
ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1141 (and consolidated cases)

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

AMERICAN CHEMISTRY COUNCIL

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Agency Actions
76 Fed. Reg. 15,554 (Mar. 21, 2011)
78 Fed. Reg. 7,488 (Feb. 1, 2013)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 27(a)(4) and Circuit Rule 28(a)(1), Industry Intervenor-Respondents hereby certify as follows:

A. Parties and Amici

All parties and Interveners appearing before this Court are correctly listed in Industry Petitioners' brief.

B. Rulings Under Review

Accurate references to the rulings at issues appear in Industry Petitioners' brief.

C. Related Cases

Accurate references to the related cases appear in Industry Petitioners' brief.

CORPORATE DISCLOSURE STATEMENTS

Industry Intervenor-Respondents submit the following statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

American Chemistry Council (ACC): is a not-for-profit trade association that participates on its members' behalf in administrative proceedings and in litigation arising for those proceedings. ACC represents the leading companies engaged in the business of chemistry. ACC has no outstanding shares of debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

American Forest and Paper Association (AF&PA): serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative – Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufacturers approximately \$210 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in AF&PA.

American Gas Association (AGA): represents 201 energy companies that deliver natural gas throughout the United States. There are more than 70 million residential, commercial and industrial natural gas customers in the U.S., of which 91 percent – more than 64 million customers – receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry association. Today, natural gas meets almost one-fourth of the United States' energy needs. AGA is incorporated under the laws of Delaware as a nonprofit, membership corporation. AGA is the national trade association of America's local natural gas distribution utilities. AGA is a "trade association" for purposes of Circuit Rule 26.1(b), and, as such, its members need not be enumerated here.

American Home Furnishings Alliance (AHFA): is a non-profit industry trade association headquartered in High Point, North Carolina. AHFA's membership consists of approximately 450 companies in the home furnishings industry, including most domestic wood furniture manufacturers. AHFA has no parent corporation and

no publicly held company has a ten percent (10%) or greater ownership interest in AHFA.

American Iron and Steel Institute (AISI): is a non-profit, national trade association headquartered in the District of Columbia. AISI has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 20 producer member companies, including integrated and electric furnace steelmakers, and 125 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent more than three quarters of both U.S. and North American steel capacity.

American Petroleum Institute (API): is a national trade association representing all aspects of America's oil and natural gas industry. API has over 600 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10 percent (10%) or greater ownership interest in API.

American Wood Council (AWC): is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs over one-third of a million men and women in well-paying jobs. AWC's engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced government policies that sustain the wood products industry. No parent corporation and no publicly held company has a ten percent (10%) or greater ownership interest in AWC.

Biomass Power Association (BPA): is a non-profit, national trade association headquartered in Portland, Maine and organized under the laws of the State of Maine. BPA has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in BPA. BPA serves as the voice of the U.S. biomass industry in the federal public policy arena. BPA is comprised of 23 member companies who either own or operate biomass power plants, and 16 associate and affiliate members who are suppliers to or customers of the industry. BPA's member

companies represent approximately 80 percent of the U.S. biomass to electricity sector.

Chamber of Commerce of the United States of America (Chamber): is a non-profit corporation organized and existing under the laws of the District of Columbia. The Chamber is not a publicly held corporation and no corporation or other publicly held entity holds more than ten percent (10%) of its stock. The Chamber is the world's largest federation of business, trade and professional organizations. The Chamber represents 300,000 direct members and indirectly represents the interest of more than three million businesses and organizations of every size, in every industry from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. Many of the Chamber's members are subject to the regulation at issue in this matter.

Corn Refiners Association (CRA): is a non-profit, national trade association headquartered in the District of Columbia. CRA has no parent corporation. CRA serves as the voice of the U.S. corn wet millers industry in the public policy arena. CRA is comprised of 6 member companies with 23 plants located throughout the United States.

Council of Industrial Boiler Owners (CIBO): is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations. CIBO has not issued shares to the public and has no parent company.

National Association of Manufacturers (NAM): is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has no parent company, and no publicly held company has a ten percent (10%) or greater ownership interest in the NAM.

National Oilseed Processors Association (NOPA): is a non-profit, national trade association headquartered in the District of Columbia. NOPA has no parent

corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in NOPA. NOPA represents 13 companies engaged in the production of food, feed, and renewable fuels from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants located in 19 states throughout the country, including 57 plants that process soybeans.

Rubber Manufacturers Association (RMA): is a non-profit, national trade association headquartered in the District of Columbia. RMA has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in RMA. RMA is the national trade association representing tire manufacturing companies that manufacture tires in the United States. RMA member companies include: Bridgestone Americas, Inc.; Continental Tire the Americas, LLC; Cooper Tire & Rubber Company; The Goodyear Tire & Rubber Company; Michelin North America, Inc.; Pirelli Tire North America; Toyo Tire Holdings of Americas Inc. and Yokohama Tire Corporation. RMA's eight member companies operate 30 tire manufacturing plants, employ thousands of Americans and ship over 90 percent of the original equipment tires and 80 percent of the replacement tires sold in the United States.

Society of Chemical Manufacturers and Affiliates (SOCMA): is a non-profit, national trade association headquartered in the District of Columbia. SOCMA has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in SOCMA. SOCMA is the leading trade association representing the batch, custom, and specialty chemical industry. SOCMA's over 200 member companies make the products and refine the raw materials that make our standard of living possible. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products. Over 70% of SOCMA's active members are small businesses. SOCMA advocates for U.S. laws and regulations that promote our members' competitiveness and bottom line.

Southeastern Lumber Manufacturers Association (SLMA): is a trade association that represents independently owned sawmills, lumber treaters, and their suppliers in 17 states throughout the Southeast. SLMA's members produce more than 2 billion board feet of solid sawn lumber annually, employ over 12,000 people, and responsibly manage over a million acres of forestland. These sawmills are often the largest job creators in their rural communities, having an economic impact that reaches well beyond people that are in their direct employment. The association serves as the unified voice of its members on state and federal government affairs and offers

various other programs including networking events, marketing and management, and operational issues. No parent corporation and no publicly held company has a ten percent (10%) or greater ownership interest in SLMA.

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GLOSSARY OF TERMS

CAA	Clean Air Act, 42 U.S.C. §§ 7401 <i>et seq.</i>
CEMS	Continuous Emission Monitoring System
EGUs	Electric Generating Units
EPA	United States Environmental Protection Agency
ESP	Electrostatic Precipitator
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
MMBtu	One Million British Thermal Units
MMBtu/hr	Millions of British Thermal Units Per Hour
NO _x	Oxides of Nitrogen
POM	Polycyclic Organic Matter
SIP	State Implementation Plan
PM	Particulate Matter
Title V	42 U.S.C. §§ 7661a – 7661f, CAA §§ 502 – 507
TPY	Tons Per Year

STATUTES AND REGULATIONS

With the exception of the statutes and regulations reproduced in the attached Addendum, all applicable statutes and regulations are contained in the briefs of the Industry Petitioners, Environmental Petitioners, and Respondent U.S. Environmental Protection Agency (“EPA” or “the Agency”).

STATEMENT OF ISSUES

1. Whether § 112(c)(6) gives EPA discretion to revisit its initial inclusion of a source subcategory among a group that contributes to 90% of the emissions of seven specified HAP without removing that subcategory from regulation under § 112?
2. Whether EPA lawfully excluded from regulation under the rule boilers that are temporary and not area source boilers?
3. Whether EPA lawfully set GACT rather than MACT standards for some area sources, where the statute indicates that EPA “may, in lieu of [MACT standards] elect” to set GACT standards for such sources?
4. Whether the work practice standards, which require sources to minimize HAP emissions, are lawful MACT standards?
5. Whether in setting GACT standards, EPA lawfully determined what constitutes “generally available control technology” by considering multiple factors,

including available control technologies and their transferability to area sources, cost and economic impacts?

6. Whether EPA acted reasonably in exempting from the Title V permitting requirement synthetic area sources that are already subject to federally enforceable permits that (i) effectively replicate the features of Title V permits and (ii) require them to use controls to limit their emissions to area source levels?

STATEMENT OF THE CASE

The factual background of the area source rule is well developed in Industry Petitioners' Brief and EPA's Response Brief. Environmental Petitioners' brief necessitates further elaboration of the facts regarding only one issue: the types of operating permits available under the Clean Air Act ("CAA" or "the Act").

The CAA requires sources emitting hazardous air pollutants ("HAP") to obtain a Title V operating permit. CAA § 502(a). The law gives EPA the discretion, however, to exempt "area sources" of HAP, such as those subject to this rule, from Title V permitting where EPA concludes that requiring such permits would be impracticable, infeasible or unnecessarily burdensome. *Id.*

Area sources are those with the potential to emit less than 10 tons per year ("TPY") of any one HAP and less than 25 TPY of all HAP combined. CAA § 112(a)(2). Area sources come in two varieties: "natural" and "synthetic." (The latter are sometimes referred to as "synthetic minors.") 75 Fed. Reg. 31,896, 31,913 (June 4,

2010) (JA___). Natural area sources are those whose uncontrolled HAP emissions are already below the 10 and 25 TPY thresholds. *Id.* Synthetic area sources are those whose uncontrolled HAP emissions are higher, but which have voluntarily subjected themselves to federally enforceable state operating permits (“federally enforceable permits”) – not issued under Title V – that limit their HAP emissions to below those thresholds. 76 Fed. Reg. 80,532, 80,538 (Dec. 30, 2011) (JA___). Some synthetic area sources comply with their limits by accepting legally binding operating limits, and some comply with their limits by use of pollution control equipment. 75 Fed. Reg. at 31,913 (JA___). In the proposed area source rule, EPA exempted from Title V almost all area source boilers, but it did not exempt the subset of synthetic area boilers that use pollution control equipment to meet their federally enforceable limits (“controlled synthetic area source boilers”). *Id.* (JA___).

In the final rule, EPA exempted *all* area source boilers from Title V. EPA determined that Title V requirements are unnecessarily burdensome for the area source boiler category – including controlled synthetic area boilers. 76 Fed. Reg. 15,554, 15,578 (Mar. 21, 2011) (JA___); 78 Fed. Reg. 7,488, 7,497 (Feb. 1, 2013) (JA___). In making that determination, EPA concluded that the controlled synthetic area source boilers have Title V burdens comparable to other area source boilers and that any potential Title V benefits do not outweigh the burdens. 76 Fed. Reg. at 15,578 (citing 75 Fed. Reg. at 31,910-13 (JA___)) (JA___). Environmental Petitioners

challenge the Title V exemption only as it applies to the controlled synthetic area source boilers.

EPA regulations not at issue in this case establish the requirements for both State-issued Title V permits and for federally enforceable permits, and those requirements are materially identical. Title V operating permits can only be issued by States that have been approved by EPA to issue such permits, based on a demonstration that the State has authority to require compliance assurance measures and enforce the conditions of permits that it issues. 40 C.F.R. § 70.4. Similarly, federally enforceable state operating permits can only be issued by States that have been approved by EPA to issue such permits, again based on a demonstration of authority to assure source compliance and enforce against noncompliance. 40 C.F.R. § 51.231. Under both types of permits, States must prohibit exceedances of emission limits; require sources to monitor, record and report data sufficient for the State to assure compliance; and ensure the public's access to data and ability to enforce directly. The table below summarizes the permitting elements that Environmental Petitioners have identified as of concern, the comparable Federally Enforceable State Operating Permit requirement, and the specific requirement in Title V:

Environmental Petitioners' Permitting Elements of Concern	Federally Enforceable State Operating Permit Requirements	Title V Permit Requirements
Citizen enforcement. Env'tl Pet'rs' Br. at 39.	Limitations and conditions in permits "are enforceable by the Administrator and citizens under the Act..." 40 C.F.R. § 63.2.	"All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act." 40 C.F.R. § 70.6(b)(1).
Citizen access to compliance information and data for enforcement. Env'tl Pet'rs' Br. at 44.	<p>"[A]ll reports, records, and other information collected by the Administrator under this part are available to the public. 40 C.F.R. § 63.15(a)(1).</p> <p>A "copy of each permit application, compliance plan (including the schedule of compliance), notification of compliance status, excess emissions and continuous monitoring systems performance report, and title V permit is available to the public..." 40 C.F.R. § 63.15(a)(1).</p>	<p>"The compliance plan, schedule of compliance, and emissions or compliance monitoring report shall be available to the public." CAA § 503(e).</p> <p>[A]ll permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." 40 C.F.R. § 70.7(h).</p>
Reporting of reliable data representative of source compliance. Env'tl Pet'rs' Br. at 44.	State must require sources "to maintain records of and periodically report to the State – (a) Information on the nature and amount of emissions from the stationary sources; and (b) Other information... necessary [for the] State to determine whether the sources are	Permits shall include "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with

	<p>in compliance....” 40 C.F.R. § 51.211.</p> <p>State must show authority to “make [source emission] data available to the public as reported and as correlated with any applicable emission standards or limitations.” 40 C.F.R. § 51.230(f).</p>	<p>the terms and conditions of the permit.” 40 C.F.R. § 70.6(c)(1).</p> <p>Permits shall require reporting at least every 6 months. 40 C.F.R. § 70.6(a)(3)(iii).</p>
<p>Verification of requirements applicable to a source. <i>Env’tl Pet’rs’ Br.</i> at 46.</p>	<p>Permits must be issued only after adequate and timely notice and opportunity for comment. 40 C.F.R. § 63.2 (definition of “federally enforceable”, ¶ 6(v)).</p> <p>“[E]ach permit application, compliance plan (including the schedule of compliance), notification of compliance status, excess emissions and continuous monitoring systems performance report, and title V permit is available to the public...” 40 C.F.R. § 63.15(a)(1).</p>	<p>“Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.6(a)(1).</p> <p>“A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit....The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source....” 40 C.F.R. § 70.5(c)(3)(i).</p>
<p>Assuring compliance with CAA requirements, including use of control equipment. <i>Env’tl Pet’rs’ Br.</i> at 46.</p>	<p>State must show that “[t]he limitations, controls, and requirements in the permit in question are permanent, quantifiable, and otherwise enforceable as a practical matter.” 40 C.F.R. § 63.2 (definition of federally enforceable, ¶ 6(iv)).</p>	<p>Permits must include “[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all</p>

	<p>State must establish “a system for detecting violations of any rules and regulations through the enforcement of appropriate visible emission limitations and for investigating complaints.” 40 C.F.R. § 51.212(b).</p>	<p>applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.6(a)(1).</p> <p>Permits shall include requirements for “compliance certification with terms and conditions contained in the permit including emission limitations, standards, and work practices.” 40 C.F.R. § 70.6(c)(5).</p>
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SUMMARY OF ARGUMENT

Industry Petitioners endorse EPA’s responses to Environmental Petitioners’ arguments and provide the following additional support for EPA’s positions.

- The final rule sets reasonable standards that are consistent with all CAA requirements.
- EPA has properly issued § 112(d)(2) Maximum Achievable Control Technology (“MACT”) standards for the group of subcategories that EPA determined contribute to 90% of the emissions of the specified HAP, as required by § 112(c)(6). As is permitted by the Act, EPA did not delist (and hence de-regulate) the subcategories, like area source boilers, that are no longer included in the 90% group.

- EPA reasonably (and consistently with the CAA) clarified that the rule excludes from its coverage temporary boilers because they are not part of the area source boiler category.
- EPA set standards that are consistent with the Act and reasonable: 1) EPA acted within its discretion in electing to set Generally Available Control Technology (“GACT”) standards in lieu of MACT standards and fully supported its decision in the record; 2) The work practice standards for small coal-fired boilers and during startup and shutdown periods minimize emissions and are well supported by the record; and 3) The GACT management practice standards reflect GACT methodology and are reasonable and within EPA’s discretion under the CAA to promulgate “generally available...management practices.”
- The rule lawfully and reasonably includes within the Title V exemption for area sources the subset of synthetic area sources that operate controls under a federally enforceable permit.

ARGUMENT

I. EPA APPROPRIATELY SET GACT STANDARDS FOR SOURCES NOT CONTRIBUTING TO 90% OF THE EMISSIONS OF THE SECTION 112(C)(6) HAP.

Congress established a multi-stage process for EPA to follow in listing and regulating categories of HAP sources under § 112. Regulation of major sources is comprehensive and straightforward: under § 112(c)(1), EPA must publish “a list of all

categories and subcategories of major sources....” Because area sources tend to be owned by small entities, are far more numerous, and are less cost-effective to control than major sources, Congress limited EPA to listing those area sources that, individually or in the aggregate, present a risk of adverse effects on health or the environment. CAA § 112(c)(1), (c)(3). This narrower scope was subject to two caveats:

- First, to ensure that this list was adequate to address threats to health in urban areas, Congress specified that EPA had to ensure that it listed sources sufficient to account for 90% of area source emissions of the 30 HAP that pose the greatest threat to public health in the largest number of urban areas. CAA § 112(c)(3), (k)(3)(B).
- Second, and at issue in this litigation, to “assure” that almost all emissions of seven specified HAP were regulated stringently, Congress required EPA to identify sources sufficient to account for 90% of the aggregate emissions of those seven HAP, and to regulate them via MACT or health-based – but not GACT – standards. CAA § 112(c)(6).

With regard to this second caveat, the question of whether EPA has actually imposed non-GACT standards on sufficient area sources to account for 90% of emissions of the seven HAP has been the subject of litigation intermittently since 1998. *See, e.g., Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012). EPA maintains that

it has met this requirement, and has just issued for public comments its proposed final determination of § 112(c)(6) source categories and subcategories. *See* 79 Fed. Reg. 74,656 (Dec. 16, 2014) (JA____). That issue is not before this Court.

At various times since 1998, EPA has included various categories and subcategories of area sources in its provisional § 112(c)(6) determinations. *See* EPA, EPA-HQ-OAR-2006-0790-2312, “Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act” (Feb. 18, 2011). EPA has consistently taken the position that it can and indeed should update and revise the determinations over time, as it gains greater and more current knowledge about the emissions of various source categories, derived from emissions inventories and from information gathered as it developed emission standards for particular categories. Environmental Petitioners argue that if EPA has ever identified a category of sources on one of its § 112(c)(6) determinations, it is thereafter bound to impose non-GACT standards on those sources unless and until it delists them from regulation altogether under § 112. Stated slightly differently, they argue that the identification of a source as a § 112(c)(6) source is nothing more than, and inseparable from, the listing of that source under § 112(c)(1). So for area source boilers, they argue that EPA must issue MACT standards for the oil and biomass-fired subcategories, which had been identified in 1998 as § 112(c)(6) sources for mercury and POM emissions, but were not among the § 112(c)(6) sources as of February 2011.

See 76 Fed. Reg. at 15,566 (JA___). This contention is neither mandated by the statute nor a reasonable interpretation of it.

Section 112(c) requires EPA to establish the list of source categories and subcategories sources that will be subject to regulation under that section, as noted above. EPA may add categories and subcategories to “the initial list” any time. CAA § 112(c)(5). “For the categories and subcategories the Administrator lists, the Administrator shall establish” standards under § 112(d). CAA § 112(c)(2). The determinations that EPA makes under § 112(c)(6) serve a separate, supplementary purpose, as just explained.

Environmental Petitioners’ interpretation of § 112(c)(6) ignores a key term in § 112(c)(6) – “assuring” – and renders it surplus. EPA must “list categories and subcategories of sources *assuring that* sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4)....” CAA § 112(c)(6) (emphasis added). “It is axiomatic that all words and provisions of a statute are presumed to have meaning and are to be given effect.” *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981). Courts are “reluctant to treat statutory terms as surplusage in any setting.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under § 112(c)(6), EPA must “assur[e] that” sources accounting for 90% of the emissions of the seven pollutants are subject to § 112(d)(2) or (d)(4), which are MACT or health-based standards. By requiring EPA to assure that MACT or health-based standards apply to sources emitting 90%

of the seven pollutants, EPA must not only list those sources, but also must determine which among those sources contribute towards 90% of the emissions and regulate them differently. If the 90% sources shift over time, under Environmental Petitioners' interpretation, EPA would lack authority to refocus its regulatory efforts as directed by Congress to set MACT or health-based standards for those sources. This interpretation would nullify EPA's ability to carry out Congress's directives under § 112(c)(6).

In addition, if Congress had intended EPA to subject all sources emitting any of the seven § 112(c)(6) pollutants to MACT or health-based standards, regardless of the volume of their individual emissions, it would have drafted § 112(c)(6) in the same fashion as § 112(c)(1) and simply required that the sources emitting those pollutants meet § 112(d)(2) or (d)(4) standards. "Courts should assume that Congress was aware of the distinctions it was making and that it intended to make those distinctions." *Diamond v. U.S. Agency for Int'l Dev.*, 108 F.3d 312, 316 (Fed. Cir. 1997).

Environmental Petitioners argue that the only way EPA can set GACT standards for sources categories that it has ever included in the § 112(c)(6) 90% group is to "delist" them under § 112(c)(9). However, that provision establishes the process by which EPA can delete a source category from the § 112(c)(1) list; i.e., from regulation under § 112 altogether.¹ Environmental Petitioners' view would therefore

¹To delete a category, the Administrator must determine that either: no source in the category emits HAP in quantities that may cause a lifetime cancer risk greater than

leave EPA with only two choices if it has ever included a category in the 90% group: regulate it under MACT or a health-based standard, or else completely deregulate its HAP emissions. By contrast, the approach EPA has adopted still “assur[es]” that the sources emitting 90% of the seven specified HAP are regulated to a MACT level of control, but also allows EPA to impose GACT standards on other sources – like area source boilers – that were once included in the 90% group.

This more logical and natural reading of § 112(c)(6) recognizes that the group of 90% contributing sources may change over time as source categories and their emissions change, or as EPA gains fuller or more accurate information about emissions. The goal of § 112(c)(6) is not served by identifying sources based on a one-time snapshot of their emissions and then mindlessly adhering to an outdated compilation of 90% contributors. The express goal is to reduce emissions of seven specified air pollutants for the betterment of human health and the environment. That goal can be served most effectively if EPA is permitted to make adjustments over time to reflect shifts in source categories and their emissions that may derive from newly listed source categories, new emissions data, and other improvements. As noted above, EPA has revised the § 112(c)(6) list multiple times. Most recently, EPA amended its § 112(c)(6) determination in February 2011, to reflect updated emissions data, including mercury emissions estimates from industrial and commercial boilers

one in one million; or no source in the category emits HAP above a level adequate to protect public health and that will result in an adverse environmental effect. CAA § 112(c)(9)(B).

that suffered from a “number of technical problems” and which for oil-fired boilers had been “overestimated by an order of magnitude.” EPA, EPA-HQ-OAR-2006-0790-2312, “Emission Standards for Meeting the Ninety Percent Requirement Under Section 112(c)(6) of the Clean Air Act” at 10-11 (Feb. 18, 2011). It is not a reasonable reading of § 112(c)(6) to expect EPA to fulfill its charge to assure that it properly regulates sources accounting for no less than 90% of the aggregate emissions while limiting EPA’s ability, if necessary, to refocus its regulatory efforts to act on new emissions information.

In support of their argument, Environmental Petitioners offer *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). *See* Env’tl Pet’rs’ Br. at 28. However, *New Jersey* was specifically directed to removing a source category listed under § 112(c)(1): “the only way EPA could remove EGUs from the section 112(c)(1) list was by satisfying section 112(c)(9)’s requirements.” 517 F.3d at 582. *New Jersey* simply does not speak about updating the categories or subcategories that are 90% contributors under § 112(c)(6). Since EPA did not delist the area source industrial boiler category, *New Jersey* is simply not relevant to this litigation.

II. TEMPORARY BOILERS ARE NOT AREA SOURCE BOILERS AND WERE PROPERLY EXCLUDED.

EPA provides a reasoned explanation for not identifying temporary boilers in the initial area source rule: they are not part of the industrial boiler area source category. A “temporary boiler” is “any gaseous or liquid fuel boiler that is designed

to, and is capable of, being carried or moved from one location to another by means of, for example, wheels, skids, carrying handles, dollies, trailers, or platforms.” 40

C.F.R. § 63.11237. Under that same definition, a boiler is not “temporary” if it

- (1) is attached to a foundation;
- (2) remains at a location within the facility and performs the same or similar function for more than 12 consecutive months, unless the regulatory agency approves an extension;
- (3) is located at a seasonal facility and operates during the full annual operating period of the seasonal facility; or
- (4) is moved from one location to another within the facility but continues to perform the same or similar function and serve the same electricity, steam, and/or hot water system in an attempt to circumvent the residence time requirements of this definition.

See id.

Under this definition, only boilers that are not permanent and onsite for a limited period of time are considered temporary. *See id.* Environmental Petitioners challenge the exclusion of temporary boilers from the industrial boiler area source category based solely on the unsupported allegation that they were once explicitly considered part of this source category. That these boilers are not part of the category is borne out by the record and also by the statutory structure for listing and regulating source categories.

Refining a source category during the standard-setting process is contemplated under CAA § 112(e)(4). Under that provision, “no action” of the EPA involving listing a category or subcategory under CAA § 112(c) is final and judicially reviewable until EPA issues emission standards for the category or subcategory. CAA § 112(e)(4). Delaying judicial review of listings until EPA issues substantive

requirements shows that Congress anticipated that further work may remain to define the source category and subcategories during the development of the standards. EPA's practice is initially to list a generic source category. Then, during the rulemaking to set emission limits and other requirements for that category, EPA learns more about the characteristics, limitations and capabilities of the units in that category. Based on that information, it may adjust the definition of the category in the final rule.

This rule was no exception. In 1999, EPA listed the area source categories generally as industrial boilers and institutional/commercial boilers. *See* 64 Fed. Reg. 38,706, 38,721 tbl. 2 (July 19, 1999) (JA___). In 2010, EPA proposed standards for those categories. *See* 75 Fed. Reg. at 31,921 (JA___). EPA specified the particular types of boilers subject to the rule through that rulemaking process. Commenters suggested many clarifications, some of which were adopted by EPA. For example, commenters pointed out that certain boilers used as emissions control devices are regulated by other MACT standards and thus should not be subject to the area source rule. *See, e.g.,* API and AFPM, EPA-HQ-OAR-2006-0790-2482, Comments on the Proposed Reconsidered Area Source Rule 10-11 (Feb. 21, 2012) (JA___). EPA clarified that the rule does not apply to these boilers in the final reconsideration. *See* 78 Fed. Reg. at 7,492 (JA___). EPA also excluded electric and residential boilers "because they are not part of either the industrial boiler source category or the commercial/institutional sources category." 76 Fed. Reg. at 80,539 (JA___).

The proposed area source rule lacked any reference to temporary boilers. *See* 75 Fed. Reg. 32,050 (June 4, 2010) (proposed 40 C.F.R. § 63.7491(i)) (JA____). EPA's failure to address temporary boilers in the proposed rule was brought to its attention by commenters who sought the same clarity that was provided in the proposed major source boiler MACT rule, which made clear that temporary boilers were not covered by its terms.² *See* AF&PA, EPA-HQ-OAR-2006-0790-1939, Comments on Proposed Area Source Rule 58 (Aug. 23, 2010) (JA____). EPA agreed with these commenters and brought the area source rule into line with the boiler MACT rule in the final reconsidered rule. *See* 78 Fed. Reg. at 7,506 (current 40 C.F.R. § 63.11195(h)) (JA____). EPA explained that it never intended to include temporary boilers. *See* 78 Fed. Reg. at 7,491 (JA____).

As described by commenters and EPA, temporary boilers are portable units, brought onsite during emergencies or periods when stationary boilers are undergoing maintenance. In most cases, the boiler is not owned by the stationary source and may not be operated by the stationary source. *See* AF&PA, EPA-HQ-OAR-2006-0790-1939, Comments on Proposed Area Source Rule 58 (Aug. 23, 2010) (JA____).

Area sources bringing a temporary boiler onsite may also be required to obtain a permit specifically for that boiler. For example, Kentucky requires that non-major sources have a federally enforceable permit for temporary boilers. *See* 401 Ky. Admin.

² The final boiler MACT rule retains this exclusion for temporary boilers. *See* 40 C.F.R. § 63.7491(n).

Regs. 52:030 § 20(1). Those sources are limited to 6 months of operation before either (i) they are replaced by the original permitted unit or (ii) the temporary boiler must be permitted as a permanent unit. *See* 401 Ky. Admin. Regs. 52:030 § 20(5). In Texas, temporary boilers are covered under a standard permit that requires recordkeeping, installation of CEMS for boilers greater than or equal to 100 MMBtu/hr, and NOx emission limitations. *See* 31 Tex. Reg. at 9,502 (Nov. 17, 2006) (JA___). Contrary to the picture painted by Environmental Petitioners, temporary boilers are very distinct from area source boilers. EPA acted reasonably and within the law in determining, as part of the final area source boiler rulemaking, that the covered source category did not include these units.

III. EPA REASONABLY EXERCISED ITS DISCRETION UNDER § 112(d)(5) TO SET GACT RATHER THAN MACT STANDARDS.

Environmental Petitioners argue that EPA should have issued MACT rather than GACT standards for metals. Yet, under the express terms of § 112(d)(5), Congress vested EPA with discretion to set GACT rather than MACT standards for area sources:

[T]he Administrator may, in lieu of the authorities provided in [§ 112(d)(2) or § 112(f)], elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

CAA § 112(d)(5).

Where Congress wants to condition EPA's selection of a particular standard, it does so specifically. Examples of such specific direction abound in the CAA, including in § 112. For example, before determining a MACT standard, EPA must first set the floor and then consider whether sources can achieve beyond-the-floor emission reductions. CAA § 112(d)(3), (d)(2). Similarly, before EPA can adopt work practices as a MACT standard, it must first find that it is not feasible to prescribe or enforce numeric emission limits. CAA § 112(h)(1). No such conditions are imposed under § 112(d)(5), reflecting congressional intent that EPA use its judgment to define the appropriate standard for area sources. EPA must, of course, act within the bounds of reasonableness in using its judgment, and it did so here.

Although the statute does not require EPA to conduct a formal analysis of the feasibility of MACT standards before setting GACT standards for area sources, in the case of the boiler rules, EPA developed the major and area source rules simultaneously. Therefore, EPA's decision to set GACT standards was informed by voluminous data and analysis regarding the entire domestic boiler population – both major and area source boilers – with widely ranging characteristics regarding such aspects as boiler fuel emission control, equipment emissions tests, and other data. *See* ERG, EPA-HQ-OAR-2006-0790-2333, Revised MACT and GACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers National Emission Standards for Hazardous Air Pollutants – Area Source (Feb. 2011) (JA____).

EPA analyzed data from boilers and considered the effectiveness of all possible controls and work and management practices in use at area sources and major sources for this rule and selected GACT standards as appropriate. In setting GACT standards, EPA considered the controls that are deployed at large area sources for PM: fabric filter, ESPs and multicyclones. EPA also considered the PM controls deployed at major sources and their potential applicability to area sources. EPA's floor setting memoranda demonstrate that EPA fully considered all possible controls for area source boilers. *See generally id.* (JA___); *see also* ERG, EPA-HQ-OAR-2006-0790-2407, Revised (November 2011) MACT Floor Analysis for the Industrial, Commercial, and Institutional Boilers National Emission Standards for Hazardous Air Pollutants – Area Source (Nov. 2011) (JA___). EPA was well aware of the cost effectiveness and feasibility of PM controls, and of the capabilities of area sources regarding those controls. Environmental Petitioners effectively are arguing that EPA should have considered the need for more stringent PM standards for area source boilers. EPA did just that. The Agency considered the full range of emissions control options for PM and made a reasoned decision to select options reflecting generally available rather than maximum achievable control technology.

IV. WORK PRACTICE STANDARDS SOURCES ARE CONSISTENT WITH § 112(d) AND ARE REASONABLE.

EPA may set a work practice standard that “*in the Administrator’s judgment* is consistent with the provisions of subsection (d) or (f)” of § 112. CAA § 112(h)(1)

(emphasis added). Because this determination is left to the judgment of the Administrator, the Court will defer to EPA as long as EPA provides a rational basis for its decision. *See Lead Indust. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980).

EPA set two types of work practice standards for coal-fired sources at issue here: a tune-up for small coal-fired boilers and emissions minimization during startup/shutdown for large coal-fired boilers. Giving the phrase “consistent with” its plain meaning, EPA must issue work practice standards that are consistent with the goal of § 112(d) – to achieve a reduction in emissions reflecting the practices of the better controlled sources in the source category. The work practice standards in EPA’s judgment, are consistent with this goal.

Environmental Petitioners dismiss EPA’s analysis showing that it is infeasible to establish or enforce numeric limits for small coal-fired boilers and during startup and shutdown. *See* Env’tl Pet’rs’ Br. at 34. Yet that very analysis also demonstrates that the work practices specified by the rule are consistent with § 112(d) maximum emissions reduction. During startup and shutdown periods, emissions may exceed standards and controls are not necessarily operating. *See* ACC, EPA-HQ-OAR-2006-0790-1925, Comments on Proposed Area Source Rule 31 (Aug. 23, 2010) (JA___). Therefore minimizing startup and shutdown is consistent with achieving the

maximum emission reduction.³ The opposite action – extending startup and shutdown periods to conduct testing to set numeric limits and prove compliance – is not only infeasible, it could actually increase emissions. *See, e.g.*, 76 Fed. Reg. at 15,560 (JA____) (it is not technically feasible to complete stack testing during periods of startup and shutdown); *id.* at 15,560 (“Operating in startup and shutdown mode for sufficient time to accommodate the required test runs could result in higher emissions than would otherwise occur.”) (JA____).

V. GACT STANDARDS ARE LEGAL AND REFLECT THE GENERALLY AVAILABLE CONTROL TECHNOLOGY.

Section 112(d)(5) provides that, for area sources, EPA “may...elect to promulgate...requirements...which provide for the use of generally available...management practices.” This means that EPA has discretion to establish work practices as GACT for area source boilers. In this rulemaking, EPA followed its well-established methodology for determining GACT for area sources. In doing so, EPA considers the control technologies and management practices that are generally available and transferable to area sources; if appropriate, the controls available to analogous major sources; and the costs and economic impacts of available controls.

³Manufacturers’ recommendations are guides for best combustion practices. *See* 75 Fed. Reg. at 31,907 (“The most common best practice is simply tuning the boiler to the manufacturer’s specification.”) (JA____); *see also* Occidental Chemical Corp., EPA-HQ-OAR-2006-0790-2227, Comment on Proposed Area Source Rule 2 (Aug. 23, 2010) (“Work practice standards, including operating the boiler according to the manufacturer’s recommendations to ensure good combustion along with periodic tune-ups, is the most practical method of regulation during low load periods.”) (JA____).

See 75 Fed. Reg. at 31,898 (JA____). EPA has faithfully followed this methodology for determining GACT standards in multiple area source rules. *See, e.g.*, 78 Fed. Reg. 22,370 (Apr. 15, 2013) (JA____); 74 Fed. Reg. 63,504 (Dec. 3, 2009) (JA____); 74 Fed. Reg. 63,236 (Dec. 2, 2009) (JA____); 74 Fed. Reg. 56,008 (Oct. 29, 2009) (JA____); and 72 Fed. Reg. 38,864 (July 16, 2007) (JA____).

Environmental Petitioners argue that EPA's selection of several GACT standards in the area source rule is unlawful. But they point to nothing unreasonable about EPA's GACT standard-setting methodology. In its GACT methodology in this rule, consistent with all other area source rules applying this methodology, EPA has not accorded the terms "generally available" any specific interpretive weight divorced from the other GACT factors. Instead, EPA's findings of "general availability" reflect an all-factors analysis. Commenters have suggested – and EPA has rejected – defining "generally available" based on whether the control is used by a majority of area sources in the category. *See, e.g.*, 74 Fed. Reg. at 63,515 ("GACT reflects what is generally available, and a control technology may be generally available even if a majority of sources are not currently using it.") (JA____). In this way, EPA has resisted reducing the analysis to a counting exercise and instead retained its discretion to give weight as appropriate to all relevant factors for area sources. In this rulemaking, EPA analyzed the range of controls deployed at area sources and considered that information in the context of cost, practicality to retrofit,

effectiveness at controlling HAP emissions reductions and other factors. Resp't Br. at 68. Thus, "widespread use" is not synonymous with "generally available."

Environmental Petitioners agree, partially. They argue – and neither EPA nor Industry Petitioners contest – that EPA has discretion to define a control as GACT even where that control is not "widely used." *Env'tl Pet'rs'* Br. at 36. That is, the mere fact that the control is not fully deployed across the area source category does not end the general availability inquiry. *Id.* The converse logically must also hold if EPA is to retain any discretion. That is, if EPA finds that controls *are* widely used at area sources, its inquiry does not end there. EPA must still consider the other factors. In this rulemaking, EPA did just that, as described in detail in its brief. *See* Resp't Br. at 68-69.

Yet Environmental Petitioners insist that wide use of a control tilts the balance in favor of finding that control to be GACT, effectively creating a hurdle that EPA must overcome with some undefined additional proof. *See* Earthjustice et al., EPA-HQ-OAR-2006-0790-1982, Comments on Proposed Area Source Rule at 16 (Aug. 23, 2010) (EPA has "complete[ly] fail[ed] to explain why technologies that are already in widespread use by area source boilers are not generally available technologies for these sources.") (JA___). Nothing in the statute or in EPA's well established GACT methodology establishes the wide use of a control as presumptively GACT.

EPA's all-factor analysis reflects the statutory design for setting GACT standards, which grants EPA broad discretion to account for the nature of area

sources. This is contrasted with the more prescriptive two-step analysis for setting MACT standards, which requires EPA to define the maximum achievable control technology without consideration of other factors, with such factors as cost and non-air quality impacts being considered only in the second step of the analysis, for beyond-the-floor standards. For GACT determinations, EPA has reasonably established a methodology that considers control technologies as part-and-parcel of the one-step standard setting analysis.

VI. EPA REASONABLY EXEMPTED FROM TITLE V SYNTHETIC AREA SOURCES WITH CONTROLS AND FEDERALLY ENFORCEABLE LIMITS.

Environmental Petitioners claim that EPA irrationally exempted controlled synthetic area source boilers from Title V permitting. They essentially argue that the four-factor analysis for exempting sources leads to a different outcome for this subset of synthetic area boilers because: 1) the controlled synthetic boilers do not bear the same burden as other area sources; and 2) any burden on these sources is outweighed by the benefits of Title V. Environmental Petitioners also claim (contrary to law) that controlled synthetic boilers have greater potential emissions. *See* Env'tl Pet'rs' Br. at 38-39.

EPA fully explained its basis for concluding that the Title V exemption for natural area sources should also apply to the subset of synthetic area sources with installed controls and a federally enforceable permit. EPA fully analyzed the Title V burden and potential compliance benefits using its four-factor test for exempting

sources from Title V, addressed this issue in the reconsideration rule, responded to comments and provided additional explanation in the preamble. *See* 78 Fed. Reg. at 7,497 (citing 76 Fed. Reg. 15,554 (JA____) and 76 Fed. Reg. 80,532 (JA____)) (JA____).

Environmental Petitioners claim that the burden on controlled synthetic area sources is not comparable to the burden on other Title V exempt area sources. Yet the record shows the contrary. Controlled synthetic area sources bear a burden comparable to, for example, the area source boilers subject to numeric emission limits under this rule. Resp't Br. at 82-83. Such boilers must limit their emissions through the use of control equipment and comply with the requirements of this rule. *See* 76 Fed. Reg. at 15,570 (“some coal-fired area source boilers will need to install controls to meet these standards, and that these controls have significant costs.”) (JA____). Environmental Petitioners do not challenge EPA’s conclusion that Title V is unnecessarily burdensome for the area source boilers subject to numeric limits. Like those area sources, the controlled synthetic area source boilers will be subject to specific emission limits, compliance monitoring, recordkeeping and reporting, enforcement risk and other regulatory obligations. *See* ACC, EPA-HQ-OAR-2006-0790-2444, Comments on Proposed Area Source Rule Reconsideration 22 (Feb. 21, 2012) (JA____); *see also supra* pages 5-7.

Commenters pointed out the burdens of Title V, including preparing and obtaining a permit and ongoing reporting and compliance certification requirements. *See, e.g.*, Dow Chemical, EPA-HQ-OAR-2006-0790-1766, Comments on Proposed

Area Source Rule 1 (Aug. 23, 2010) (JA____); Northern States for Coordinated Air Use Management, EPA-HQ-OAR-2006-0790-2454, Comments on Proposed Reconsideration Area Source Rule 4 (Feb. 21, 2012) (JA____).

Environmental Petitioners also argue that Title V permits, as contrasted with the area source rule, provide these benefits:

- Citizen enforcement. *Env'tl Pet'rs' Br.* at 39.
- Citizen access to compliance information and data for enforcement. *Env'tl Pet'rs' Br. Id.* at 44, 45, 46.
- Reporting of reliable data representative of source compliance. *Id.* at 44.
- Verification of requirements applicable to a source. *Id.* at 46.
- Assuring compliance with CAA requirements, including use of control equipment. *Id.* at 46.

Environmental Petitioners completely ignore the inconvenient fact that the subset of synthetic area sources they wish to subject to Title V is already subject to federally enforceable permits that require protections equivalent to those listed above. As shown on pages 5-7 of this brief, federally enforceable permits address *each* of the benefits of Title V permits claimed by Environmental Petitioners, providing compliance assurance, public participation and enforceability that correspond to Title V provisions. For example, citizen enforceability is already guaranteed through the federally enforceable permits, which by definition are “enforceable by the Administrator and citizens under the Act...” 40 C.F.R. § 63.2. Commenters pointed this out during the reconsideration of the rule. *See* ACC, EPA-HQ-OAR-2006-0790-2444, Comments on Proposed Area Source Rule Reconsideration 22 (Feb. 21, 2012)

(JA___). EPA reasonably concluded that Title V would add burden and no proportionate additional environmental protection. Resp't Br. at 80.

As EPA reasonably concluded, applying its traditional four-factor analysis, Title V would impose burdens on area sources that will not achieve additional environmental benefit. For *any* area boiler with emission controls and monitoring, recordkeeping, and reporting requirements, duplicative Title V requirements are burdensome. Further, Environmental Petitioners identify no Title V element that will provide greater compliance assurance or environmental protection than a federally enforceable permit for a source with emission controls.

Finally, Environmental Petitioners' assertion that synthetic area sources have greater potential emissions and therefore pose greater environmental risk lacks a legal foundation. EPA fully accounted for any additional risk in its regulatory structure by defining "potential to emit" to include any

physical or operational limitation on the capacity of the stationary source [under Part 63] to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R. § 63.2. Therefore, for purposes of regulatory analysis, the synthetic area source risk is no greater than the permitted emissions, which are within the limits established in the area source rule.

CONCLUSION

For the reasons and those in EPA's Response Brief, the provisions of the area source rule challenged by Environmental Petitioners should be upheld.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Brief of Industry Intervenor-Respondents contains 6,737 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 7,000 word limit set by the Court.

Dated: December 23, 2014

/s/ Lisa Marie Jaeger
Lisa Marie Jaeger

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Industry Intervenor-Respondents was electronically filed with the Clerk of the Court on December 23, 2014, using the CM/ECF system and thereby served upon all ECF-registered counsel.

/s/ Lisa Marie Jaeger
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