

**No. 16-1021 (and consolidated case)**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SIERRA CLUB, *et al.*,

*Petitioners,*

v.

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

*Respondents.*

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**On Petition for Review of Final Action of the Environmental Protection  
Agency 80 Fed. Reg. 72,790 (Nov. 20, 2015)**

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**RESPONSE OF RESPONDENT-INTERVENORS  
TO PETITION FOR PANEL REHEARING**

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Manufacturers, National Oilseed  
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## GLOSSARY OF TERMS

APCD	Air Pollution Control Device
HAP	hazardous air pollutant
Respondent Intervenors	Respondent Intervenors are American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Municipal Power, Inc., American Wood Council, Biomass Power Association, Council of Industrial Boiler Owners, Coalition for Responsible Waste Incineration, Eastman Chemical Company, National Association of Manufacturers, National Oilseed Processors Association, Southeastern Lumber Manufacturers Association, and the Utility Air Regulatory Group
§112(d)	Clean Air Act §112(d), 42 U.S.C. §7412(d)
§112(h)	Clean Air Act §112(h), 42 U.S.C. §7412(h)
Sierra Club	Sierra Club et al. or petitioners
SCR	selective catalytic reduction
SNCR	selective noncatalytic reduction

## INTRODUCTION

Sierra Club et al.'s Petition for Panel Rehearing should be denied.

Petitioners fail to meet the standard for rehearing. Purporting to identify claims of error, the petition transparently attempts to reargue the very issues the panel already considered and decided against petitioners. Petitioners have not shown that the panel “over-looked or misapprehended” points of law or fact. Fed. R. App. P. 40(a)(2). Rather, their claims are based on continued mischaracterization of both EPA’s actions and the administrative record, which fully support the panel’s decision on the issues raised by the petition.

## BACKGROUND

The panel’s decision addresses portions of a 2015 rule establishing work practice standards for hazardous air pollutants (HAPs) from industrial boilers in lieu of otherwise applicable numeric emission limitations during limited periods when boilers are either starting up or shutting down. 80 Fed. Reg. 72,790 (Nov. 20, 2015) (JA0064-111). The opinion accurately recounts the rulemaking history, in which EPA initially made and then revised (1) a determination under Clean Air Act §112(h), 42 U.S.C. §7412(h), that it was “not feasible” for EPA to “prescribe or enforce” numeric emission limitations during startup or shutdown for any of the boiler subcategories it had established, because “application of measurement methodology” to that particular class of sources was “not practicable” during those

periods, and (2) the associated work practice standards for those periods. Slip op. at 7, 23-26. The Court reviewed the revised startup definition and the relevant work practice standards and found them “consistent with the Clean Air Act.” *Id.* at 4.

Most of the opinion is not at issue here. With respect to the revised startup definition, petitioners seek rehearing only as to whether the panel evaluated EPA’s infeasibility determination relative to the statutory requirement to identify a “particular class of sources.” For the startup work practice standards, they seek correction of a purported factual error that may have influenced the panel’s decision. As to the shutdown work practice standards, they claim the panel relied on a rationale not articulated by EPA. Reh’g Pet. 1-2.

### **ARGUMENT**

Rehearing is inappropriate. The panel evaluated EPA’s infeasibility determination under the correct statutory standard. Petitioners, simply disagreeing with the outcome, attempt to reframe the issue and force a different result by repeatedly mischaracterizing EPA’s determinations. The panel also correctly characterized the record with respect to what else might be required for startup work practices. Petitioners’ claims regarding *additional* use of clean fuel are neither part of, nor consistent with, the rulemaking record. EPA nonetheless considered use of clean fuel and required it to the extent it deemed reasonable.

The panel's opinion also correctly represents EPA's rationale for the shutdown work practice standards which, like those for startup, are based on EPA's determination of what the best performing sources reasonably could do, considering obvious operational constraints. To the extent the rulemaking record on that issue lacks detail, the fault lies with petitioners, not EPA. Because no one presented petitioners' objections during the rulemaking, EPA had no reason to elaborate on its rationale until petitioners mischaracterized the rule and EPA's positions, as they do now.

**I. THE PANEL DID NOT ERR IN ITS EVALUATION OF EPA'S "INFEASIBILITY" DETERMINATION.**

The panel upheld the revised startup definition, finding that EPA's determination of infeasibility under §112(h) for the "class of industrial boilers as a whole," rather than for a more limited class of sources, was both "reasonable" and "consistent with the statute." Slip op. at 27-29. Specifically, the panel found "reasonable" EPA's determination that the revised definition represented the point at which the "best performing" boilers could stabilize controls (and emissions) and that there were no "easily isolated boiler characteristics" by which to further classify boilers relative to length of startup. *Id.* at 27. The panel also agreed that §112(h) does not require a determination as to every source in the identified class. *Id.*

Petitioners assert that the panel simply found EPA's action was "reasonable" and never evaluated whether EPA met the statutory standard of identifying a "particular class of sources" for which accurate measurement was "infeasible." Reh'g Pet. 1, 4-5. According to petitioners, the panel must not have reached that issue because, if it had, the panel surely would have found EPA had not made the required infeasibility determination for the entire category. *Id.* 6.

Petitioners' claim is based on the same false premises as their initial challenge: (1) that EPA conceded that it could have prescribed numeric emission limits for some boilers starting at the point when useful thermal energy is generated, *id.* 3, 4, 7, 8, 10; and (2) that EPA never articulated an interpretation of §112(h) that authorizes its finding that the entire boiler category is a "class of sources" for which prescribing or enforcing emission limitations was not feasible. *Id.* 5, 7. In upholding EPA's action, the panel neither over-looked those assertions nor misapprehended any fact. Rather, it appropriately rejected petitioners' mischaracterizations.

**A. EPA Made No Concession Regarding Feasibility for the Shorter Startup Definition.**

EPA did not concede in the 2015 rule that it was feasible to "prescribe or enforce" numeric emission limitations for some subset of boilers starting at the end of the shorter startup definition. Although EPA's exercise of §112(h) authority was based on several factors, none related to any particular boiler's startup

capabilities. Consistent with Clean Air Act §112(d), 42 U.S.C. §7412(d), EPA subcategorized boilers based on unit design and established numeric emission limitations for those subcategories using information obtained under steady-state operating conditions. 2012 Response to Comments at 914 (explaining that EPA had “no HAP data for startup and shutdown periods”) (JA0234-235).

Determining under CAA §112(h) that “due to physical limitations and the short duration of startup and shutdown” it “was not feasible to complete stack testing” during startup or shutdown (and, therefore, that “enforcement of numeric emission limits” would not be practicable), EPA established work practices for those periods for “all subcategories.” 76 Fed. Reg. 15,608, 15613 (Mar. 21, 2011) (JA0006) and 15642 (JA0009). In its first reconsideration proceeding, EPA emphasized that, in addition to problems enforcing numeric standards during startup and shutdown, EPA lacked sufficient information to establish (or, in the words of §112(h), “prescribe”) such standards for those periods. 76 Fed. Reg. 80,598, 80,615 (Dec. 23, 2011) (JA0013).

In its second reconsideration proceeding, in response to criticism that its startup definition did not accommodate all boilers, EPA conducted analyses of the capabilities of the “best performing” units with respect to engagement of emission controls during startup. 2014 Revised Startup Analysis (JA0244-265). Specifically, EPA sought to identify the point when emissions stabilize following

startup, to both better define when emissions could be measured and ensure its work practice standards satisfied the stringency criteria in §112(d). Among other conclusions, EPA:

found no significant difference in performance related to startup events between the different boiler types and APCD technologies assessed in this analysis.

*Id.* 22 (JA0265). EPA thus extended its determination that it was not feasible to “prescribe” or “enforce” numeric emission limitations for the entire boiler category.

Petitioners agree that such a determination would be consistent with the statutory requirement to make an infeasibility determination for a “particular class of sources,” but insist that EPA *did not make* that determination because EPA conceded some boilers could engage controls and “meet emission limitations” at the end of the shorter startup definition. Oral Argument at 1:30:29-1:31:20. Petitioners mischaracterize both the record and the statutory criteria.

The record is clear that in retaining the shorter startup definition as a compliance option, EPA did not conclude or concede that it would have been feasible for EPA to “prescribe” or “enforce” numeric emission limitations for any identifiable class or previously established subcategory of boilers at the point of generation of useful thermal energy. EPA also neither concluded nor conceded

that any boiler or class of boilers could “accurately measure” its emissions at that point.

After enumerating the “technological and economic limitations” of available measurement methodologies at anything other than steady-state operating conditions, EPA concluded:

Based on these specific facts for the Boilers and Process Heater source category, the EPA developed a separate standard for these periods, and we are finalizing amendments to the work practice standards to meet this requirement. ... [T]he EPA continues to maintain that testing is impracticable during periods of startup and shutdown, despite the revisions to the definitions for the two terms as finalized in this action. We set standards based on available information as contemplated by CAA section 112. Compliance with the numeric emission limits ... [is] demonstrated by conducting performance stack tests. The revised definitions of startup and shutdown better reflect when steady-state conditions are achieved, which are required to yield meaningful results from current testing protocols.

80 Fed. Reg. at 72,792-93 (emphases added) (JA0066-067). As for retaining the shorter startup definition, EPA conceded only that it had information that some boilers could engage controls earlier than the average of the best performers and, therefore, comply with the more stringent work practice standard (something EPA wanted to encourage), not that EPA actually could prescribe and enforce a numeric standard beginning at the point of generation of thermal energy:

We have information that some existing sources are able to engage control devices at the time they begin

supplying useful thermal energy; therefore, we believe that it is appropriate to retain that definition as a compliance option. ... We are finalizing both definitions because we believe that they both meet the requirements of CAA section 112 to reduce HAP emissions during this time period and will provide operators with flexibility, even though we question the ability to accurately measure HAP emissions at the start of supplying useful thermal energy.

2015 Response to Comments at II-4 to 5 (emphases added) (JA0352-353); Int'rs' Br. 24-25.

EPA drew the line required by §112(h) and that line included all boilers up to the end of the longer startup period. Nothing about retaining a shorter startup definition and its associated work practice standards as an *option*, changed EPA's determination on reconsideration that, for *all of the subcategories of boilers for which it set numeric emission limitations*, the steady-state stack test data on which it based those limits were not representative of those boilers' operations until the end of the longer startup period. Rather, EPA retained the shorter startup period and associated work practice as an option because nothing in the statute prevented EPA from *allowing* a boiler to opt into those numeric standards early if the operator chose and had confidence it would have information (which may include information on control device operation) sufficient to support certification of compliance with applicable numeric standards. Slip op. at 32 (recognizing boiler owners' obligations to demonstrate compliance, many of which also apply to

numeric emission limitations). Allowing sources to comply with a more stringent standard is not the same as having information sufficient to “prescribe” standards that are consistent with statutory requirements to consider achievability and other factors.

**B. EPA Articulated an Interpretation of §112(h) That Supports Its Determination.**

EPA did articulate an interpretation of §112(h) that authorizes its finding for the entire boiler category. In the 2015 rulemaking, petitioners asserted that the longer startup definition was unlawful because §112(h) only authorizes work practice standards for “classes of sources, not for periods of operation.” Sierra Club 2015 Comments at 11-12 (JA0316-317). In response, EPA made clear that nothing in that language prevented an infeasibility determination for entire categories or subcategories of sources and that EPA had done so here:

The EPA disagrees with the commenter that the reference to “a particular class of sources” in CAA section 112(h)(2) limits the EPA’s authority to determine, for a category or subcategory of sources, that it is infeasible to prescribe or enforce an emission standard for those sources during certain identifiable time periods, such as startup and shutdown. Contrary to the commenter’s assertion, the EPA did make a determination under CAA section 112(h) that it is not feasible to prescribe or enforce a numeric standard during periods of startup and shutdown ....

80 Fed. Reg. at 72,792 (emphases added) (JA0066). And, EPA definitively stated “that application of measurement methodology to a particular class of sources is not practicable.” 2015 Response to Comments at II-4 (emphasis added) (JA0352).

In short, petitioners’ assertion that EPA applied some statutory definition it did not articulate, Reh’g Pet. 5, is false. EPA interpreted §112(h) as authorizing it to evaluate the “feasibility” of prescribing or enforcing numeric emission limitations based on categories or subcategories, including the boiler subcategories it already had established based on boiler design, and to determine for those boiler subcategories that such standards were not feasible for particular periods of operation, like startup and shutdown.

**C. The Court Evaluated EPA’s Action Under the Correct Standard.**

The real question here, and the one the panel addressed, is not whether EPA drew the line that §112(h) requires. EPA plainly did. The question is whether the line EPA drew was reasonable and permissible. Petitioners concede that the statute does not require EPA to consider each source individually. *Id.* 3. And, during oral argument, petitioners’ counsel agreed that the line EPA draws under §112(h) does not have to be “perfect.” Oral Argument at 1:32:39-41.

The panel agreed on those points. Specifically, the panel evaluated EPA’s determination relative to the statutory language and agreed with EPA and

petitioners that §112(h) does not require examination of feasibility for every source:

EPA's authority to resort to a work practice standard does not depend on its determining that numerically gauging emissions would be impractical throughout the entire startup period for every single source to which a work practice applies; the Act requires only that EPA determine that it is impractical to measure emissions for the "particular class of sources" at issue. 42 U.S.C. § 7412(h)(2)(B).

Slip op. at 27. And, the panel considered petitioners' claim that EPA's failure to further categorize or classify sources was arbitrary, and concluded that although the line EPA drew may not be perfect, EPA had good reasons for that imperfection:

EPA ...reasonably concluded that startup performance (and associated variability) was not correlated with any easily isolated boiler characteristics. This left EPA with no basis on which to apply different definitions of startup to different boilers by subcategorizing them into different "classes" or "types." 42 U.S.C. § 7412(d)(1).

*Id.* at 27-28. In short, petitioners have identified no deficiency in the standard the panel applied when evaluating EPA's interpretation and application of statutory authority. Petitioners simply disagree with the panel's conclusion that the line EPA drew was good enough.

**II. THE PANEL DID NOT ERR IN ITS TREATMENT OF SIERRA CLUB'S ARGUMENTS REGARDING USE OF CLEAN FUEL DURING STARTUP OR SHUTDOWN.**

The panel upheld EPA's work practice standards for the revised startup definition and for shutdown based on the broad discretion §112(h) affords EPA's judgment on that point, and the well documented technological limitations on controls during those periods. *Id.* at 31-34. Petitioners seek rehearing on two aspects of those holdings. With respect to the revised startup definition, they claim that the panel erred in finding that Sierra Club did not "identify what more EPA could realistically have required of boiler operators." Reh'g Pet. 1, 13-15; Slip op. at 33. With respect to shutdown, petitioners claim that the panel upheld "EPA's refusal to require the use of clean fuels ... based on a rationale that EPA did not advance." Reh'g Pet. 2, 15-16. This request mischaracterizes the panel's findings and the administrative record.

The panel did not err in either respect. Contrary to claims in their briefs and rehearing petition, petitioners *never* asked EPA *in the rulemaking* to require use of clean fuel beyond what is in the 2015 rule, or provided any support for their current contention that mandating exclusive use of clean fuel would be consistent with §112(d)'s criteria. Petitioners' sole comment on use of clean fuel in the rulemaking was in comments on a 2011 proposed rule containing no requirements at all for use of clean fuel when EPA specifically asked:

whether other work practices should be required during startup and shutdown, including requirements to operate using specific fuels to reduce emissions during such periods.

76 Fed. Reg. at 80,615(emphasis added) (JA0013). At that time, petitioners only suggested:

EPA could, at a minimum, require sources to use natural gas (or the cleanest available alternative) as a fuel during periods of startup and shutdown.

Sierra Club 2012 Comments at 17 (emphasis added) (JA0192).

EPA responded to this sole comment by including a requirement for use of clean fuel in the startup work practice standards in the 2013 rule. Slip op. at 23.

EPA explained that it did so because there was “no technical barrier” to use of clean fuels as it had prescribed, but at the same time recognized that some control devices have more specific temperature requirements that must be met:

The EPA carefully considered fuels and potential operational constraints of APCD when designing its work practices for periods of startup and shutdown. The EPA notes that there is no technical barrier to burning clean fuels (e.g., natural gas, distillate oil) for longer portions of startup or shutdown periods at a boiler and the HAP emission reduction benefits warrant additional utilization of such fuels until the temperature and stack emissions pressure is sufficient to engage the APCD. The EPA is aware that SNCR and SCR systems with ammonia injection need to be operated within a prescribed and relatively narrow temperature window to provide NO<sub>x</sub> reductions. Further, the EPA is aware that dry scrubbers also need to be operated close to flue gas saturation temperature, and that fabric filters need to be operated at

temperatures above the acid dew point. Because these devices have specific temperature requirements for proper operation, the EPA notes in its work practices that it is the responsibility of the operators of affected boilers and process heaters to start their SNCR, SCR, fabric filter and dry scrubber systems appropriately to comply with relevant standards applicable during normal operation.

78 Fed. Reg. 7138, 7147 (Jan. 31, 2013) (emphases added) (JA0018). Read in context, EPA clearly was not suggesting that all control devices could be warmed sufficiently using *only clean fuel*, but rather that clean fuel could be used for longer periods than some boilers might otherwise employ them. EPA also explained why it did not go further with respect to natural gas:

The EPA is not requiring the use of natural gas onlys [sic] during periods of startup and shutdown because natural gas pipelines are not available in all regions of the U.S., and natural gas is simply not available as a fuel or a startup fuel for many industrial, commercial, and industrial [sic] boilers. The work practice does require the source to record the type and amount of fuels combusted during each startup, as well as the duration of each startup.

2012 Response to Comments at 974 (emphasis added) (JA0237).

Petitioners do not challenge the work practice standard for the use of clean fuel as it applies to the shorter startup definition. They challenge it only in the context of the longer startup definition. Both work practice standards authorize boilers to burn fuels other than a listed clean fuel during startup as long as they vent emissions to the main stack and engage controls at prescribed times. The

longer startup definition differs in the engagement of those controls by allowing one additional hour after combustion of the primary fuel to engage particulate controls. 80 Fed. Reg. at 72,824 (Tbl. 3) (JA0098)

In proposing the work practice standards for the longer startup definition and for shutdown in 2015, EPA again solicited comment on the use of clean fuel, including the requirement that if any fuel other than a primary fuel is used during “shutdown,” that fuel must be one of the listed “clean fuels.” 80 Fed. Reg. 3090, 3092, 3120 (Jan. 21, 2015) (JA0025; JA0053). But this time, petitioners submitted no comment at all on that issue. They objected to the “as expeditiously as possible” standard for engagement of controls under the longer startup definition, but did not suggest any measures for HAP control other than limiting the overall length of startup or engaging controls earlier. Sierra Club 2015 Comments at 15-17 (JA0320-322). Their only comments with respect to use of “clean fuel” were an objection to EPA’s proposal to add several fuels to that list, and claims that EPA failed to demonstrate that “allowing all of the fuels it labels ‘clean’ ... is consistent with § 112(d).” *Id.* at 14-15 (JA0319-320).

The rehearing petition cites pages in petitioners’ briefs where they asserted that EPA should have assessed and required other regulatory approaches, like combustion of clean fuel. Reh’g Pet. 13-14. But, neither petitioners’ brief nor rehearing petition provide any citation to the 2015 *rulemaking record* where

commenters presented any alternative measures to EPA. EPA's response correctly characterized this issue. Resp't's Br. 35. The only record cites provided (Reh'g Pet. 14, 16; Pet'rs' Reply 26-27) are to (1) the very general 2011 comment EPA already addressed by *adding* a clean fuel requirement, and (2) EPA's contemporaneous explanation for why, after "carefully consider[ing] fuels and potential operational constraints of APCD," 78 Fed. Reg. at 7147 (JA0018), EPA found it reasonable to require use of clean fuels *as it had prescribed and not any more than that*. Petitioners repeatedly mischaracterize EPA's statement as suggesting EPA found no limits on boilers' ability to combust clean fuel during startup and shutdown.

In short, as to the work practice standards for the alternative startup definition, the panel's statement that Sierra Club identified no other reasonable measures is correct with respect to the administrative record, Slip op. at 33, which is all that matters here. Petitioner's clean fuel argument had no support in the record, and the panel rightly ignored it.

With respect to shutdown work practice standards, petitioners similarly fault the panel for not evaluating arguments regarding use of clean fuel that are not in the rulemaking record, including *brand new arguments* – like the unsupported and incorrect assertion that EPA itself has agreed that all boilers (even those designed for solid fuel) can operate normally on only clean fuel or switch to clean fuel

before shutdown begins. Reh’g Pet. 16. To the contrary, EPA was correct in its assessment in its brief that “[p]etitioners identify nothing in the record that renders [EPA’s] determination [with respect to shutdown] unreasonable.” Resp’t’s Br. 36.

In short, the panel correctly limited its evaluation to the claims regarding shutdown that were briefed – petitioners’ contention that the rule requires no control and that EPA mischaracterized the requirement for clean fuel. Pet’rs’ Br. 45-46; Slip op. at 35. If EPA’s responses to petitioners’ arguments on those issues, and the panel’s opinion, are more specific than the explanations in the record, that is understandable given petitioners’ failure to raise those issues in the rulemaking.

Regardless, the reality is that, despite petitioners’ failure to raise clean fuel use in the 2015 rulemaking, EPA carefully considered its use for the work practice standards for both startup definitions, and shutdown, adding it to the rule to the extent it deemed reasonable given §112(d)’s criteria, under which EPA must consider HAP control *and* costs and non-air quality impacts. Resp’t’s Br. 36; Int’rs’ Br. 32. Nothing in the record contradicts the reasonableness of EPA’s determinations.

### CONCLUSION

Petitioners fail to identify any error in the panel’s decision. The petition should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 40(b) and 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rules 40, I hereby certify that the foregoing Response of Respondent-Intervenors to Petition for Panel Rehearing contains 3890 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. This document also complies with the type-face and type-style requirements of those rules.

*/s/ Lauren E. Freeman*  
Lauren E. Freeman

Dated: June 5, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 5th day of June, 2018, a copy of the foregoing Response of Respondent-Intervenors to Petition for Panel Rehearing was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Lauren E. Freeman

Lauren E. Freeman