congressional concern that such analyses would "delay[] regulation" and "emphasize easily quantifiable factors over more qualitative factors").

B. EPA's Preferred Approach Applied Longstanding Cost Metrics and Properly Weighed Relevant Benefits and Costs.

Consistent with the breadth of section 112(n)(1)(A), as confirmed by *Michigan*, 135 S. Ct. at 2709, EPA properly applied routine cost metrics and then conducted a multi-factor weighing of benefits and costs. That approach is similar to the one EPA has long used to implement section 111's open-ended directive to "tak[e] into account" costs, 42 U.S.C. §7411(a)(1)—an approach this Court repeatedly has upheld so long as the regulated industry's costs are not "exorbitant." *See, e.g.*, *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999). Given Congress's overriding goal of promptly reducing the dangers posed by toxic air emissions, 81 Fed. Reg. 24,421, and EPA's well-supported finding that the cost of reducing those emissions is reasonable and will not jeopardize an affordable and reliable electricity supply, *id.* 24,426-27, EPA's preferred approach meets its obligation to give "at least some attention to cost," *Michigan*, 135 S. Ct. at 2707, in deciding whether to regulate.

1. EPA's Cost Metrics Reasonably Focused on Impacts to the Electric Sector, Ratepayers, and Reliability.

EPA considered several metrics to evaluate the reasonableness of the costs of complying with the Standards, as well as the effect those costs would have on the power sector's ability to perform its key functions—generation, transmission, and distribution of electricity. 81 Fed. Reg. 24,424-27. Those metrics have often

been used by EPA to assess regulatory cost impact. For example, EPA routinely has used the "sales test," which calculates annual compliance costs as a percent of sales, to evaluate whether such costs are reasonable. *See* States Comments 8 n.19, JA __. EPA has also previously considered how the projected costs of regulating power-sector pollution will affect retail electricity prices. *Id.* 9 n.20, JA __; *see also* Comments, Northeast States for Coordinated Air Use Management, Proposed Supplemental Finding, 2, EPA-HQ-OAR-2009-0234-20529 ("NESCAUM Comments"), JA __ (Delaware and New York predicted no increase in electricity rates from their state mercury rules because projected increases in electricity generation costs were low). Similarly, EPA's use of a resource adequacy analysis to determine whether anticipated power-plant retirements attributable to the Standards would adversely affect reliability over the three-year compliance period is a standard methodology within the power industry. States Comments 10 n.22, JA __.

Based on its evaluation of those metrics, EPA reasonably concluded that the Standards would minimally affect the power industry—considering historical variability in annual revenues, capital and production costs, and electric rates—and would not impair its ability to provide reliable and affordable electricity to consumers. 81 Fed. Reg. 24,424-26. In fact, the annual compliance costs incurred through April 2016, approximately $2 billion, show that EPA's $9.6 billion annual

cost projection was greatly overestimated. *See* Calpine Comments 3, JA_. Such pre-compliance cost-overestimates have been common under the Clean Air Act, including under the Title IV program, EPA Br. 39, and are often due to, as here, unforeseen technology innovation and lower fuel costs, NESCAUM Comments 3, JA __.

Moreover, EPA's conclusion is consistent with the experience of the dozen states that, since 2003, have implemented their own power-plant mercury limitations—nearly all of which are more stringent than the Standards. States Comments 10-11, JA _-_. The majority of those state rules have now been in effect for years, and power plants have complied with them cost effectively, without undue cost to ratepayers or adverse effect on electric system reliability. *Id.*; NESCAUM Comments 3, JA _.

2. EPA Properly Considered the Immense Health and Environmental Benefits of Reducing Hazardous Power-Plant Emissions Under Section 112.

EPA has exhaustively documented the immense health and environmental benefits the Standards are expected to produce, and indeed have been producing for the last two years. Prior to implementation of the Standards, power plants contributed half the Nation's mercury emissions, and, in aggregate, hundreds of thousands of tons of other toxic chemicals—including arsenic, cadmium, chromium, and hazardous acid gases—annually. 76 Fed. Reg. 25,002, 25,005-06.

Exposure to these toxins causes a wide range of adverse chronic and acute health effects, including, but not limited to, elevated cancer risks. *Id.* 24,977-78. The substantial power-plant emissions reductions produced by the Standards—seventy-five percent for mercury, eighty-eight percent for hydrogen chloride, and nineteen percent for fine particulate matter (a surrogate for non-mercury hazardous metals)—currently are preventing those serious harms to public health, as Congress intended. *See* 77 Fed. Reg. 9424.

Of particular concern for public health are the serious neurological, cardiovascular, genotoxic, and immunological harms mercury exposure poses to certain highly exposed and/or sensitive populations, like developing fetuses and children who can suffer permanent neurological damage, and populations that rely on wild-caught fish, such as American Indian tribal communities. *See* 76 Fed. Reg. 24,977-78.[1] When EPA made its 2000 appropriate and necessary determination, it found that seven percent of U.S. women of childbearing age were exposed to mercury at levels exceeding those considered safe for developing fetal brain and neurological systems. 65 Fed. Reg. 79,825, 79,829-30 (Dec. 20, 2000). Today, mercury contamination continues to pose a nationwide health hazard—

[1] The disproportionate effects of mercury contamination on American Indians—whose blood mercury levels are among the highest of any racial or ethnic group in the United States—also threaten generations-old cultural traditions and important social practices of fishing and fish consumption. 81 Fed. Reg. 24,442; Tribal Brief 7-8, 12-15.

recent exposure data shows that considerable numbers of people in the U.S. have unsafe blood mercury concentrations. Comments, Public Health and Environmental Groups, Proposed Supplemental Finding, EPA-HQ-2009-0234-20558, Ex.1 at 4, JA __. That contamination is so widespread that nearly 105,000 river and stream miles and 8,270,000 acres of lakes, reservoirs, and ponds are impaired under Clean Water Act section 303(d) due to mercury, creating an ongoing exposure risk from fish consumption. States Comments 3, JA __.

Moreover, scientific understanding of the magnitude of the health and environmental harms caused by power-plant hazardous emissions has expanded since EPA promulgated the Standards. Recent studies estimate that mercury-related health benefits from the Rule are, in fact, orders of magnitude larger than those calculated by EPA's limited 2012 analysis. 81 Fed. Reg. 24,441; Sunderland, et al. Br. 28-29. While EPA did not estimate risks posed by mercury contamination in coastal waters or from commercially-caught fish, 76 Fed. Reg. 25,007, researchers have since identified a strong correlation between decreasing North American mercury emissions and reduced mercury levels in two important commercial species along the Atlantic seaboard—bluefish[2] and bluefin tuna.[3] This

[2] States Comments 4, JA_.

[3] Darryl Fears, *Burning less coal isn't just making air cleaner. It's making your tuna safer*, Washington Post (Nov. 29, 2016), *available at* https://www.washingtonpost.com/news/energy-

finding is particularly significant, as women living in Atlantic coastal areas have shown higher mean mercury blood levels than other U.S. women of child-bearing age. NESCAUM Comments 5, JA __. It is also consistent with studies demonstrating that power-plant mercury emissions have substantial local and regional depositional effects. Sunderland, et al. Br., 8, 19-21.[4]

Petitioners' view that this overwhelming evidence of the Standards' benefits is irrelevant because those benefits are not *monetized*, *see* Pet'rs' Br. 39-40, 56, is unsupported by *Michigan* and section 112's text and purpose. *See* Part I.A, *supra*. It is also contrary to the specific concern Congress expressed about mercury harms, including from power-plant mercury emissions. *See* 42 U.S.C. §7412(c)(6) (prioritizing development of non-power-plant standards for certain persistent pollutants, including mercury); *id.* §7412(n)(1)(B), (C) (requiring study of mercury emissions, including from power plants, and health risks); S. Rep. No. 101-228, 1990 U.S.C.C.A.N., at 3515 (noting widespread contamination of fish in northern lakes "attributable to mercury emissions from coal-fired power plants").

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environment/wp/2016/11/29/burning-less-coal-isnt-just-making-air-cleaner-its-making-your-tuna-safer/?utm_term=.e373a76a1f84

[4] Such localized impacts controvert the claim, Cato Institute Br. 19-21, that U.S. power-plant mercury emissions present little risk because they constitute a relatively small share of global mercury emissions.

II. EPA WAS NOT REQUIRED TO CONSIDER THE "ALTERNATIVE CONTROL STRATEGIES" THAT PETITIONERS ADVOCATE, INCLUDING DEFERRING REGULATION ENTIRELY TO THE STATES.

Within section 112(n)(1)(A)'s modest instruction to evaluate "alternative control strategies" for power-plant hazardous emissions, Petitioners claim to have discovered an expansive command that EPA must explore in its cost-consideration analysis allegedly less costly regulation under other sections of the Act, and even state law. Just as in the *White Stallion* litigation, however, Petitioners' interpretation lacks textual support and countermands Congress's goal of promptly and permanently curbing hazardous air emissions. EPA Br. 61-66.

With regard to Clean Air Act section 111(d), this Court should reject Petitioners' suggestion that EPA could regulate power-plant hazardous air pollutants under that section, Pet'rs' Br. 60-61, which would effectively resuscitate EPA's vacated 2005 rule and "deeply flawed" regulatory approach, EPA Br. 65. The provisions Petitioners cite for deferring regulation entirely to states are also inappropriate for regulating those emissions. Pet'rs' Br. 61-62. For example, section 116 merely preserves states' rights to enact standards more stringent than section 112 standards; it does not support deferring federal regulation of dangerous pollutants entirely to the states. *Id.* §7416. *See also id.* §7402 (providing only that EPA shall encourage interstate cooperation and uniform state and local air pollution control laws). Similarly, section 112(l) permits EPA-approved state

programs to regulate hazardous air emissions, but prohibits standards less stringent than section 112 standards. 42 U.S.C. §7412(l)(1).

Further, Petitioners' suggestion that state regulation, alone, is the answer to the dangers of power-plant hazardous emissions is contradicted by recent history. During the two decades that EPA failed to regulate those emissions under section 112, states alone were *not* able to address them adequately. When EPA finalized the 2012 Standards, numerous states had promulgated limits on power-plant mercury emissions within their borders, but those requirements could not halt cross-border mercury pollution. States Comments 3-4, 10-11, JA _-_, _-_. That limitation is significant—the waters of the seven northeastern states that are currently subject to a regional mercury "total maximum daily load" cannot meet federal water quality standards without EPA action to "implement significant reductions from up-wind out-of-region sources, primarily coal-fired power plants." *Id.* 4 (quotations omitted), JA _. Similarly, successful implementation of Minnesota's statewide mercury "total maximum daily load" will require out-of-state power-plant emissions reductions. *Id.* National controls are essential to making state waters safe—and protecting our residents—from mercury.

Finally, there is no merit to Petitioners' bare assertion that EPA's decision to set nationally-uniform standards has improperly "supplant[ed]" some unspecified aspect of "traditional State authority." Pet'rs' Br. 62. Federal agencies, including

EPA, have long exercised concurrent regulatory authority with states over various aspects of power-plant operations. *See, e.g.*, 16 U.S.C. §817(1) (Federal Energy Regulatory Commission license required to construct or operate a hydroelectric project affecting navigable waters); 42 U.S.C. §2131 (Nuclear Regulatory Commission license required to construct or operate a nuclear power plant); *Am. Elec. Power Co., Inc., v. Connecticut,* 564 U.S. 410, 427-28 (2011) (EPA acts "as primary regulator of greenhouse gas emissions," including from power plants). As is the case here, that concurrent federal involvement properly reflects power plants' cross-border health, safety, and environmental risks. *Cf. EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593-95 (2014) (describing EPA's longstanding role in regulating interstate air pollution from stationary sources, like power plants).

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

Dated: February 10, 2017

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced, Times New Roman typeface and contains 3,735 words, according to the count of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Pursuant to the Court's Order dated October 14, 2016, I further certify that the combined words of the Public Health and Environmental Group Respondent-Intervenors, the State and Local Government Respondent-Intervenors, and the Industry Respondent-Intervenors do not exceed 11,250 words.

DATED: February 10, 2017

/s/ Tracy L. Triplett
Tracy L. Triplett

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for State and Local Government Respondent-Intervenors in Support of EPA has been served through the Court's CM/ECF system on all registered counsel.

DATED: February 10, 2017

/s/ Tracy L. Triplett
Tracy L. Triplett

STATUTORY AND REGULATORY ADDENDUM

Statutes

Legislative History

United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter I. Regulation of the Development of Water Power and Resources (Refs & Annos)

16 U.S.C.A. § 817

§ 817. Projects not affecting navigable waters; necessity for Federal license, permit or right-of-way; unauthorized activities

Currentness

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

(2) No person may commence any significant modification of any project licensed under, or exempted from, this chapter unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this subchapter. As used in this paragraph, the term "commence" refers to the beginning of physical on-site activity other than surveys or testing.

CREDIT(S)

(June 10, 1920, c. 285, § 23(b), 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846; Oct. 16, 1986, Pub.L. 99-495, § 6, 100 Stat. 1248.)

16 U.S.C.A. § 817, 16 USCA § 817
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-288, 114-290 to 114-316, 114-318 to 114-321, 114-324 to 114-326. Title 26 current through 114-329.

End of Document

ADD-1

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 23. Development and Control of Atomic Energy (Refs & Annos)
Division a. Atomic Energy
Subchapter IX. Atomic Energy Licenses (Refs & Annos)

42 U.S.C.A. § 2131

§ 2131. License required

Currentness

It shall be unlawful, except as provided in section 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 2133 or 2134 of this title.

CREDIT(S)

(Aug. 1, 1946, c. 724, Title I, § 101, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 936; amended Aug. 6, 1956, c. 1015, § 11, 70 Stat. 1071; renumbered Title I, Oct. 24, 1992, Pub.L. 102-486, Title IX, § 902(a)(8), 106 Stat. 2944.)

42 U.S.C.A. § 2131, 42 USCA § 2131
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-288, 114-290 to 114-316, 114-318 to 114-321, 114-324 to 114-326. Title 26 current through 114-329.

End of Document

ADD-2

The law has worked poorly. In 18 years, EPA has regulated only some sources of only seven chemicals. One reason the law has worked poorly is the standard of protection required. "An ample margin of safety "has been interpreted by many to mean zero exposure to carcinogens, because any amount of exposure may cause a cancer. EPA has not been willing to write standards so stringent because they would shutdown major segments of American industry. The legislation reported by the Committee would entirely restructure the existing law, so that toxics might be adequately regulated by the Federal Government.

In April of 1989 EPA issued the first Toxic Release Inventory compiled from reports required by the Emergency Planning and Community Right-to-Know Act of 1986. The EPA data indicated that toxic releases to the air from major manufacturing facilities were approximately 2.7 billion pounds in 1987. The largest amounts of emissions were in Texas (240 million pounds), Ohio (173 million pounds), Louisiana (138 million pounds), Tennessee (135 million pounds) and Virginia (132 million pounds).

Chemicals most frequently released included toluene, ammonia, acetone, methanol, carbon disulfide, trichloroethane, methyl ethyl ketone, xylene, dichlormethane and chlorine. Actual emissions are likely to be two to five times higher, as the reporting requirement only applied to a fraction of the sources which are known to emit toxic pollutants.

In a 1989 study examining the potential cancer-causing effects of exposure to air toxics, EPA estimated a national annual cancer incidence of approximately 2700 cases as the result of exposure to some 15–40 toxic air pollutants. This would mean that 190,000 of ***3514** the Americans now alive (2700 annually x 70 year life span) might be expected to contract cancer from exposure to air toxics. Again, this estimate may be low as a much larger number of air pollutants have been identified as potentially toxic.

In 1987 the South Coast Air Basin (the Southern California pollution control agency) released a study on ambient concentrations of approximately 20 air toxics in the Los Angeles area. Based on that data and extrapolating to the whole nation, cancer incidence attributable to toxic air pollution may be as high as 500,000 fatal cases for those Americans now alive.

Cancer incidence for the general population is only one aspect of the problem. There is also an equity concern, the very high risk of health problems experienced by individuals living near large industrial facilities or in highly developed urban corridors. EPA has examined cancer risks at more than 2600 industrial facilities across the U.S. as part of its effort to promulgate air toxics regulations. At more than one-quarter of these facilities, toxic emissions produced cancer risks greater than 1-in-10,000 for people living nearest these plants (that is 1 additional cancer for each 10,000 persons exposed). If these sites were abandoned waste dumps, risks of that magnitude would qualify them for cleanup under the federal Superfund program.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***3515** The 1987 South Coast Air Basin study found cancer risks in the Los Angeles area for the mix of air pollutants from industrial sources, highway fuels and small business to exceed 1-in-1000. Based on the actual ambient concentrations recorded as part of the study, cancer deaths in the area were projected at 222 per year.

Beyond the cancer and other adverse health effects caused by exposure to air toxics, these air pollutants also cause widespread environmental degradation. It is estimated that a large percentage of the toxics in the Great Lakes–up to 80% of the toxics in Lake Superior–are deposited from the air rather than from surface runoff. Lakes all across the northern tier of states are now posted with warnings for pregnant women and children because of high mercury levels in fish attributable to mercury emissions from coal-fired powerplants.

***3567** Forced by a court decision to establish a NESHAP for coke by-product plants and checked by public opinion when it tried to promulgate a standard beyond the traditional definition of acceptable risk, the Agency followed the technology-based path and justified its selection with risk assessment qualifiers after the fact. The "bright light" boundaries on acceptable risk contained in this legislation are necessary to bring public health considerations into the standard-setting process at the beginning.

In the case of cancer-causing air pollutants, the "unreasonable risk" standard proposed in the President's bill cannot serve as a successful foundation for a residual risk program. The public health consequences of substances which express their toxic potential only after long periods of chronic exposure will not be given sufficient weight in the regulatory process when they must be balanced against the present day costs of pollution control and its other economic consequences.

Work practice standards and other requirements.–Generally, the requirements of section 112 of the Clean Air Act, both current law and as amended by the bill, are implemented by the promulgation of numerical emissions standards applicable to point sources of release (such as stacks, vents, pipes, etc.) from stationary sources of the listed air pollutants. However, in some cases regulation in this form would not be effective or appropriate for significant source categories. For instance, emissions of asbestos fibers from construction or demolition sites cannot be controlled or even measured by focusing on a point source of emissions. To assure that adequate control is, nevertheless, achieved, it is in some cases possible to prescribe the use of specific equipment or procedures in the design of a facility or conduct of an activity. In the 1977 amendments to the Clean Air Act (and specifically in response to a court case nullifying regulations for the non-point release of asbestos fibers because the requirements were not expressed as emissions standards), the Congress authorized the use of other regulatory requirements including design, equipment, work practice or operational standards as an alternative to emissions standards to carry out the objectives of section 112. These amendments add operator training requirements to that list.

The purpose of the amendments in the new section 112(h) is to assure that these alternative forms of control are available to the Agency as it implements the new authority to set technology-based standards for major sources and area sources of hazardous air pollutants. As under current law, the Administrator may set design, equipment, work practice, or operational standards in lieu of an emission standard only when the latter is "not feasible" as defined in paragraph (1)(B) of section 112(h). In determining whether an emission standard is "not feasible" the Administrator may not consider any factor other than those specifically mentioned in that paragraph.

The authority to establish alternative requirements which will "protect public health from such pollutant or pollutants with an ample margin of safety" (the standard of protection under current law) is modified. The amendment adds authority to use these alternative control measures to achieve the degree of protection required by standards issued under the new section 112(d) which describes ***3568** the degree of control to be incorporated in technology-based standards for major sources.

Paragraph (3) of section 112(h), as amended, requires the Administrator to establish leak prevention, detection and correction requirements as part of the emissions standard for each category of sources regulated under section 112. This paragraph covers both equipment leaks (formerly called "fugitive emissions" by EPA) and emissions from storage tanks. Equipment leaks are responsible for the largest percentage of the emissions in many facilities handling toxic chemicals. In some cases, the Agency has defined equipment leaks and storage tanks as separate source categories. In other cases, EPA considers equipment leaks and storage tanks as part of the basic units regulated. The provision included here will require that emissions standards address all of the emissions within the facility, whether from stacks, vents or other process units and from equipment leaks and storage tanks.

